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May 25, 2010

**VIA FEDERAL EXPRESS**

Michael P. Hansen, Secretary  
Florida Land & Water Adjudicatory Commission  
Office of Policy & Budget  
Executive Office of the Governor  
Room 1802  
The Capitol  
Tallahassee, FL 32399-0001

**Re: Petition to the Florida Land and Water Adjudicatory Commission for  
Appeal of a Development Order Rendered by the Board of County  
Commissioners of Flagler County, Florida**

Dear Secretary Hansen:

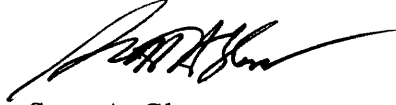
In accordance with Rule 42-2.002, F.A.C., I have enclosed herewith the original and one copy of the Notice of Appeal and the Petition For Appeal Of A Development Order with regard to that certain development order issued on April 5, 2010 by the Board of County Commissioners of Flagler County, Florida, identified as Resolution No. 2010-22, relating to an application for a Notice of Proposed Change to the Hammock Dunes Development of Regional Impact Development Order. Resolution No. 2020-22 was transmitted by the Board of County Commissioners to the Developer on April 23, 2010. Accordingly, the enclosed Notice of Appeal and Petition have been timely filed pursuant to §380.07, F.S.

As also required by Rule 42-2.002, F.A.C., copies of the enclosed Notice of Appeal and Petition have been mailed this day to all parties of record, including the Bureau of Land & Water Management, the Department of Community Affairs, the Northeast Florida Regional Council, and to the Board of County Commissioners of Flagler County as shown on the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions or comments, or if we have overlooked anything in making this filing, please contact the undersigned at the phone numbers or e-mail address listed above.

Sincerely,

SHUTTS & BOWEN LLP

A handwritten signature in black ink, appearing to read "Scott A. Glass", written over a horizontal line.

Scott A. Glass

Enclosures  
ORLDOCS 11854368 1

**CERTIFICATE OF SERVICE**

In accordance with Rule 42-2.002, F.A.C., I hereby certify that a copy of the Notice of Appeal and a copy of the Petition for Appeal of a Development Order filed with the Florida Land and Water Adjudicatory Commission and captioned as Ginn-LA Marina, LLP, Ltd., Northshore Hammock Ltd. LLLP and Northshore Ocean Hammock Investment, Ltd., LLLP, Petitioners, v. Flagler County, Respondent, were mailed, via first class U.S. mail, postage prepaid this 25<sup>th</sup> day of May, 2010 to those entities listed in Rule 42-2.002, or their successor entities, as listed below:

The Hon. Charlie Crist  
Governor, State of Florida  
The Capitol  
400 S. Monroe St.  
Tallahassee, FL 32399-0001

The Hon. Bill McCollum  
Florida Attorney General  
Office of Attorney General  
Office of Cabinet Affairs  
PL-01, The Capitol  
Tallahassee, FL 32399-1050

The Hon. George Hanns, Chairman  
Board of County Commissioners  
Flagler County Government Svcs. Bldg.  
Suite 303  
1769 East Moody Boulevard  
Bunnell, Florida 32110

Ocean Hammock Property Owners Ass'n.  
c/o Michael Chiumento, Esq.  
Chiumento & Guntharp, P.A.  
4 Old Kings Road North, Suite B  
Palm Coast, Florida 32137-8226

Hammock Beach Club Homeowners Assoc.  
c/o Steven Geller, Esquire  
Greenspoon Marder, P.A.  
100 W. Cypress Creek Rd., Ste. 700  
Fort Lauderdale, Florida 33309-2195

The Hon. Alex Sink  
Chief Financial Officer  
Florida Dept. of Financial Affairs  
PL 11  
The Capitol  
Tallahassee, FL 32399-0301


The Hon. Charles H. Bronson  
Commissioner  
Dept. of Agriculture & Consumer Svcs.  
The Capitol  
Tallahassee, FL 32399-0800

The Hon. Thomas G. Pelham, Secty.  
Dept. of Community Affairs  
2555 Shumard Oak Boulevard  
Tallahassee, FL 32399-2100

Office of the General Counsel  
Dept. of Environmental Protection  
3900 Commonwealth Boulevard  
M.S. 49  
Tallahassee, FL 32399

Northeast Florida Regional Council  
6850 Belfort Oaks Place  
Jacksonville, FL, 32216

Admiral Corporation  
c/o Ellen M. Avery-Smith, Esq.  
Rogers Towers, P.A.  
7 Waldo Street, Ste. B  
St. Augustine, FL 32084-2718

  
\_\_\_\_\_  
Scott A. Glass, Esq.

**STATE OF FLORIDA  
LAND AND WATER ADJUDICATORY COMMISSION**

GINN-LA MARINA, LLLP, LTD, a Georgia limited liability partnership, authorized to do business in Florida, NORTSHORE HAMMOCK LTD, LLLP, a Georgia limited liability partnership authorized to do business in Florida; and, NORTSHORE OCEAN HAMMOCK INVESTMENT, LTD, LLLP, a Georgia limited liability partnership authorized to do business in Florida,

Petitioners,

FLAWAC Case No.: \_\_\_\_\_

DOAH Case No.: \_\_\_\_\_

v.

FLAGLER COUNTY, a political subdivision of the State of Florida,

Respondent.

\_\_\_\_\_ /

**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN pursuant to §§ 380.06(19)(f)6. and 380.07(2), F.S. and Rule 42-2.002, F.A.C., that Petitioners appeal the denial by Flagler County of certain amendments to the Hammock Dunes Development of Regional Impact Development Order requested by Petitioners in that certain amended Notice of Proposed Change filed on February 11, 2010 with Flagler County, the Department of Community Affairs and the Northeast Florida Regional Council and which denial is evidenced by Resolution 2010-22 adopted by the Board of County Commissioners of Flagler County on April 5, 2010, and Petitioners submit the attached Petition for Appeal of a Development Order in support thereof.

Respectfully submitted this 25<sup>th</sup> day of May, 2010.

**Mailing Address:**

**SHUTTS & BOWEN LLP**  
300 S. Orange Ave., Suite 1000  
Orlando, Florida 32801-3373  
**Post Office Box 4956**  
**Orlando, Florida 32802-4956**  
Telephone: (407) 423-3200  
Facsimile: (407) 425-8316

By: \_\_\_\_\_

Scott A. Glass, Esq.  
Florida Bar No. 911364

**STATE OF FLORIDA  
LAND AND WATER ADJUDICATORY COMMISSION**

GINN-LA MARINA, LLLP, LTD, a Georgia limited liability partnership, authorized to do business in Florida, NORTSHORE HAMMOCK LTD, LLLP, a Georgia limited liability partnership authorized to do business in Florida; and, NORTSHORE OCEAN HAMMOCK INVESTMENT, LTD, LLLP, a Georgia limited liability partnership authorized to do business in Florida,

Petitioners,

FLAWAC Case No.: \_\_\_\_\_

DOAH Case No.: \_\_\_\_\_

v.

FLAGLER COUNTY, a political subdivision of the State of Florida,

Respondent.

\_\_\_\_\_ /

**PETITION FOR APPEAL OF A DEVELOPMENT ORDER**

COMES NOW, PETITIONERS, GINN-LA MARINA, LLLP, LTD, a Georgia limited liability partnership authorized to do business in the State of Florida, NORTSHORE HAMMOCK, LTD, LLLP, a Georgia limited liability partnership authorized to do business in the State of Florida, and NORTSHORE OCEAN HAMMOCK INVESTMENT, LTD, LLLP, a Georgia limited liability partnership authorized to do business in the State of Florida (collectively "Developer"), by and through their undersigned counsel, and appeal to the Florida Land and Water Adjudicatory Commission the denial by Flagler County (the "County") of certain amendments to the Hammock Dunes Development of Regional Impact Development Order (the "Hammock Dunes DRI/PD") requested by Petitioners in that certain Notice of Proposed Change ("NOPC") originally filed with Flagler County on March 2, 2009, amended on June 19, 2009, and finally amended on February 11, 2010, and as also filed concurrently with the

Department of Community Affairs (“DCA”) and the Northeast Florida Regional Council (“NFRC”), and which denial is evidenced by Resolution 2010-22 adopted by the Board of County Commissioners of Flagler County (“BCC”) on April 5, 2010.

### **PARTIES**

1. Developer is the owner of real property in Flagler County, Florida located within the boundaries of the Hammock Dunes DRI/PD (the “Property”).
2. Developer’s address is c/o Kenneth W. Wright, Esq., Shutts & Bowen LLP, 300 S. Orange Avenue, Suite 1000, Orlando, Florida 32801, attorney for the Developer.
3. Respondent, Flagler County, is a political subdivision of the State of Florida and, through its BCC, is responsible for issuing development orders for developments of regional impact in unincorporated Flagler County. §380.06(15), F.S. (2009) and §163.3171, F.S. (2009). Flagler County’s denial of certain amendments to the Hammock Dunes DRI/PD requested by Developer in its NOPC is the subject of this appeal.

### **BACKGROUND**

4. In 1984, the BCC approved the original development order (the “Development Order” or “D.O.”) for the Hammock Dunes DRI/PD (Resolution #84-7). The Development Order entitled the original developer to construct 6,670 dwelling units in 42 separate geographical areas known as “Clusters” as generally depicted on Map H attached to the D.O. The 42 Clusters initially covered 893 of the DRI’s total 2,258 acres. As with all Developments of Regional Impact, the Application for Development Approval (“ADA”) for the Hammock Dunes DRI/PD, including the proposed uses, densities, phasing and conceptual development plan, was rigorously reviewed by numerous regulatory agencies. The resulting D.O. ensured that any and all impacts to local and regional resources including, but not limited to, impacts to

transportation facilities, environmental resources, educational services and public safety were addressed and mitigated as necessary.

5. Due to changing market conditions and development plans, the D.O. has subsequently been amended four times. The first amendment occurred in 1995 when the BCC adopted Resolution #95-50. This amendment reduced the entitled number of dwelling units from 6,670 to 4,400, reduced the residential acreage from 893 to 888, added a 43<sup>rd</sup> Cluster and reallocated the approved units over the approved Clusters.<sup>1</sup> It also allowed the original developer to realign the spine road in the DRI/PD.

6. The next amendment came in 1998 when the BCC adopted Resolution #98-10 which, among other things, increased the residential acreage from 888 acres to 916 acres. Simultaneously, eight of the 43 Clusters were eliminated and the approved residential units were reallocated over the remaining 35.

7. The D.O. was further amended in 2002 and 2003, but neither of these changes affected the permitted number of dwelling units, residential acreage or residential Clusters.

8. In March 2009, Developer submitted an NOPC to the County pursuant to §380.06(19), F.S. The NOPC requested two changes to the Development Order. First, the NOPC requested that the Development Order be amended to recognize the automatic extension of the DRI build-out date provided by the Legislature in §380.06(19)(c). Second, Developer proposed to create a new residential Cluster 35 within the DRI boundaries and to reallocate 1,147 previously-approved, but unbuilt, dwelling units from Clusters 21-34 to the new Cluster.<sup>2</sup> The proposed Cluster 35 consisted of 34 acres within the Ocean Hammock Golf Course plat. Eight

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<sup>1</sup> The addition of a new Cluster in 1995 clearly demonstrates that the DRI/PD Master Plan was never intended by either party to be set in stone but instead was intended to be a somewhat fluid document that could be modified as necessary to address changing market conditions and economic realities. It also established a clear precedent for the creation of the proposed Cluster 35.

<sup>2</sup> While 35 individual Clusters were already approved in the Development Order, one of those Clusters was numbered "1a" and the remainder were numbered 1 – 34. Thus, the new Cluster would be designated Cluster 35.

of those acres are located north of 16<sup>th</sup> Road on land currently occupied by a 20-room hotel and golf clubhouse (the “Lodge/Restaurant”) with associated amenities and supporting facilities including surface parking. The remaining 26 acres, south of 16<sup>th</sup> Road, currently features a driving range, related facilities, landscaped areas, buffer and open acreage. A copy of Developer’s initial NOPC is attached hereto as **Exhibit “A.”** Additionally, for convenience, an aerial overlay showing both the March, 2009 proposed Cluster 35 and the Cluster 35 proposal ultimately submitted to the BCC for consideration is attached hereto as **Exhibit “B.”**

9. After submitting the NOPC Developer entered into discussions with interested property owners both within and outside the Hammock Dunes DRI/PD. As a result of these discussions the required public hearing on the NOPC application was continued several times upon the request of both Developer and County staff. On June 19, 2009, Developer amended its pending NOPC to reduce the total number of approved dwelling units within the entire DRI/PD from 4,400 to 3,800.<sup>3</sup> Additionally, Developer reduced the size of the proposed Cluster 35 by almost a third, from 34 acres down to 24 acres. Likewise, Developer reduced the number of residential dwelling units it was requesting be reallocated to Cluster 35 from 1147 to 541. This number, when added to the existing 20 hotel rooms, would result in 561 dwelling units allocated to Cluster 35 which would still be consistent with the overall density limit of the DRI D.O. Finally, in an effort to address concerns of neighboring property owners, Developer volunteered that prior to the development of Cluster 35 it would submit to a more rigorous site plan review process than the standard required for any parcel previously developed within the Hammock Dunes DRI/PD prior to any actual development within the proposed Cluster 35.

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<sup>3</sup> Interestingly, on May 13, 2009, after Developer submitted its original NOPC but before it amended the NOPC to request the reduction of approved residential units, the NFRC sent a letter to the County advising it that NFRC staff had reviewed the initial NOPC and concluded that it would not cause any additional substantial regional impacts. In other words, the NFRC had concluded that shifting 1,147 residential units to the proposed Cluster 35 would not constitute a substantial deviation pursuant to §380.06, F.S.



10. The County's professional planning staff reviewed the Amended NOPC and determined that it was not a substantial deviation as defined in §380.06, F.S. Staff also determined that the requested amendments were consistent with the Flagler County Comprehensive Plan and the Flagler County Land Development Code. Accordingly, staff recommended that the BCC approve the requested D.O. amendments subject to a condition that:

issuance of a development permit within Cluster 35 ... be contingent upon the submittal and approval by the Board of County Commissioners of such maps, exhibits and supporting materials in fulfillment of the PUD reclassification application requirements, together with replat of the Ocean Hammock Golf Course Plat, said approval processes by the Board of County Commissioners to be completed through appropriately noticed public hearing processes consistent with the Flagler County Land Development Code.

A copy of the Flagler County Planning Staff Report and Draft Resolution dated June 23, 2009 is attached hereto as **Exhibit "C"** for convenience. The NOPC was then scheduled for public hearing on July 6, 2009.

11. Prior to the scheduled July 6<sup>th</sup> public hearing Developer was still engaged in discussions with interested parties, including individual DRI residents, property owners associations, and other organized groups. At the request of representatives of several of these interested parties, and despite the fact that it had the written recommendations from Flagler County staff to the BCC to approve the NOPC as submitted, the Developer agreed to jointly request a further continuance in an effort to address residents' concerns and reach a consensus.

12. Over the next seven months, Developer continued to meet with representatives from various property and homeowner associations within the Hammock Dunes DRI/PD even though the Master Declaration of Covenants, Conditions and Restrictions for the DRI specifically provides that the subject property is totally separate from, and not subject to, governance or approval by adjacent property owners associations.

13. As a result of these meetings, and based on current economic conditions, Developer agreed to again amend its NOPC to, among other things, again reduce the size of the proposed Cluster 35 by cutting it from 24 acres to 12, most of which were already developed with the Lodge/Restaurant facility and related parking. Accordingly, on February 10, 2010, Developer submitted its newly amended NOPC to the County for review. The Amended NOPC requested the following:

- a) recognition of the automatic build-out date extension provided in §380.06(19)(c);
- b) reduction in the number of approved dwelling units within the Hammock Dunes DRI/PD from 4,400 to 3,800 units;
- c) creation of a new, reconfigured 12 acre Cluster 35 with a designation of Ocean Recreation Hotel, a maximum building height of 77 feet (which is the height of the existing Lodge/Restaurant building) and the reallocation of 541 previously approved but unbuilt residential units to the new Cluster;
- d) addition of a further “PUD-like” review process, including additional public hearings and BCC approvals, as a condition precedent to the issuance of any development permits for the new Cluster 35; and,
- e) approving the slight realignment of 16<sup>th</sup> Road to the south at Developer’s sole expense if, in the future when a development plan is submitted for Cluster 35, the final number and proposed layout of residential units necessitate the relocation in order to keep all development to the north of 16<sup>th</sup> Road.

14. The amended NOPC was reviewed by the NFRC, in conformity with the requirements of §380.06(19)(f)4, which advised the County that the proposed changes did not constitute a substantial deviation and thus would not require further regional review. DCA received a copy of the amended NOPC but did not submit a written review of the proposal,

thereby effectively concurring that the proposed changes did not constitute a substantial deviation.<sup>4</sup>

15. The amended NOPC was, of course, also reviewed by the County's professional planning staff. County staff concurred that the proposed changes did not constitute a substantial deviation and recommended approval of all of the requested amendments, although it recommended that several be approved subject to the addition of various conditions to ensure compatibility with existing development. A copy of the Flagler County Planning Staff Report prepared for the April 5, 2010 BCC hearing, along with relevant attachments, is attached hereto as **Exhibit "D"** for convenience.

16. Among its other findings, staff concluded that the request to create a new Cluster 35 designated as Ocean Recreation Hotel and the assignment of a maximum residential density of 561 units to Cluster 35 was essentially no different than approval of the original D.O.'s Cluster 1 designated "Destination Hotel" with 545 units. *Id.*

17. Staff also pointed out that, "historically, the Board of County Commissioners has permitted the reallocation of density within the Hammock Dunes DRI (reference the second amendment approved through Resolution #98-10), reallocating units from Clusters 35-42 to Clusters 24-34." *Id.*

18. While recognizing that the BCC had a significant prior history of approving requests for the creation or deletion of Clusters and the reallocation of density within the DRI, staff also recognized that the current request was being made in the context of a more mature DRI nearing build-out. Accordingly, staff agreed with Developer's offer to undertake an additional step in the site plan review process that had not historically been included in prior

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<sup>4</sup> DCA staff had reviewed Developer's application and orally communicated its response to County staff indicating that it did not believe the NOPC constituted a substantial deviation, but reserving its right to appeal the BCC's decision if it subsequently objected to it. Upon information and belief, this is a fairly common practice by DCA staff.

NOPC approvals. Specifically, staff recommended that the following language be included in the D.O.:

Specific to the development/redevelopment of Cluster 35 ... issuance of a development permit within Cluster 35 ... shall be contingent upon the submittal and approval by the Board of County Commissioners of such maps, exhibits and supporting materials in fulfillment of the PUD reclassification application requirements ... said approval processes to be completed through appropriately noticed public hearing processes consistent with the Flagler County Land Development Code, but not requiring an amendment to this Development Order.

*Id.*

19. Despite recommending its inclusion in the D.O., staff admitted in its report that this condition was, “on its face, unnecessary because the County staff’s current practice within other DRIs similarly zoned as Planned Unit Development, but lacking specific conditions regulating development, are required to follow the County’s Land Development Code processes for submittal, review, and approval of PUD development agreements and site plans.” *Id.*

20. In addition to the foregoing, staff also recommended that no building be allowed on Cluster 35 within 100 feet of its boundary except an amenity or recreation building of one story or less, and that a minimum 25 foot landscape buffer be installed, if not present naturally, and maintained so as to be opaque along the southern and eastern boundary lines.<sup>5</sup> *Id.*

21. County staff also recommended that the amount of acreage designated in the D.O. for residential development be revised from 916 to 960 to account for the new 12 acre Cluster 35 and to reflect actual platted residential development which may have been previously underestimated or understated.

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<sup>5</sup> Interestingly, in its numerous conversations with Developer, County staff never discussed, or even mentioned, this proposed condition. Instead, it appears staff adopted it from correspondence the County received from Michael Chiumento, counsel for a neighboring property owners association.

22. Finally, on April 5, 2010, more than a year after Developer first submitted its NOPC, a politically charged public hearing was held before a standing room only crowd in the BCC chambers. The crowd was largely comprised of residents who opposed any further development in the DRI whatsoever.

23. The first person to testify at the hearing was Adam Mengel, the Flagler County Planning Director. Mr. Mengel testified that, as with other DRIs in Flagler County, when Hammock Dunes was assigned a DRI classification it was also assigned a Planned Unit Development ("PUD") zoning classification. He noted that, despite the PUD classification, specific development standards such as setbacks, floor area ratios, landscaping and the like were typically not incorporated into the development order, but instead the County would review individual plats for the various Clusters as they were submitted. It was during this review of an actual proposed site plan that the County would impose appropriate development standards in documents called "plat addenda." Mr. Mengel further testified that this is the same process currently used by the County in reviewing proposed PUD developments, except instead of plats and plat addenda, the County now reviews PUD site plans and imposes development standards in a PUD Development Agreement.

24. After explaining the historical and current development processes for planned developments, Mr. Mengel testified that, in order for there to be any actual development in the new Cluster 35, the Developer would have to first submit a PUD Development Agreement and site plan and have it considered and voted upon by the BCC. He also testified that if any portion of the 16<sup>th</sup> Road right-of-way had to be vacated to accommodate Developer's commitment to limit residential development to the north side of 16<sup>th</sup> Road, that too, would require additional review and approval by the BCC.

25. Mr. Mengel further testified that staff's finding, based on the criteria set forth in the Florida Statutes, was that the NOPC was not a substantial deviation pursuant to Ch. 380, F.S.<sup>6</sup>

26. After Mr. Mengel testified, Developer presented the testimony of Ken Metcalf. Opposing counsel had previously stipulated that Mr. Metcalf was an expert in planning. Mr. Metcalf testified that he had reviewed the staff reports prepared for the July 6, 2009 meeting and for the April 5, 2010 meeting and concurred with the analysis and conclusions of each. He further testified that he had performed an *independent* evaluation of the amended NOPC and concluded that the requested amendments to the D.O. did not constitute a substantial deviation, were consistent with the Flagler County Comprehensive Plan, were consistent with the original Development Order, and were fully consistent with the historical precedent established by the County in prior amendments.

27. After Mr. Metcalf testified, Developer presented the testimony of its traffic expert, Mr. Scott Leftwich, whose expertise had also been stipulated to by opposing counsel. Mr. Leftwich testified that he had reviewed the County staff report and concurred with its analysis and conclusion that the requested amendments to the D.O. would not result in any substantial traffic impacts. He further testified that he had done an independent traffic study and reached the same conclusion.

28. Developer also entered into the record at the hearing an environmental report by its environmental expert, Virginia Sinn, whose expertise had also been stipulated. Ms. Sinn had concluded that the proposed amendments would not have any significant environmental impact.

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<sup>6</sup> Such conclusion was inevitable as the impacts to regional resources, if any, that might be caused by the proposed amendments to the D.O. had already been included, fully reviewed and, if necessary, mitigated pursuant to the initial ADA. Importantly, the total density of the Hammock Dunes DRI/PD, including the 561 residential units proposed for Cluster 35, was less than the total density approved in the original D.O. in 1984.

Inasmuch as the opposition had not raised any environmental concerns, Ms. Sinn was not called upon to testify.

29. After Developer's experts testified and were cross-examined by opposition counsel, the opposition put on their case in chief. They presented only one witness, Mr. Steven Davis, a retired architect who claimed to be an expert in architecture, engineering, planning and land use. Developer did not stipulate to Mr. Davis' alleged expertise in anything but architecture. Nonetheless, Mr. Davis testified that, in his opinion, the DRI had been residentially "overdeveloped" already and the requested amendments should be denied. He also testified that under his interpretation of the D.O., the BCC had no authority to amend it to create a new Cluster despite the fact that they had previously done so. He further testified that, again, in his opinion, the 541 units that Petitioner requested to relocate could not be added to any existing cluster, let alone a new Cluster, without violating the Development Order. Finally, he testified that he believed the original developer's intent was that the land proposed for Cluster 35 would never be developed with residential uses.

30. In addition to Mr. Davis' self-asserted "expert" opinion, the opposition entered a number of exhibits into the record, including a self-serving internal memo created by Mr. Davis which simply argued against the amendments. The opposition also submitted for the BCC's review a highly prejudicial artist's rendering of a monolithic, 77 foot high, red building panning the entire proposed Cluster 35 inside the recommended setback. The rendering did not show any open space, parking, stormwater management areas or compliance with floor area ratio or other design criteria required under the County Land Development Code. Yet, the opposition represented this drawing as a very possible scenario if the requested amendments were approved.

31. The opposition also submitted certain marketing material, including a sales video, which stated that the condominiums then being offered would be the final offering of oceanfront

residences at Hammock Beach. The opposition's counsel then argued that the use of this sales material effectively resulted in a "complete and absolute waiver of any additional development." Tr. 107. A copy of the transcript of the April 5, 2010 BCC Special Meeting is attached hereto as **Exhibit "E"** for convenience. He further argued to the BCC that a number of residents had relied on this sales material to their detriment and that the Developer is legally and equitably estopped from now seeking the creation of Cluster 35.

32. The opposition did not produce a copy of any resident's purchase contract. Had they done so, the BCC would have seen that each such contract conspicuously sets forth in no less than three separate sections that the purchaser acknowledges that he or she cannot rely upon, and in fact has not relied upon, any oral or other representations not included in the contract. The sales contract also specifically states that Purchaser has not relied upon any verbal or written statements in any advertising and promotional matter including, but not limited to, brochures, newspapers, and radio and television advertising, but has relied solely on the contract and the condominium documents. Neither the contract nor the condominium documents warrant that nothing shall be built between the purchaser's unit and the ocean, nor do they provide that a view easement will be conveyed with any condominium unit. Instead, the governing documents, which unit owners voluntarily and contractually agreed to adhere to, clearly allow the Developer to modify its plans for development in its sole discretion if market conditions or economic conditions change, or for any other reason whatsoever.

33. After the opposition completed their presentation, Developer's counsel addressed the BCC and pointed out that all of the expert testimony and evidence they had received supported a finding that the NOPC was not a substantial deviation and that the proposed amendments were consistent with the County's Comprehensive Plan. He also noted that it would be inherently unfair for the BCC to deny the requested amendments based on an alleged



failure of the proposed development to comply with the County's PUD criteria because no actual development plan had been submitted, nor was it required to be submitted at this stage in the review process. Developer's counsel further noted that, while the County Land Development Code's PUD criteria would certainly be a major factor in the BCC's review of a specific site development plan for Cluster 35 in the future, such criteria were not yet relevant to the BCC's consideration of the actual application before it.

34. Upon the close of the public portion of the hearing, the BCC determined that, pursuant to §380.06(19), the NOPC was not a substantial deviation requiring further development of regional impact review. A copy of the BCC's Resolution #2010-22 is attached hereto and incorporated herein as **Exhibit "F."**

35. The BCC also voted to recognize the three year extension to the Hammock Dunes DRI/PD D.O. and the reduction in the overall approved dwelling units from 4,400 to 3,800 as requested by the Developer.

36. Finally, however, the BCC voted to deny the creation of the new Cluster 35 and the reallocation of the previously approved but unbuilt residential dwelling unit entitlements to the new Cluster, ostensibly on the basis that,

[t]he creation of a new Cluster 35 and its proposed Planned Unit Development (PUD), in accordance with Section 3.04.02.F.1., Flagler County Land Development Code, adversely affects the orderly development of Flagler County; and the creation of a new Cluster 35 and its proposed density and intensity within the Planned Unit Development (PUD), in accordance with Section 3.04.02.F.2., Flagler County Land Development Code, adversely affects the health and safety of residents and workers in the area and will be detrimental to the use of adjacent properties and the general neighborhood.

*See, Exhibit "F."* This finding was not supported by any factual determination or evidence adduced at the hearing.

37. The decision of the BCC regarding Developer's NOPC application to amend the Hammock Dunes DRI/PD is a "development order" as defined in §§380.031(3) and (4), F.S. and §380.04, F.S. Furthermore, although the BCC determined the NOPC was not a substantial deviation and Developer is not appealing that part of the BCC's decision, Developer has been adversely affected by the BCC's denial of its request to amend the Hammock Dunes DRI/PD Development Order to create a new Cluster 35 and allow the relocation of previously approved but unbuilt residential units.

38. Because this denial is related to and inextricably tied to the DRI/PD Development Order, Developer's *only* route of appeal is by *de novo* appeal to the Florida Land and Water Adjudicatory Commission pursuant to §380.06(19)(f)6. and §380.07, F.S. *See also, Bay Point Club, Inc. v. Bay County*, 890 So.2d 256 (Fla. 1<sup>st</sup> DCA 2004).

39. The statutory deadline for Developer to appeal the County's decision regarding the NOPC is forty-five (45) days after the County transmitted its decision to Developer. *See*, §380.06(19)(f)6., F.S. and §380.07(2), F.S. The County transmitted its decision to the Developer on April 23, 2010. Accordingly, the jurisdictional deadline for filing this Petition is June 7, 2010 and this Petition has, therefore, been timely filed.

#### **STATEMENT OF DISPUTED FACTS**

40. The BCC prematurely applied PUD provisions of the Flagler County Land Development Code when there was no specific development plan before it.

41. The BCC incorrectly attempted to justify its premature PUD review based on Section 3.04.02.D. of the County's Land Development Code which "permits simultaneous review of the Development of Regional Impact (DRI) and Planned Unit Development (PUD), as was initially approved through Resolution #84-7 for the creation of the Hammock Dunes DRI."

42. Section 3.04.02.D. of the County's Land Development Code is titled, "*Simultaneous DRI and PUD application review (optional)*." Emphasis added. This section unequivocally states that:

**The developer may opt for simultaneous review** by the Flagler County Commission. **When the developer ... requests simultaneous PUD and DRI review**, the public hearing required for the DRI application shall also serve as the public hearing provided under subsection 3.05.05.C. of this article.

Emphasis added. The County's Land Development Code does not give the County the authority to compel simultaneous review and, because the Developer in the instant case did not opt for or request such review, the BCC had no authority to consider and apply PUD criteria from the Land Development Code to the NOPC at all, let alone use it as the basis for denial.

43. At no time did Developer opt for or request to go through simultaneous review of the NOPC application and a detailed PUD site plan review. In fact, Developer represented at the hearing that it could not respond to specific site plan issues because it did not yet have a site plan, nor was it required to have one in order to go through the NOPC process to amend the Hammock Dunes DRI/PD D.O. Tr. 120-121. Instead, Developer agreed to include a condition in the D.O. that would require it to go through the full PUD review process at the time it was ready to develop the new Cluster 35, even though similar review requirements were already contained in the D.O. and were required by County staff with similarly situated DRIs. Again, Petitioner disputes the County's implied claim that it has authority to force the Developer to undergo simultaneous PUD review during the NOPC review when Developer has no specific development plans in place for the property.

44. Sections 17.5 and 17.6 of the Hammock Dunes DRI/PD D.O. establish that the DRI is a PUD, and, as such, the project is subject only to certain review provisions enumerated in the D.O., including the submittal of a site development plan for approval by the BCC *prior to*

*the start of any construction.* Section 17.7 of the D.O. states that, “[t]he County and the Applicant recognize that this development order will form the basis upon which the Applicant or its successors will plan and conduct its phased development activities.” Accordingly, Petitioner was under no obligation to submit a PUD Development Agreement or site development plan with the NOPC application. Instead, and in conformance with the cited D.O. provisions, the historical practices of Flagler County, and the Flagler County Land Development Code, Developer must submit a PUD Development Agreement and a site plan for review, public hearing, and BCC approval before any development is actually permitted on the proposed Cluster 35. The County’s application of the PUD review process and criteria at the NOPC stage was *ultra vires* and in violation of Developer’s due process rights.

45. The County denied Developer its constitutionally created equal protection rights by failing to treat the Developer and the Hammock Dunes DRI/PD the same as similarly situated developers and DRIs in Flagler County. Specifically, the County’s existing practice with similarly situated DRIs is to require them to follow the County’s Land Development Code PUD process prior to actual construction, not at the NOPC review stage. Only when a DRI developer has an actual proposed development plan is he or she required to submit a PUD Development Agreement and a Site Plan for review, public hearing and final action by the BCC. In the instant case, by mandating that the NOPC application adhere to PUD code provisions before Developer has created an actual development plan, the BCC did not treat Developer fairly and guaranteed a denial of the requested amendments without following the essential requirements of law.

46. The County failed to comply with Section 3.04.03 of its own Land Development Code, which requires a detailed site plan be submitted and approved by the BCC prior to the start of construction of any phase or portion of the property proposed to be developed. Section 3.04.03.A. specifically states, “Where the PUD is to be phased, *the site development plan*

*submitted may be for only that portion for which construction is pending.”* Emphasis added.

The site plan must include, among other things: location of land uses and their acreages, lot sizes, building setbacks, the number and type of residential units, location and character of parking, and relation of abutting land uses and land use districts to the proposed development including, where view protection is an objective, location of principal public viewpoints into or through the proposed PUD. Essentially, under the County’s Land Development Code, in order to require a PUD review process, a developer must know specifically what is going to be developed on the property and where the structures will be located. Until that happens there is no valid way for the BCC to review the detailed elements of the PUD and to make decisions as to whether it complies with the Land Development Code. Therefore, denial of the requested D.O. amendments on the basis of PUD provisions of the Code was incorrect and improper.

47. The BCC erred in partially basing its denial of the creation of Cluster 35 on Sections 3.04.02.F.1. and 3.04.02.F.2. of the County’s Land Development Code by finding that the new cluster would adversely affect the orderly development of the County and would additionally adversely affect the health and safety of residents and workers in the area and would be detrimental to the use of adjacent properties and the general neighborhood. These Code sections are findings that the BCC must consider in determining whether to enact an ordinance *establishing* a PUD, which was not the question before the BCC at the NOPC hearing on April 5, 2010.

48. The BCC had no basis in fact for finding that the creation of a new Cluster 35 and its proposed PUD, in accordance with Section 3.04.02.F.1. of the Flagler County Land Development Code, will adversely affect the orderly development of the County.

49. Creation of a new Cluster 35 and the reallocation of previously approved but unbuilt residential units to Cluster 35 will not adversely affect the orderly development of Flagler County.

50. The BCC had no basis in fact, and the record is devoid of any factual or legal support, for finding that the creation of the new Cluster 35 and its proposed density and intensity within the PUD, in accordance with Section 3.04.02.F.2. of the Flagler County Land Development Code, adversely affects the health and safety of residents and workers in the area and will be detrimental to the use of adjacent properties and the general neighborhood.

51. The creation of a new Cluster 35 with a maximum density of 561 residential dwelling units will not adversely affect the health and safety of residents and workers in the area and will not be detrimental to the use of adjacent properties and the general neighborhood.

52. Replatting the Ocean Hammock Golf Course plat in order to allow the creation of Cluster 35 is not prohibited as a matter of law by the Hammock Dunes DRI/PD D.O. and/or an existing plat restriction.

53. The Ocean Hammock Golf Course is privately owned by the Developer and Hammock Dunes residents do not have an easement, license or other ownership interest in or over the Ocean Hammock Golf Course that would require their consent to a replat by the owner.

54. The plat restriction on the Ocean Hammock Golf Course plat regarding the limitation of its use does not constitute a dedication to the public, to Flagler County or to any other association or entity, nor does it reflect a permanent or perpetual restriction such as to prohibit a replat of that portion of the platted property to allow the creation of Cluster 35.

55. The BCC previously approved the following uses for the proposed Cluster 35 property when it approved the development of the Lodge/Restaurant: hotel, conference and meeting, office, retail, restaurant, bar and lounge, golf operations, fitness, spa, outdoor

recreation, swimming, parking, walk paths, landscape buffers and preservation. As these uses have previously been deemed by the BCC to be appropriate for this property and consistent with the Flagler County Comprehensive Plan, the proposed reallocation of 541 residential dwelling units to the proposed Cluster 35 for Ocean Recreation Hotel use is consistent with both the DRI D.O. and the Comprehensive Plan as a matter of law. Moreover, because the BCC did not impose the plat restriction until after portions of the subject property were already being used for these approved uses, such uses have already been deemed consistent with the plat restriction by the BCC and, therefore, the plat restriction does not have to be amended or removed in order to accommodate the same uses in the proposed Cluster 35.

56. The NOPC request for the creation of the new Cluster 35 and the reallocation of unused density with a specific site development plan to be submitted in the future and subjected to the PUD review and public hearing process is consistent with the County's Land Development Code.

57. The BCC's denial of the requested amendments on the alleged basis of inconsistency with the County's Land Development Code was premature inasmuch as Developer had not submitted, and could not submit, a specific site development plan for the proposed Cluster 35 because Developer does not yet know how many of the remaining unbuilt units would ultimately be constructed on Cluster 35 or in what manner or configuration.

58. Neither Flagler County, nor its citizens, nor any other entity, has a view easement or other legally protected property right that would preclude the construction of residential buildings to a height of 77 feet in the proposed Cluster 35.

59. Developer did not waive its rights to amend its development plan to reallocate previously approved residential development on its property by use of sales and marketing materials.

60. The County is not precluded by the doctrine of equitable estoppel from approving the requested amendments.

61. The County has no authority to pick and choose among the proposed D.O. amendments in the NOPC, approving those that it deems favorable to the opposition and rejecting those that would benefit Developer. The unilateral reduction of existing entitlements without offsetting benefit to the Developer is a taking of the Developer's property rights without just compensation in violation of the Florida Constitution and the United States Constitution.

### **STATEMENT OF ULTIMATE FACTS**

62. Developer has timely filed this Petition and the Florida Land and Water Adjudicatory Commission has jurisdiction to hear and decide this appeal.

63. In addition to having jurisdiction to decide matters related to Ch. 380, F.S., the Florida Land and Water Adjudicatory Commission has the jurisdiction and authority to interpret and apply local development regulations and issue a decision granting or denying permission to develop and may attach conditions and restrictions to its decision. *See*, §380.07(7), F.S.

64. The BCC correctly concluded in Resolution #2010-22 that the proposed amendments in Developer's NOPC are consistent with the County's Comprehensive Plan, the report and recommendation of the NFRC, and the State Comprehensive Plan.

65. Developer is presently entitled as a matter of right to construct a total of 4,400 residential units in the DRI. Of this number, the Developer has 1,147 dwelling units that remain unconstructed and may be geographically relocated within the DRI through amendment of the D.O.

66. For all purposes of the DRI/PD Development Order hotel rooms, condominiums, single family homes and multi-family homes are equally considered "residential units" and are functionally interchangeable for calculating the number of residential units.



67. Construction of up to 561 residential units on a 12 acre site currently occupied by the golf course pro shop, "Lodge" hotel facility, restaurant, swimming pool, surface parking and open area will not exceed the approved DRI/PD density or decrease the amount of open space mandated by the DRI/PD Development Order.

68. There is no legal basis for the BCC's attempt to compel Developer to submit to the County's PUD review process and criteria during the review of the NOPC, nor at any time prior to Developer's submittal of an actual development plan for the proposed Cluster 35.

69. The Hammock Dunes DRI/PD Development Order has been amended on multiple occasions, and with the amendments the BCC has permitted the reallocation of density within the Hammock Dunes DRI/PD residential Clusters, the creation and deletion of residential Clusters, reconfiguration of development areas and uses, realignment of roadways and increase of acreage for residential Clusters.

70. Parcels within the Hammock Dunes DRI/PD, including the residential Clusters, have historically developed for more than 30 years through subdivision plat approval accompanied by a BCC approved plat addendum, which served to outline the applicable development parameters on the parcels. This historic process is similar to the County's current PUD agreement and site development plan process.

71. The proposed Cluster 35 involved creation of a new residential Cluster, reallocation of existing residential density, realignment of a roadway, reconfiguration of development areas and adjustment of the total residential acreage, all of which have been previously approved by the BCC in other amendments to the Hammock Dunes DRI/PD Development Order without the submission of a PUD site development plan.

72. The creation of Cluster 35 and the transfer of previously approved residential units alone, without submittal of a specific site plan, does not adversely affect the orderly development of Flagler County.

73. The creation of Cluster 35 and the transfer of previously approved residential units alone, with no site plan being proposed for its development at this time, does not adversely affect the health and safety of residents and workers in the area and will not be detrimental to the use of adjacent properties and the general neighborhood.

74. The BCC's denial of Developer's request to create a new Cluster 35 was based on the BCC's premature and erroneous application of PUD provisions from the County Land Development Code despite the fact Developer had not submitted a site development plan for Cluster 35 as part of the NOPC.

75. The BCC's decision denying the creation of Cluster 35 did not follow the terms of the Hammock Dunes DRI/PD Development Order, 30 years of precedent for how the County has previously reviewed parcel development within the DRI, the County's current practice for reviewing development in similarly situated DRIs, or the County's own Land Development Code.

76. The Ocean Hammock Golf Course is a private facility and no portion thereof has been dedicated to the public, nor does the County or any individual Hammock Dunes DRI/DO resident or club member have a property right in the Ocean Hammock Golf Course that would preclude the replat of such property. As sole owner of the golf course property Developer is entitled to replat a portion of the golf course so long as Developer complies with platting requirements and any enforceable plat and/or deed restrictions.

77. Ambiguous restrictions on the free use and alienation of land are to be narrowly construed to promote individual property rights and the free use of private property to the maximum extent permitted by law.

78. The BCC did not have jurisdiction or authority to deny the requested amendments on the basis of estoppel or waiver related to private dealings or alleged agreements between Developer and residents.

79. There are no legally protected view corridors or easements in existence that would preclude creation of the requested Cluster 35 and the construction of one or more buildings thereon with a maximum height of 77 feet.

80. Developer's application fully complied with the County's Comprehensive Plan and Land Development Code and should have been approved as a matter of law.

81. While Developer did not request to proceed this way, the Developer's application would technically qualify under the Flagler County Land Development Code as a minor adjustment to an ordinance creating a planned unit development pursuant to Section 3.04.02. G, Deviations From Ordinance Creating a PUD, which provides that:

In order to facilitate minor adjustments to the plans approved as part of the Ordinance creating a PUD, the Development Administrator may approve changes in such plans which comply with the following criteria:

1. There are the same or fewer number of dwelling units and/or floor area; or
2. The open space is the same general amount, or a greater amount; or,
3. The roads follow approximately the same course, have the same or greater width, have the same public or private rights therein.

## **DEMAND FOR FULL EVIDENTIARY HEARING AND DE NOVO REVIEW**

82. Section 380.07(6), F.S., states in relevant part that, “[t]he commission shall encourage the submission of appeals on the record made below in cases in which the development order was issued after a full and complete hearing before the local government or an agency thereof.” The statute does not, however, mandate a hearing on the record below.

83. In order to have a full and complete hearing as contemplated by §380.06(6), such hearing must comport with the fundamental principles of due process, to wit, fair notice, an opportunity to be heard, and consideration of the matter by a qualified and impartial decision-maker. The hearing before the BCC in this case did not qualify as a full and complete hearing because even a cursory review of the transcript reveals substantial bias on the part of the BCC against the Developer and in favor of a loud crowd of voters. For example, early on in the process the County Commissioner in whose district the DRI is located asked the County Attorney, “... it is a possibility, or a *probability*, just for an example, that in the event this Board determines that it is not a substantial deviation, the project could still be turned down because its deemed incompatible; is that correct? Tr. 11. The transcript is replete with similar statements of pre-determination and bias by most, if not all, of the members of the BCC.

84. In addition to a lack of an impartial tribunal, the BCC allowed the opposition to present evidence and raise arguments that were highly prejudicial and not probative of the issues.

85. Inasmuch as there is no requirement that the Petitioner consent to an appeal solely on the record below, and inasmuch as the hearing below was not a full and complete hearing as contemplated by Ch. 120, F.S., Petitioner respectfully demands a full and impartial evidentiary hearing before the Florida Land and Water Adjudicatory Commission or a duly appointed Administrative Law Judge. Additionally, while the record below may be considered by the Commission or Administrative Law Judge for what it is worth, neither the Commission nor

Judge owe any deference whatsoever to the BCC's findings and conclusions inasmuch as Petitioner is entitled to a *de novo* consideration of its application.

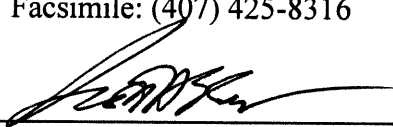
**DEMAND FOR RELIEF**

86. For the above reasons, Petitioners respectfully request that:
- a. the Florida Land and Water Adjudicatory Commission accept jurisdiction of this appeal pursuant to §380.07, F.S.;
  - b. the Florida Land and Water Adjudicatory Commission refer this appeal to the Division of Administrative Hearings for assignment to an Administrative Law Judge for a full and impartial evidentiary hearing pursuant to §§ 120.569 and 120.57, F.S.;
  - c. the Administrative Law Judge enter an order recommending that the amendments proposed in the Petitioners' NOPC be approved;
  - d. the Florida Land and Water Adjudicatory Commission enter an order adopting the Administrative Law Judge's recommended order; and,
  - e. the Florida Land and Water Adjudicatory Commission grant such other and further relief as it may deem necessary and appropriate.

Respectfully submitted this \_\_\_ day of May, 2010.

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