

LAW OFFICE OF JOSEPHINE M. BALZAC, P.A.
P.O. Box 622873, Oviedo, FL 32762 • (407) 687-2108

July 12, 2016

Honorable Mayor Teresa Jacobs
Honorable S. Scott Boyd, District 1 Commissioner
Honorable Bryan Nelson, District 2 Commissioner
Honorable Pete Clarke, District 3 Commissioner
Honorable Jennifer Thompson, District 4 Commissioner
Honorable Ted Edwards, District 5 Commissioner
Honorable Victoria P. Siplin, District 6 Commissioner

Orange County Government
201 South Rosalind Avenue
Fifth Floor
Orlando, Florida 32801

**RE: Sustany (aka Lake Pickett North) and The Grow (aka Lake Pickett South)
Development Proposals**

Dear Honorable Mayor and Commissioners,

The purpose of this written communication is to inform you that our firm has been retained to represent the interests of the residents of Corner Lakes Estates, a community affected by the proposed Lake Pickett North and Lake Pickett South developments currently being considered. We urge you to reject the proposed comprehensive plan amendments and rezoning for Lake Pickett South (LPS) and Lake Pickett North (LPN). Our clients strongly oppose the developments proposed, for many reasons which have previously been brought to your attention but which we will enumerate once again in this letter and the attached exhibits.

We hope that you will carefully consider the concerns consistently raised by your constituents as you make this important decision which could significantly impact and change the very nature of rural east Orange County.

BACKGROUND

The LPS and LPN development proposals are requesting privately initiated comprehensive plan (CP) text amendments (Lake Pickett Study Area Policies), privately initiated large scale Future Land Use Map Amendments (located in District 5), and concurrent rezoning amendments.¹ The amendments are undergoing State Expedited Review.² The proposed text amendment involves requested changes to the Goals, Objectives, and/or Policies of the Comprehensive Plan.³ The proposed changes would allow urban development outside the

¹ Lake Pickett Adoption and Transmittal packet, 2, <http://www.orangecountyfl.net/PlanningDevelopment/ComprehensivePlanning.aspx#.VIsdhPkrLIU> [hereinafter *Lake Pickett*].

² *Id.*

³ *Id.*

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Orange county Urban Service Area and within the designated rural areas of Lake Pickett. The proposed text, map, and zoning amendments essentially change the entire future land use designations of the Lake Pickett Study Area without any justification and for the sole purpose of economic gain for the developers, owners, and county. The current residents or "affected parties" of the area strongly oppose both developments because they want to preserve the rural essence and character of the area.

The proposed amendments are inconsistent with the current CP and incompatible with the current goals, policies, and objectives. In order to attempt compliance, the private parties rewrote many portions of the CP, adding entirely new goals, policies, and objectives that continue for several pages in order to be compatible. This is clearly not the intent and purpose of the CP, to govern growth and development of Orange County by arbitrarily promulgating new rules in the plan along the way.

The LPS and LPN projects titled "The Grow" and "Sustany" respectively, abut Seminole County and would require the urban development of 2,832 acres of land, of which 2,605 acres are currently subject to FLUM amendments 2015-2-A-5-1 and 2016-1-A-5-1.⁴ Therefore, these proposals have a significant impact on not only Orange County but Seminole county as well. The designated Lake Pickett Study Area, generally, encompasses the properties located north of East Colonial Drive, west of Chuluota Road, south of the Orange County-Seminole County line, and east of South Tanner Road and the Econlockhatchee Sandhills Conservation Area, excluding property within Rural Settlements.⁵

I. The LPS and LPN Proposals in the Lake Pickett Study Area are Outside the Urban Service Area of Orange County

Per Florida Statutes, the Growth Management Act requires that every local government in Florida adopt a comprehensive plan to guide growth and development.⁶ The comprehensive plan⁷ provides the principles and strategies that must guide future decisions in a consistent manner and must contain the programs and activities to ensure implementation of the comprehensive plans.⁸ The comprehensive plan specifically provides the goals, objectives, and policies, which describe how the local government's programs, activities, and land development regulations will be initiated, modified, or continued to implement the comprehensive the plan in a consistent manner.⁹

The 2030 Orange County Comprehensive Plan (CP) was adopted on May 19, 2009 and became effective on August 14, 2011.¹⁰ The plan is in place until year 2030.¹¹ The CP

⁴ *Id.* at 9. (Lake Pickett Study Area and Communities Figure 1).

⁵ *Id.*

⁶ Fla. Stat. § 163.3177 (2016) (citing the Growth Management Act; Orange County, Florida, Comprehensive Plan 2010-2030 (effective Aug. 14th, 2011), <http://orangecountyfl.net/Portals/0/resource%20library/planning%20-%20development/Comprehensive%20Plan%202010%20-%202030%20Goals,%20Objectives,%20Policies.pdf>).

⁷ Fla. Stat. § 163.3177 (1) (2016) ("The comprehensive plan shall provide the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements.").

⁸ Fla. Stat. § 163.3177 (1) (2016).

⁹ Fla. Stat. § 163.3177 (1) (2016).

¹⁰ Orange County, Florida, Comprehensive Plan 2010-2030 [hereinafter *CP*].

¹¹ *Id.*

designates an urban service area to control the desired development pattern of Orange County.¹² The Comprehensive Plan clearly states: "Urban uses shall be concentrated within the Urban Service Area."¹³ The Comprehensive Plan mandates Orange County to "use urban densities and intensities and Smart Growth tools and strategies to direct development to the Urban Service Area and to facilitate such development."¹⁴ The LPS and LPN proposals would permit urban developments outside the urban service area. These proposals would allow massive urban development in rural areas zoned as agricultural.

a. The Proposed Developments' Increased Density Land Use Exceeds the Rural Service Area's Allowable Limits

The Future Land Use Map designates and outlines the specific minimum and maximum densities for all developments in Orange County.¹⁵ Future Land Use designations provide the appropriate densities. Properties within the Lake Pickett Study Area currently have a Future Land Use Map (FLUM) designation of Rural 1/10 (R).¹⁶ The proposed new Future Land Use Map designation is titled Lake Pickett (LP).¹⁷ Both proposals would require a complete undoing of the Comprehensive Plan, as they are completely inconsistent with the allowed maximum densities for the designated areas.

Specifically, for the LPS proposal, the gross acreage of the site is 1,187.5 acres, including wetlands, the net developable acreage is approximately 835 acres.¹⁸ The subject site is currently undeveloped; however, the existing Future Land Use Map (FLUM) designation of Rural 1/10 (R) allows for development of up to 89 single-family homes on the subject property.¹⁹ The applicant for "The Grow" is requesting an amendment to the land use designation and zoning, in order to develop 2,078 single-family dwelling units and 172,000 square feet of non-residential development, including, office, retail, restaurant and community center in the vicinity of SR 50.²⁰

The LPN proposed development is a 1,423-acre property currently zoned as A-2 (farmland Rural District) with a maximum allowable development of 158 single family dwelling units.²¹ The LPN proposal requests using transect zoning to create up to 1,999 residential dwelling units.²² The proposals are requesting approval of urban developments with the utilization of urban services in the Lake Pickett Study rural area.

The proposals LPS and LPN are outside the Urban Service Area. The Lake Pickett Study Area is in a future land use designated Rural Service Area, consisting of maximum densities of 1 DU/10 AC and zoning as A-1, A-2, A-R, R-CE.²³ Per Future Land Use Policy 6.1.2 the CP mandates Orange County to "enforce criteria to ensure the scale, and density and/or intensity of

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at Policy FLU1.1.

¹⁵ *Id.* at Policy FLU1.1.2 A.

¹⁶ Lake Pickett, *supra* note 1, at 58.

¹⁷ *Id.*

¹⁸ *Id.* at 65.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 607. (Traffic and Mobility Consultants, Transportation Facilities Analysis).

²² *Id.* at 562. (Sustany).

²³ CP *supra* note 10, at Rural Service Area, OBJ FLU6.1, Policies FLU6.1.1.

development within the Rural Service Area so that it promotes the intended rural character." The policies further require that residential uses in areas designated Rural be limited to a maximum density of 1 DU/10 acres.²⁴ Future Land Use designations in the Comprehensive Plan for Rural and Rural Settlement are implemented to provide for appropriate locations in which residents prefer a rural lifestyle with limited services.²⁵ These rural designations are only for areas outside the County's Urban Service Area, where uses such as agricultural or agricultural-related activities predominate.²⁶

b. Protecting the Rural Character and Natural Resources of Rural Areas is Required by Law

The objective and intention of the Comprehensive Plan in designating rural service areas is to promote the rural character and assets of the Rural Service Areas.²⁷ It is clear through both the objectives and policies of the Comprehensive Plan that the densities not be increased to those of the Urban Service Areas, as this would eliminate the intended rural character. These proposals intend to change the entire future land use designation and zoning for the Lake Pickett Study area by developing urban density developments that eradicate the rural character, the rural density, the rural use, and the rural facilities and services, all in clear and unequivocal violation of the current zoning and future land designations for this area.

Under the Agricultural Development Act, the Florida legislature finds and declares: "a thriving rural economy with a strong agricultural base, healthy natural environment, and viable rural communities is an essential part of Florida."²⁸ The Legislature further recognizes the importance of protecting Florida's rural economy through innovative planning and development strategies in rural areas for enhancing the ability of rural landowners to protect rural character, control urban sprawl, and provide necessary open space for agriculture and the natural environment.²⁹ Pursuant to these Florida Statutes, the rural service area of Lake Pickett needs to be protected through innovative planning and development strategies, not by simply circumventing the system and converting rural areas to urban areas, which inevitably destroy the environment within these areas and negatively impacts its thriving rural economy.

The Legislature identifies the fact that "rural areas include the largest remaining intact ecosystems and best examples of remaining wildlife habitats as well as a majority of privately owned land targeted for natural resource protection."³⁰ The Lake Pickett Study Area consists of significant natural resources and wildlife habitats, including approximately 1000 acres of wetlands or surface waters, the Econlockhatchee Sandhills Conservation Area, and the Econlockhatchee River ("Econ"), which is an Outstanding Florida Water.³¹

²⁴ *Id.* at Goal FLU1, OBJ FLU6.1, Policies FLU6.1.3.

²⁵ *Id.* at Goal FLU1, FLU1.1.4 (H).

²⁶ *Id.* at FLU1.1.4 (H).

²⁷ *Id.* at OBJ FLU6.1.

²⁸ Fla. Stat. § 570.70(1) (2016).

²⁹ Fla. Stat. § 570.70(4) (2016).

³⁰ Fla. Stat. § 570.70(1) (2016).

³¹ Lake Pickett, *supra* note 1, at 2.

c. Urban Density Developments Outside the Urban Service Area is Prohibited Sprawl

The development of urban densities outside the urban service area is urban sprawl. Per Florida Statute 163.3177 any amendments to a comprehensive plan must discourage the proliferation of urban sprawl.³² The Comprehensive Plan additionally contains language eliminating and discouraging urban sprawl.³³ Urban sprawl requires the extension of public facilities and services in an inefficient manner and fails to provide a clear separation between urban and rural uses.³⁴ The Econlockhatchee River has long been the line between the urban service areas and rural areas of Orange County. Officially crossing the line with these proposed text and map amendments and rezoning blurs the line completely and further proves the occurrence of urban sprawl by failing to provide a clear separation between urban and rural uses.

In accordance with Policies FLU1.2.1, FLU1.2.2, FLU1.2.5, and FLU1.2.6, Orange County must not support expansions of the Urban Service Area that indicate the project may result in sprawl.³⁵ Sprawl is characterized by any of the following factors: allowing or designating significant amounts of urban development to occur in rural areas, encouraging premature or poorly planned conversion of rural land to other uses, failing to adequately protect and conserve natural resources, failing to adequately protect agricultural areas, failing to maximize use of existing public facilities and services, and causing inefficient use of facilities and service investments (roads, potable water, sanitary sewer, stormwater management, law enforcement, education, etc.).³⁶ The LPS and LPN development meet the factors and elements characterizing urban sprawl and therefore, should be prohibited for violating both the Comprehensive Plan and Florida Statutes as well.

a. The Proposed Rezoning of the Lake Pickett Study Area Constitutes Illegal Spot Zoning

A Spot zoning is created when there is a piecemeal rezoning of parcels of land to greater density causing disharmony with the surrounding areas.³⁷ In essence it gives "preferential treatment to one parcel at the expense of the zoning scheme as a whole."³⁸ These elements help to determine whether a rezoning decision is consistent with the already established zoning designation within the comprehensive plan.³⁹ If a zoning change is challenged to the circuit court, the court scrutinizes the change to "assure strict compliance with the comprehensive plan."⁴⁰

³² Fla. Stat. §§ 163.3177 (6)(a) (2)(h), (9)(a)-(9)(b) (2016).

³³ CP *supra* note 10.

³⁴ Fla. Stat. § 163.3164 (2016); Community Planning Act.

³⁵ CP *supra* note 10 at FLU1.2.1, FLU1.2.2, FLU1.2.5, and FLU1.2.6.

³⁶ *Id.* at Policy FLU1.2.6.

³⁷ Southwest Ranches Homeowners Assoc. v. Broward County, 502 So. 2d 931, 935 (Fla. 4th DCA 1987).

³⁸ Southwest Ranches Homeowners Assoc. v. Broward County, 502 So. 2d 931, 935 (Fla. 4th DCA 1987).

³⁹ Allapattah Cmty. Ass'n v. Miami, 379 So.2d 387 (Fla. 3d DCA 1980).

⁴⁰ Town of Juno Beach v. McLeod, 832 So. 2d 864, 864 (Fla. 4th DCA 2002) (citing Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach, 788 So.2d 204 (Fla.2001)).

The LPS and LPN proposed plan amendments constitute spot planning and spot zoning because it is a piecemeal changing of the uses of a single parcel, significantly increasing its density and intensity and creating disharmony in the rural area. The proposed amendments and rezoning are inconsistent with the Orange County 2030 Comprehensive Plan because it attempts to change a rural service area into an urban service area in violation of the intent and purpose of the Comprehensive Plan. Therefore, these zoning changes are not in strict compliance with the Comprehensive Plan as they are required to be and create illegal spot zoning.

II. Approving the Proposed Amendments and Rezoning Will have a Significant and Adverse Impact on the Environment, Public Services, and the Health, Safety, and Welfare of the Orange County Citizens

The Orange County Board of Commissioners must use its codes and ordinances to implement the goals, objectives and policies of the Comprehensive Plan consistent with the health, safety, and welfare of the general public.⁴¹ The development of the Lake Pickett area will have a detrimental effect on the citizens of Orange County, on the environment, and will ultimately violate the Comprehensive Plan.

a. Potable Water Services

The proposed comprehensive plan amendments would detrimentally impact both the natural resources and public services in east Orange County and Seminole County. First, there are insufficient public services and facilities to serve increased density in population, contrary to the Comprehensive Plan.⁴² The development alone would demand 1,386,000 gallons of potable water per day.⁴³ Pursuant to Comprehensive Plan Objective PW1.4, "water facility plans and programs shall be designed to be consistent with the Future Land Use Element and to avoid urban sprawl." Comprehensive Plan Policy PW1.4.1 also states: "future growth at urban densities or intensities shall be located in areas which have existing or planned potable water capacity." Furthermore, Comprehensive Plan Policy PW1.4.3 clearly states that if extension of potable water facilities into the Rural Service Area is necessary, this extension "shall not be construed as adequate justification for development at urban intensities in the Rural Service Area."

Based on this text in the Comprehensive Plan, it is clear that the original legislative intention was not to extend potable water facilities to the Rural Service Area, unless it was a necessity. Additionally, if it is a necessary, the Comprehensive Plan plainly states that urban intensities must not be developed in the Rural Service Area. The approval of these text amendments would completely undermine the language, plain meaning, intent and purpose of the Comprehensive plan. The proposed amendments are seeking a rewriting of the Potable Water Element to arbitrarily include the Lake Pickett Study Area as an exception to extend potable water services without requiring the necessary sector plan.⁴⁴ The proposed amendments are attempting to pass through without having to complete the detailed sector plan in violation of the

⁴¹ CP *supra* note 10 at GOAL FLU8.

⁴² *Id.* at OBJ FLU8.6 (Concurrency).

⁴³ Lake Pickett, *supra* note 1, at 251.

⁴⁴ *Id.*

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requirements. The proposals amended the requirements of this section with a stroke of a pen in order to allow the extension of potable water services without having to comply with the necessary requirements, intent and purpose of the Comprehensive Plan.

b. Traffic

The proposed developments would have severe adverse impacts on the already overburdened roadways and traffic patterns in Orange County. Currently, the roadways that would be impacted by LPS/LPN suffer heavy congestion and the proposed developments will substantially increase the number of daily trips adding to the heavy traffic patterns.⁴⁵ In their current condition, the affected roadway segments have been found to already be operating at a deficient Level of Service (LOS).⁴⁶ The following roadway segments have been specifically found to be *currently* operating at deficient LOS:⁴⁷

- Colonial Drive from Woodbury Road to Chuluota Road
- Lake Pickett Road from Colonial Drive to Percival Road
- McCulloch Road from Lockwood Boulevard to N. Tanner Road
- Woodbury Road from Waterford Lakes Parkway to Colonial Drive

The projected 2020 conditions were analyzed using the projected background volumes and the additional trips generated from the development in the year 2020. The analysis indicated that the following roadway segments will continue to be deficient and backlogged in 2020:⁴⁸

- Chuluota Road from Colonial Drive to Lake Pickett Road – Need 4 Lanes
- Colonial Drive from Woodbury Rd to Lake Pickett Rd – Need 8 Lanes
- Colonial Drive from Avalon Park Road to Chuluota Road – Need 6 Lanes
- Lake Pickett Road from Colonial Drive to Percival Road – Need 4 Lanes
- McCulloch Road from Lockwood Boulevard to N. Tanner Road – Need 4 Lanes
- Woodbury Road from Waterford Lakes Boulevard to Colonial Drive – Need 4 Lanes

The traffic studies conducted to date clearly indicate that the current roadway structure cannot support the additional traffic that would be brought by the proposed developments. However, two of the most obvious solutions to these traffic issues remain unresolved at this time. First, the Richard Crotty Parkway roadway extension proposal through Research Park has been rejected, as the roads within Research Park are private and Research Park does not want the additional pass-through traffic that would result. Secondly, the proposed 408 expressway extensions have also been rejected by the FDOT. Without this roadway extension, Hwy 50 (Colonial Drive) will be over-capacity by 2030. Without the extensions proposed for the 408 expressways or Richard Crotty parkway, the current and future traffic congestion issues will

⁴⁵ FDOT notes LPS would result in daily trip increase of 32,637 (1,000 Friends Letter).

⁴⁶ Traffic and Mobility Consultants, Sustany PD TFA (Rev 04/19/16), Page 3.

⁴⁷ *Id.*

⁴⁸ *Id.* at 14.

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remain unresolved. Unless and until a concrete plan to alleviate the current and proposed traffic congestion is established, no amendments that would allow further developments adding to the already dire roadway situation should be approved.

Neighboring Seminole County has similarly expressed concerns with regard to the traffic situation that would be brought by the Lake Pickett proposals. In their letters to the Orange County Board of Commissioners dated March 10, 2015 and April 19, 2016, the Seminole County Board of Commissioners discussed transportation issues and reiterated (1) their objections to the crossing of the Econ River to McCulloch road and (2) their removal of the proposed widening of Chuluota road. They cite their desire to further their goal of rural preservation in East Seminole County. Orange County should keep in mind Seminole County's objections with respect to these roadway and transportation issues. Without widening Chuluota Road or crossing the Econ to connect McCulloch road, the currently overburdened roadways in the area of the proposed developments would continue to get worse. The Lake Pickett developments are simply not compatible with the rural character and nature of the surrounding areas in both Orange and Seminole County, a fact that is once again underscored by the lack of viable options to alleviate the burden of additional traffic and urbanization.

Additionally, the proposed Lake Pickett designation text amendments require that land use amendments that apply the Lake Pickett designation provide a transportation analysis coordinated with the Orange County Transportation Planning and Traffic Engineering Divisions.⁴⁹ The analysis will ultimately be used to adopt a Term Sheet and corresponding Transportation Network Agreement prior to an adoption hearing. A Roadway agreement between the developers and the property owners is necessary for this development to go forward. However, there is evidence indicating that an Agent Authorization form giving Dwight Haathoff, developer of "The Grow", authorization as agent of Larry Frankel, General Partner of Byrdley Realty Company was forged. The Agent Authorization Form gives Mr. Haathoff the specific requirements needed to continue with the Lake Pickett South development, specifically, a Roadway agreement between him and Mr. Frankel, one of the owners of Lake Pickett property in which The Grow is seeking to be developed. It appears that the Agent Authorization Form has been forged and should have no effect, thereby invalidating the Roadway Agreement between the parties.

It is evident that the proposed amendments would have a severe and adverse impact on Orange County roadways that are already operating at a deficient LOS. Unless a plan is put in place to alleviate the burdens brought by the substantial increase in daily trips, it would be irresponsible for the BCC to approve any amendments that would allow such an increase. In addition, a Roadway Agreement between the parties involved has been deemed necessary to move this project forward, and at this time we do not have a valid Agreement. The evidence available at this time indicates that an Agent Authorization form was forged in order to give Dwight Haathoff the alleged authority to enter into the Agreement as the agent of Mr. Frankel.

c. Safety

The Orange County Sheriff's Office provided comments on the proposed amendments and expressed their concern for the safety of the citizens of East Orange County. The letter

⁴⁹ FDOT, Intermodal Systems Development Growth Management Unit, DEO Amendment 15-6ESR, 9/11/2015

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stated, "All new development creates new calls for service, which in turn creates a need for new additional manpower and equipment. If calls for service increase without comparable increase in manpower our response times are likely to increase."⁵⁰ This is a significant detrimental impact that would negatively affect the health, safety, and welfare of orange county citizens; thus it should not be ignored.

Additionally, there will be a need for increased law enforcement, as studies have shown higher crime rates within areas where wider roads and increased traffic is prevalent.⁵¹ The findings suggest that in order to reduce crime, development changes that increase traffic in an area, like the widening of streets, should be avoided.⁵² As mentioned above, these developments will bring a significant increase in traffic and will require multiple widening of roads in the area. Furthermore, these developments will decrease vegetation and reduce tree canopies which further increases crime.⁵³ Numerous studies have established that paved areas with no vegetation are like "no-man's lands" that discourage residential interaction and reduce "eyes on the street."⁵⁴

a. Environment

The Conservation Element of the Orange County Comprehensive Plan (Comprehensive Plan) is a broad, overarching policy for environmental protection throughout the Plan.⁵⁵ Approximately 1000 acres of the Lake Pickett Study Area are wetlands or surface waters.⁵⁶ The Econlockhatchee Sandhills Conservation Area, along with south Tanner road, forms the western boundary of the area.⁵⁷ The project areas include the following surface waters: "Lake Paxton, Lake Tanner, Corner Lake, a portion of the Big Econ River and unnamed tributaries."⁵⁸ The Econlockhatchee River ("Econ") is an Outstanding Florida Water designated by the Florida legislature worthy of special protection.⁵⁹ The Lake Pickett Study Area is within the Econlockhatchee River Basin and the OCEPD states that the proposed developments must be in compliance with the river basin regulations.⁶⁰

Article XI of Chapter 15 of the Orange County Code is titled Econlockhatchee River Protection.⁶¹ This law states that the public has a legitimate interest in the protection of the Econ's natural resources, and that it applies to all rezoning in the protection area.⁶² The ordinance states that "[a]ny new development, including agriculture and silviculture, which alters

⁵⁰ Lake Pickett, *supra* note 1, at 600. (Orange County Sheriff's Letter).

⁵¹ Stephanie W. Greenberg & William M Rohe, *Neighborhood Design and Crime A Test of Two Perspectives*, 50:1 J. AM. PLAN. ASS'N. 48, 59 (1984).

⁵² *Id.*

⁵³ Austin Troy et al., *The relationship between tree canopy and crime rates across an urban-rural gradient in the greater Baltimore region*, 106 Landscape and Urb. Plan. 262, 262 (2012).

⁵⁴ *Id.*

⁵⁵ CP, *supra* note 10, at FLU-146 to FLU-147, at C-1 to C-17 (2011).

⁵⁶ *Id.* at 503. FLU-1, FLU-2.

⁵⁷ *Id.* at 34.

⁵⁸ *Id.* at 503.

⁵⁹ Fla. Stat. § 403.061(27) (2015); Fla Admin. Code 62-302.700(9)(i)(11)(a)-(m) (2006). This regulation names a number of tributaries to which the designation applies.

⁶⁰ Lake Pickett, *supra* note 1, at 504.

⁶¹ ORANGE COUNTY, FL, CODE OF ORDINANCES, CHAPTER 15, ART. XI (2016).

⁶² *Id.* at §§ 15-438, 15-441.

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vegetation, water quality or hydrology shall be subject to regulation with the standard of review being *no significant adverse effect* on the habitat of any aquatic or wetland-dependent wildlife or the habitat of any species designated as endangered, threatened or species of special concern . . . water quality, and the groundwater table and surface water levels to minimize alterations to natural hydrologic patterns and subsequent vegetation changes.”⁶³ According to the Orange County Environmental Protection Division, “developing portions of this area of ecological significance would diminish the functionality of the area as a greenway and move the land use from a state of higher sustainability to a state of lower sustainability...”⁶⁴ This sensitive ecosystem will experience “significant adverse effects to not only the habitats, wildlife, species, wetlands, but also to the water quality, water security, and flood risks.

An early 1990s floodplain management study conducted in Seminole and Orange County, warned about restricting new development around the Econlockhatchee River.⁶⁵ Specifically, it states, “If new development in the flood plain is not restricted the flow of water could increase flood heights and damages upstream.”⁶⁶ A 1973 U.S. Army Corp of Engineers Survey Report made an express finding that the flood plains of the Econlockhatchee River Basin, must be left largely undisturbed for flooding problems to be avoided.⁶⁷ However, the U.S. Army Corp has ignored its own advice by issuing a host of permits for residential subdivisions and commercial developments, causing the natural flood capacity of the Basin to be destroyed.⁶⁸ The approval of these developments will further degrade the river basin and put these communities at risk of flooding.⁶⁹

The Lake Pickett study area has over 460 acres of wetlands that need to be protected.⁷⁰ Wetlands are extremely important ecologically, and this is emphasized at the federal, state, and local levels of government.⁷¹ The Orange County code defines wetland “Conservation Areas” through identification procedures and functional characteristics.⁷² The code requires permitting, and a “Conservation Area Determination,” for any activities adjacent to a wetland area that could *materially affect the areas in an adverse way*.⁷³ Wetlands have the inherent ability to slow

⁶³ *Id.* at § 15-443. The state regulations regarding the endangered, threatened, or species of special concern have changed their location from chapter 39 to chapter 68A in the Florida Administrative Code.

⁶⁴ Lake Pickett, *supra* note 1, at 504.

⁶⁵ Flood Plain Management Study, Econlockhatchee River, Orange and Seminole Counties, Florida, Section 22, Special Publication SJ98-SP9 (SEE ATTACHEMENT IN EMAIL – Econ Flood Plain Study), pg. 20.

⁶⁶ Flood Plain Management Study, Econlockhatchee River, Orange and Seminole Counties, Florida, Section 22, Special Publication SJ98-SP9 (SEE ATTACHEMENT IN EMAIL – Econ Flood Plain Study), pg. 20.

⁶⁷ Mark Beorkrem & Cynthia Sarthou, *DESTRUCTION BY DESIGN: The U.S. Army Corps of Engineers’ Continuing Assault on America’s Environment*, Report by the Gulf Restoration Network, 7 (Dec. 14, 1999), http://www.healthygulf.org/sites/default/files/destruction_by_design.pdf [hereinafter Beorkrem].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 574.

⁷¹ EXECUTIVE ORDER No. 11990, Protection of Wetlands, May 24, 1977, 42 F.R. 26961, available at <https://www.epa.gov/cwa-404/protection-wetlands>; Section 404 of the Clean Water Act, Laws, Regulations, Executive Orders, <https://www.epa.gov/cwa-404/laws-regulations-executive-orders> (listing many federal laws pertaining to wetlands); Planning and Permitting to Protect Wetlands: The Different Roles and Powers of State and Local Government, Richard Grosso and Jason Totoiu, *The Florida Bar Journal* (2010); Fla. Stat. § 373.421 (2015).

⁷² ORANGE COUNTY, FL, CODE OF ORDINANCES, CHAPTER 15, ART. X, §§ 15-364, 15-378, and 15-379 (2016) [hereinafter *Code of Ordinances*].

⁷³ *Id.* at § 15-376.

floodwaters and maintain hydrologic homeostasis in the local environment.⁷⁴ The destruction of wetlands contributes to problems of rapid runoff and flooding.⁷⁵

Further, development threatens water quality with increased stormwater runoff which also causes soil disturbance and wetland loss, and destroys the natural filtration mechanisms of the ecosystem.⁷⁶ Additionally, the urbanization trend surrounding the Econ River Basin has resulted in significant drying and drawdown in the water table, causing the Florida Aquifer to be pumped in order to meet the water needs of the urban area.⁷⁷ The same Orange County report stated that the surrounding area is at risk of saltwater intrusion and is important for aquifer replenishment.⁷⁸ OBJ AR1.1 of the OC's Aquifer Recharge Element states that protecting water quality and quantity, and enhancing aquifer recharge, is a primary objective in the environmental policies of the Plan.⁷⁹

According to a report by the OCEPD, there are numerous protected wildlife species located within the Lake Pickett project area.⁸⁰ Intensive development within the Econ Basin threatens the wildlife found there as it will further negatively impact habitats, destroy critical nesting and feeding areas, and pollute aquatic and terrestrial environments.⁸¹ Overall, these proposed developments will have a *significant adverse effect and impact* on the environmental resources and ecosystems, specifically, in the Econ River Basin in violation of the Comprehensive Plan, local ordinances, and Florida Statutes.

III. The Orange County Board of County Commissioner's Procedures for Reviewing, Transmitting, and Adopting the Comprehensive Plan Future Land Use Amendments Violates Substantive and Procedural Due Process

The U.S. Constitution's Fifth Amendment creates federal due process rights, which apply to the states through the Fourteenth amendment.⁸² Furthermore, property rights are among the substantive rights protected by Florida's Constitution.⁸³ Article I, Section 9 of the Florida Constitution states that "[n]o person shall be deprived of life, liberty or property without due process of law," and so property rights must be protected by procedural safeguards, such as notice and an opportunity to be heard.⁸⁴

a. Substantive Due Process

The procedures for the passage of Amendments #2016-1-A-5-1 and #2015-2-A-5-1 are located within the Amendments themselves. This is an arbitrary and capricious procedure that

⁷⁴ Beorkem, *supra* note 67, at 87.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Code of Ordinances, *supra* note 72, at AR-1.

⁸⁰ Lake Pickett, *supra* note 1, at 504.

⁸¹ Beorkem, *supra* note 67, at 87.

⁸² U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

⁸³ Art I, § 2, Fla. Const. (providing the basic and inalienable rights to "acquire, possess and protect property").

⁸⁴ Art I, § 9, Fla. Const.; Dept. of Law Enforcement v. Real Property, etc., 588 So.2d 957, 964 (Fla. 1991).

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Orange County is using. Substantive due process bars arbitrary government decision-making.⁸⁵ Additionally, amending the comprehensive plan to add new goals, objectives, and policies is also capricious as there is no logical justification for veering from the original intent of the growth and development plan implemented for Orange County.

Under the Florida Constitution, substantive due process “protects the full range of individual rights from unwarranted encroachment by the government.”⁸⁶ Criteria considered in cases involving Florida’s substantive due process include “ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights,” and “the nature of the party being subjected to state action.”⁸⁷ Any landowner near the area of the proposed development would certainly be an “affected person” under § 163.3184(1)(a), and would have standing for a §120.57 hearing to challenge whether the amendments are in compliance.⁸⁸ The parties being affected are being treated unfairly if these amendments are approved and their substantive due process rights to property are being violated by arbitrarily changing a rural area into urban.

Adversely affected parties are people or local governments that will “suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan,” including interests related to density of development.⁸⁹ Adversely affected parties may maintain actions against any local government to challenge any decision of that local government to grant an application for a development order, which “materially alters the use, density, or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted.”⁹⁰ Based on the significant amount of opposition to these developments there are a number of adversely affected parties to challenge the transmittal and approval of these amendments and developments.

b. Procedural Due Process

Florida Statute § 163.3181 guarantees public participation in the process of amending a comprehensive plan.⁹¹ That statute states that “[d]uring consideration of the proposed plan or amendments thereto by the local planning agency or by the local governing body, the procedures shall provide for broad dissemination of the proposals and alternatives, opportunity for written comments, public hearings as provided herein, provisions for open discussion, communications programs, information services, and consideration of and response to public comments.”⁹²

⁸⁵ Daniels v. Williams, 474 U.S. 327, 331 (1986); See Rosalie Berger, *Reining in Abuses of Executive Power through Substantive Due Process*, 3 FL LAW REVIEW 60 (2012).

⁸⁶ Chuck v. City of Homestead Police Dept., 888 So. 2d 736, 743 (Fla. Dist. Ct. App. 2004).

⁸⁷ *Id.*

⁸⁸ FLA. STAT. § 163.3184(1)(a) (2015); See also St. Joe Paper Co. v. Community Affairs, 657 So.2d 27 (1995).

⁸⁹ Fla. Stat. § 163.3215(2) (2016).

⁹⁰ Fla. Stat. § 163.3215(3) (2016).

⁹¹ Fla. Stat. § 163.3181 (2015) (comprising a part of Section 163.3161, *et. seq.*, Florida Statutes, the Local Government Comprehensive Planning and Land Development Regulation Act).

⁹² Fla. Stat. § 163.3181(2) (2015).

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Regulations in the Florida Administrative Code contained additional requirements for public participation, although it appears now that they've been repealed.⁹³ Regulation 9J-5.004 required local governments to make procedures that ensure public participation while the government is considering amendments to a comprehensive plan.⁹⁴ Orange County's Comprehensive Plan (Comprehensive Plan) describes the procedures for amending the plan to include site-specific land use designations shown on the Future Land Use Map.⁹⁵ OBJ FLU8.4 states the public participation requirements for amending the CP.⁹⁶ This objective lists numerous policies for the adoption of an amendment to the CP, and they are intended to inform, involve, and generally benefit the public. These include: staff reports available 7 days prior to a public hearing, community meetings to ensure public awareness of the proposals, utilizing technology and internet to inform the public, multi-lingual outreach, and making text amendments available for public inspection 7 days prior to adoption hearings.⁹⁷

There is reason to believe that the text of the Amendments has been changing without sufficient, or any, notification to the public. § 163.3181 requires that local governments adopt procedures to ensure public participation, and which notify landowners of official actions which regulate the use of their property.⁹⁸ Orange County does not appear to have a clear policy that is applicable to this Amendment review process, except for the language in the CP discussed below. Furthermore, one can certainly argue that including the procedures for the review of amendments within the amendments themselves are not in compliance with the intent of the legislature, especially when those procedures may be changed at will.

§ 163.3181 also requires consideration of, and response to, public comments.⁹⁹ Given the extraordinarily contentious nature of these particular text Amendments, there must be a response to the vast number of public comments involved. As of yet there is not been clearly published public comment and response, which would mean it is not complying with state statutes. Florida "sunshine laws" are also relevant here. If the Amendment is approved in violation of Florida sunshine laws then a court will invalidate the decision.¹⁰⁰

Orange County's review process of the aforementioned Amendments is noncompliant with certain procedures mentioned in OBJ FLU8.4 of the CP. The "e-agenda" has not been published on the Orange County website seven days prior to this public hearing, and this agenda will contain numerous staff reports relevant to this action by the county.¹⁰¹ Another temporal

⁹³ FLA. ADMIN. CODE 9J-5.004 (1986) (containing, previously, the public participation requirements in the FAC chapter titled "Minimum Criteria for Review of Local Government Comprehensive Plans and Plan Amendments, Evaluation and Appraisal Reports, and Land Development Regulations and Determinations of Compliance.").

⁹⁴ FLA. ADMIN. CODE 9J-5.004(2) (1986). This regulation appears to have been repealed.

⁹⁵ CP *supra* note 10, at LU8.1.3 (2011).

⁹⁶ *Id.* at FLU-154.

⁹⁷ *Id.* at FLU8.4.1–FLU8.4.5. (Using both "shall" and "should" intermittently for the policies in the objective).

⁹⁸ B.H. Travel v. Dept. of Com. Affairs, 602 So.2d 1362, 1365 (Fla. Dist. Ct. App. 1992) (discussing how Reddington, Beach, Florida, for example, has a "Citizen Participation Process Ordinance," made pursuant to the (now repealed) FAC Rule 9J-5.004).

⁹⁹ Fla. Stat. § 163.3181(2) (2015).

¹⁰⁰ Town of Palm Beach v. Gradison, 296 So.2d 473 (1974).

¹⁰¹ Orange County Government, E-Agenda, available at <http://www.orangecountyfl.net/BoardofCommissioners/eAgenda.aspx#.V1juDo-cHmI> (failing to provide the comprehensive agenda, including the staff reports and text of the amendment, until five days before the approval hearing).

requirement in the CP is that, if a party makes revisions to studies, evaluations or (presumably) text amendments, then these “shall” be available seven days prior to the Board of County Commissioner’s meeting.¹⁰² The text amendments to the policies, objectives, and goals are changed arbitrarily throughout the process and without seven (7) days notice as required. Additionally, text amendments and new policies were added up until the time of the adoption hearing. Therefore, these materials that have been revised by the applicant after the LPA hearing and before the BCC hearing, are noncompliant with the CP, as they have not been released seven days prior to the BCC adoption hearing.

c. Privately Initiated Text Amendments

In August 2013, Orange County Board of Commissioners proposed an amendment to policy FLU 8.8.1 which originally stated “No applicant-initiated text amendments are permitted unless sponsored or co-sponsored by Orange County.”¹⁰³ The amendment was proposed and adopted to modify the policy to accept amendments under limited criteria.¹⁰⁴ The text amendment to the policy was passed even though it was clearly not allowed per the comprehensive plan original policy, again a showing of the Orange County Board of Commissioners violating the intent and purpose of the comprehensive plan. The comprehensive plan only intended for the amendments to be sponsored or co-sponsored by Orange County. This very arbitrary amendment essentially makes developers policy makers which is obviously not the intent of the comprehensive plan.

The passage of this amendment required the following criteria for privately-initiated text amendments:

- I. Maintains the internal consistency of the CP
- II. Furthers the overall goals of the CP
- III. Directly relates to a Future Land Use Map Amendment
- IV. Has limited geographic effect
- V. Relates to a Board direction or policy change¹⁰⁵

The LPS and LPN amendments are privately-initiated amendments and therefore, must follow the above criteria. These amendments do not comply with any of the criteria as it is inconsistent and incompatible with the comprehensive plan goals, policies, and objectives. It is requiring urban service area to enter the rural service area and allow urban development in rural east Orange County. It does not further the overall goals of the CP, but instead writes new goals, it does not relate to the future land use map amendment, but instead created a new map, it has significant geographic effect to all east of the Econ Orange County. This privately initiated amendment policy proposed and passed by Orange County Board of Commissioners in and of itself violates the Comprehensive Plan. The privately-initiated LPS and LPN amendments violate the very criteria that Orange County established for these privately-initiated amendments. These

¹⁰² CP *supra* note 10, at FLU8.4.6.

¹⁰³ Board of County Commissioners, Commissioners Report, Privately Initiated Text Amendments to the Comprehensive Plan, (Aug. 20th, 2013), available at <http://otv.ocfl.net/otv/bcc2013/bcc082013/Default.html>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

LPS and LPN amendments again fail to meet the requirements of the Comprehensive Plan entirely.

IV. The Proposed Developments Would Have an Adverse Effect on Neighboring Seminole County and Have Been Rejected by the Seminole County Board of Commissioners

Florida Statutes provide different tracks for review of local government plan amendments, namely an “expedited state review process”¹⁰⁶ and a “state coordinated review process”.¹⁰⁷ The Lake Pickett amendments have proceeded via the expedited process, however, proposed developments such as the one at hand that would have an effect on more than one county are deemed to be developments of regional impact (“DRI”) and must be subject to state coordinated review.¹⁰⁸

Florida Statute 380.06 defines DRI as “any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county.”¹⁰⁹ Furthermore, the Florida Administrative Code determined which projects are of substantial size as to constitute a DRI:

(l) Subject to Section 380.06(2)(d), F.S., the following developments shall be developments of regional impact:

Any proposed residential development that is planned to create or accommodate more than the following number of dwelling units:

- (a) In counties with a population of less than 25,000 — 250 dwelling units.
- (b) In counties with a population between 25,000 and 50,000 — 500 dwelling units.
- (c) In counties with a population between 50,001 and 100,000 — 750 dwelling units.
- (d) In counties with a population between 100,001 and 250,000 — 1,000 dwelling units.
- (e) In counties with a population between 250,001 and 500,000 — 2,000 dwelling units.
- (f) In counties with a population in excess of 500,000 — 3,000 dwelling units.

However, any residential development twenty-five percent of which is located within two (2) miles or less of a county line shall be treated as if it were located in the less populace county.¹¹⁰

More than 25% of the proposed LPS developments is within two miles of Seminole County, which has a population less than Orange County.¹¹¹ The proposed developments must therefore be treated as though being within Seminole County. The proposed number of dwelling units for LPS exceeds the DRI threshold in Seminole County, thereby indicating that LPS must go through state coordinated review rather than expedited process.¹¹²

¹⁰⁶ Fla. Stat. § 163.3184(3) (2016).

¹⁰⁷ Fla. Stat. § 163.3184(4) (2016).

¹⁰⁸ Fla. Stat. § 163.3184(2)(c); Fla. Stat. § 380.06 (30) (2016).

¹⁰⁹ Fla. Stat. § 380.06 (2016).

¹¹⁰ Fla. Admin. Code, Rule 28-24.023 (Residential Developments).

¹¹¹ Bureau of Economic and Business Research, College of Liberal Arts and Sciences, Florida Estimates of Population 2015, 14 (April 1, 2015).

¹¹² See also, Letter from 1000 Friends of Florida (June 7, 2016).

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The Florida Department of Transportation has also expressed concerns regarding the size and location of the project triggering DRI review. In their September 11, 2015 comments they stated:

"Furthermore, the Department has concerns regarding the location of the project and the requirements associated with a Development of Regional Impact (DRI) size development. Currently, it is unclear to the Department if the County has or will request an extension to the County's Urban Service Area (USA) boundary. As the County is considered a Dense Urban Land Area (DULA), the location of the USA important, as it is located west of the proposed project location, along the Econlockhatchee River. In addition, the Department would recommend additional clarity regarding the proposed development program. In the event that the proposed 2,256 dwelling units and 237,000 square feet would trip the DRI thresholds under a multi-use development (Section 380.06(2)(d) 28-24.028, F.S.), if fully constructed as retail. The location of the USA and development program clarity would assist in the understanding and determination of whether the project would be considered a DRI."¹¹³

Due to the adverse impact the proposed developments would have on Seminole County, the Seminole County Board of Commissioners has strongly objected the Lake Pickett proposed developments.¹¹⁴ Seminole County has been continuously expressing their objections concerning development proposals for certain properties along the Orange/Seminole County border since 2009. Their most significant objections have been regarding (1) the adverse effects on the East Rural Area (ERA) posed by the contiguous incompatible and uncoordinated urbanization in Orange County; (2) transportation capacity, connectivity and mobility deficits posed by increased density and the extension of McCulloch Road across the Econ River; and (3) degradation to the surface water quality within Seminole County.

Seminole County has expressed particular concern with respect to the proposed crossing of the Econ River, an Outstanding Florida Water.¹¹⁵ In regards to additional crossings of the Econ River, the City of Oviedo, Seminole County, and Orange County Land Development Codes all include language prohibiting additional crossings unless (1) there is no feasible and prudent alternative to the proposed crossing, and (2) the crossing supports an activity that is clearly in the public interest.¹¹⁶ This language is also included in Orange County's Comprehensive Plan.¹¹⁷ Seminole County has clearly and consistently raised these objections to the Lake Pickett proposals, due to the potential that these developments would damage the historic rural character and environmental assets of this area. Orange County should bear these objections in mind when deciding on the proposed amendments at issue, as these amendments would have an adverse impact not only on Orange County, but neighboring Seminole County as well.

¹¹³ FDOT Review Comments from September 11, 2015, page 24 of 34. (In Agenda Packet)

¹¹⁴ See Letter to Orange County BCC from Seminole County Board of Commissioners dated April 19, 2016.

¹¹⁵ Chp. 62-302.700 Florida Administrative Code

¹¹⁶ §15.443(1)(c), Orange County Land Development Code.

¹¹⁷ CP *supra* note 10, at Future Land Use Element Policy 5.1.3(13).

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V. **Conclusion**

In closing, the denial of these proposed amendments is consistent with protecting the safety of Orange County citizens while simultaneously protecting and conserving our environment. We respectfully request that said amendments be denied in accordance with the will of the majority of citizens who reside within the developments in question and who overwhelmingly and consistently have oppose these developments as they have been proposed.

We respectfully request that you do not adopt the Privately Initiated Text and Privately Initiated Regular Cycle Future Land Use Map (FLUM) Amendments and deny the Concurrent Rezoning Request for The GROW PD-RP as inconsistent with the Comprehensive Plan. We ask that you deny the LPS and LPN development proposals requesting privately initiated comprehensive plan (CP) text amendments (Lake Pickett Study Area Policies), privately initiated large scale Future Land Use Map Amendments (located in District 5), and concurrent rezoning amendments.

Respectfully submitted,

/s/ Josephine Balzac, Esq.

/s/ Francheska Markus, Esq.

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Enclosures
Case Law Cited
Econ Flood Plain Study
Econ Study Destruction by Design