



MEMORANDUM

Office of the City Attorney

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Phone: 334-5011/Fax 334-2229
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TO: Mayor and City Commissioners

DATE: February 21, 2000

FROM: City Attorney

CONSENT

SUBJECT: Bo Gustafson, et al. v. City of Gainesville.
Alachua County Circuit Court; Case No.: 01-00-CA-108


Recommendation: The City Commission authorize the City Attorney to represent the City in the case styled Bo Gustafson, et al v. City of Gainesville; Case No.: 01-00-CA-219.

On December 9, 1999, the Development Review Board entered a written order granting preliminary site plan approval, with conditions, on a site plan for Hidden Lakes Apartments. Certain neighbors in the area have filed a petition for writ of certiorari in circuit court challenging the Development Review Board's approval of the site plan.


On February 9, 2000, the circuit court entered an order requiring the City to file a response to the petition by March 17, 2000. The issue before the court is whether there was substantial competent evidence for the Development Review Board to approve the site plan as modified.

The City Attorney's Office has been informed by representatives for the site plan applicant, Collier Venture II Properties, Ltd., that they will seek to intervene in the challenge to the approval of their plan.

Prepared by:


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Litigation Attorney

Approved and
submitted by:


Marion J. Radson,
City Attorney

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IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

BO GUSTAFSON, MARYHELEN
WHEELER, EARL L. STONE,
PAUL WHEELER, HAROLD W.
SAIVE, NINA POSTLETHWAITE-SAIVE,
ELIZABETH BOLTON, JIM POST,
AND MARY FRANCES SHEPPARD,

Petitioners,

v.

CASE NO. 01-06-CA-108
Div. RAC

CITY OF GAINESVILLE,
a Municipal Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.100(f)

Petitioners, Dr. Bo Gustafson, MaryHelen Wheeler, Dr. Paul Wheeler, Dr. Earl L. Stone,
Harold W. Saive, Nina Postlethwaite-Saive, Dr. Elizabeth Bolton, Jim Post and Mary Frances
Sheppard file this petition for writ of certiorari for review of the action of the Development
Review Board of Respondent City of Gainesville approving preliminary site plan for Petition
134-SPA-99DB concerning Hidden Lake Apartments and state the following:

I. PARTIES

1. Bo Gustafson is an individual who lives within 400 feet of the proposed Hidden
Lake Apartments. Dr. Gustafson is a professor of astronomy at the University of Florida who has
authored over ninety scientific papers. [Transcript, p. 615, 621] He is the Director of the
University of Florida's laboratory for astrophysics where scientific space instrumentation is
developed. Dr. Gustafson is also president of Scientific Technology Applied Research, Inc., a
company that makes surveying equipment and environmental pollution monitors. He has owned

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property on Lake Meta for six years and has lived on the shores of Lake Meta for two years. [Transcript, p. 622]. Dr. Gustafson lives adjacent to the proposed Hidden Lake Apartments and is the owner of a portion of Lake Meta, a body of water which will be adversely affected by the proposed project approved by Respondent's Development Review Board in Petition 134-SPA-99DB. Dr. Gustafson is a resident of the City of Gainesville, Alachua County, Florida and is *sui juris*. He was present at the quasi-judicial hearing of the Development Review Board on or about October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999. During these hearings, he asked questions, cross-examined witnesses and made comments.

2. MaryHelen Wheeler is an individual who has lived adjacent to Lake Meta for eleven years. She believes that Lake Meta will be adversely affected by the proposed Hidden Lake Apartments. [Transcript, p. 658]. Ms. Wheeler is an art teacher at Westwood Middle School. She holds an MA and an M.Ed. in Art Education and Special Education. She is a resident of the City of Gainesville, Alachua County, Florida and is *sui juris*. She owns property adjacent to and within Lake Meta and is considered an "affected party" by Respondent for the review of the site plan for Hidden Lake Apartments. Ms. Wheeler was present at the quasi-judicial hearing of the Development Review Board on or about October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999. Ms. Wheeler on her own and while represented by counsel, asked questions, cross-examined witnesses, made comments and participated in the hearings.

3. Earl L. Stone is an individual who lives adjacent to Lake Meta, which will be adversely affected by the proposed Hidden Lake Apartments development. Dr. Stone holds a Ph.D. in soil science, and was a professor of soil science at Cornell University from 1948-1979.

[Transcript, p. 397] From 1979-1982, Dr. Stone was a visiting professor at the University of Florida, and has been an adjunct professor there since 1982. Dr. Stone has lived on Lake Meta since 1982. He is currently a member of the Bikini Atoll Rehabilitation Committee, and works with Lawrence Livermore Labs on Bikini Atoll. He is a resident of the City of Gainesville, Alachua County, Florida and is *sui juris*. Respondent considers Dr. Stone an "affected party" for the review of the site plan for Hidden Lake Apartments. Dr. Stone was present at the quasi-judicial hearing of the Development Review Board on or about October 14, 1999, and December 9, 1999. He prepared an affidavit for presentation to the Development Review Board meeting of November 4, 1999. He was absent from the meetings of November 4, 1999 and November 16, 1999 because of his participation in U.S. Government research on Bikini Atoll.

4. Paul Wheeler is an individual who lives and owns property adjacent to and within Lake Meta. [Transcript, p. 593]. Dr. Wheeler is a licensed marriage and family therapist who holds a Ph. D. in counseling from the University of Florida. Dr. Wheeler has lived in Gainesville for 24 years, 11 of which he has lived on Lake Meta. Dr. Wheeler alleges the site plan as approved will adversely affect Lake Meta. He is a resident of the City of Gainesville, Alachua County, Florida and is *sui juris*. Respondent considers Dr. Wheeler an "affected party" for the review of the site plan for Hidden Lake Apartments. Dr. Wheeler was present at the quasi-judicial hearing of the City of Gainesville Development Review Board on or about October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999. Dr. Wheeler asked questions, cross-examined witnesses, made comments and participated in the hearings.

5. Harold W. Saive is an individual who lives adjacent to the property that is the subject of Petition 134-SPA-99DB. [Transcript, p. 690]. He is a resident of the City of

Gainesville, Alachua County, Florida and is *sui juris*. Respondent considers Mr. Saive an "affected party" for the review of the site plan for Hidden Lake Apartments. Mr. Saive was present at the quasi-judicial hearing of the Development Review Board on or about October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999. Mr. Saive participated in the hearings. Mr. Saive claims the site plan as approved will adversely affect his neighborhood.

6. Nina Postlethwaite-Saive is an individual who lives adjacent to the property that is the subject of Petition 134-SPA-99DB. She lived in Bailey Gardens from January until August of 1999. [Transcript, p. 133] She is a resident of the City of Gainesville, Alachua County, Florida and is *sui juris*. Respondent considers Ms. Postlethwaite-Saive an "affected party" for the review of the site plan for Hidden Lake Apartments. [Transcript, page 133]. Ms. Postlethwaite-Saive was present at the quasi-judicial hearing of the Development Review Board on or about October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999. Ms. Postlethwaite-Saive participated in the hearings. She claims the site plan as approved will adversely affect her neighborhood.

7. Dr. Elizabeth Bolton is an individual who owns 26 rental units adjacent to the property that is the subject of Petition 134-SPA-99DB. [Transcript, p. 535]. Dr. Bolton has a Ph.D. in Adult Education and is a professor of Community Development at the University of Florida. Dr. Bolton is a resident of the City of Gainesville, Alachua County, Florida and is *sui juris*. Respondent considers Dr. Bolton an "affected party" for the review of the site plan for Hidden Lake Apartments. Dr. Bolton was present at the quasi-judicial hearing of the Development Review Board on or about October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999. Dr. Bolton asked questions, cross-examined witnesses, made

comments and participated in the hearings. She claims the site plan as approved will adversely affect her property.

8. Jim Post is an individual who owns 26 rental units adjacent to the property that is the subject of Petition 134-SPA-99DB. Mr. Post is a retired electrical engineer, is a resident of the City of Gainesville, Alachua County, Florida and is *sui juris*. Respondent considers Mr. Post an "affected party" for the review of the site plan for Hidden Lake Apartments. Mr. Post was present at the quasi-judicial hearing of the Development Review Board on or about October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999. Mr. Post asked questions, cross-examined witnesses, made comments and participated in the hearings. He claims the site plan as approved will adversely affect his property.

9. Mary Frances Sheppard is an individual who has resided in Pine Park, which is adjacent to the property that is the subject of Petition 134-SPA-99DB, for twenty years. Ms. Sheppard has been a radiologic technologist at Shands Hospital for 27 years. Respondent considers Ms. Sheppard an "affected party" for the review of the site plan for Hidden Lake Apartments. Ms. Sheppard was present at the quasi-judicial hearing of the Development Review Board on or about October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999. Ms. Sheppard asked questions, cross-examined witnesses, made comments and participated in the hearings. She claims the site plan as approved will adversely affect her property.

10. Respondent is a municipal corporation chartered by the State of Florida. Respondent created a Development Review Board, which conducted a quasi-judicial hearing and rendered the order that is the subject of this Petition for Writ of Certiorari.

II. BASIS FOR JURISDICTION

11. This court has jurisdiction over this matter pursuant to *Florida Rules of Appellate Procedure* 9.020(a)(3), 9.100(b) – (c), and 9.190 (b)(3). See also Haines City Community Development v. Heggs, 658 So.2d 523, 530 (Fla. 1995).

III. STATEMENT OF THE CASE AND FACTS

12. Respondent is a municipal corporation chartered by the State of Florida. Under the charter granted by the State of Florida to Respondent, Respondent has police powers over the area encompassing its city limits.

13. As an element of the police powers granted to Respondent by the State of Florida and pursuant to the requirements of the *Local Government Comprehensive Planning and Land Development Regulation Act* (Chapter 163, part II, *Florida Statutes*), Respondent adopted a comprehensive plan on November 13, 1991.

14. As an element of the police powers granted to Respondent by the State of Florida and pursuant to the requirements of the *Local Government Comprehensive Planning and Land Development Regulation Act* (Chapter 163, part II, *Florida Statutes*), Respondent adopted land development regulations on or about June 10, 1992. These land development regulations have been amended since June 10, 1992 and are codified as Chapter 30 *Gainesville Code of Ordinances*.

15. Respondent created a Development Review Board pursuant to Section 30-352 *Gainesville Code of Ordinances*. That section of the *Gainesville Code of Ordinances* created the Development Review Board as a “citizen board to review and approve or deny development plans submitted for its review pursuant to the provisions of this article” (Chapter 30 *Gainesville*

Code of Ordinances.) The Development Review Board is composed of seven (7) appointed members per Section 30-352 *Gainesville Code of Ordinances*.

16. On September 13, 1999, Respondent's Planning Division accepted an application for development review from Collier Venture II Properties, Ltd. (hereinafter, "Applicant") for development review of Hidden Lake Apartments. The address given for Hidden Lake Apartments by the Applicant was the south side of the 1000 block of NW 21st Avenue, Gainesville, Florida. The application is for the development approval of a 284 dwelling unit, 650-bedroom apartment complex on 20.24 acres of land. The project as requested would have a density of 14.4 dwelling units per acre. This application for development review is known as Petition 134-SPA-99DB.

17. The proposed project would be developed on Alachua County Tax Parcel Number 09930-200-000, which is owned by the Applicant, and on Alachua County Tax Parcel Number 09970-000-000, which is owned by members of the Lawton-Conrad family and on which the Applicant is sublessee. The Lawton-Conrad family are descendents of the original owner, Doyal E. Timmons, Sr., who entered into a long term lease of the property in 1968.

18. Pursuant to Section 30-151 *et seq.*, *Gainesville Code of Ordinances* various staff members of Respondent reviewed Petition 134-SPA-99DB.

19. On October 16, 1999, and continuing on November 4, 1999, November 16, 1999 and December 9, 1999, Respondent's Development Review Board met at public hearings to review the preliminary site plan for Petition 134-SPA-99DB pursuant to Section 30-151 *et seq.*, *Gainesville Code of Ordinances*.

20. During the public hearings held by Respondent's Development Review Board,

various citizens and residents of the City of Gainesville were recognized by the Development Review Board as affected parties and were permitted to participate in the formal quasi-judicial hearings held on October 14, 1999, November 4, 1999, November 16, 1999 and December 9, 1999.

21. On November 16, 1999, the Respondent's Development Review Board approved the Petition 134-SPA-99DB and entered a verbal development order granting preliminary site plan approval on Petition 134-SPA-99DB, site plan for Hidden Lake Apartments, and granting approval for the construction with conditions. [Transcript, pp. 732-745]. This order was approved by a vote of 2-1 of the Development Review Board.

22. On December 9, 1999, the Development Review Board of Respondent considered a written order for Petition 134-SPA-99DB. During that hearing, modifications were made to the written order and an objection was made to one modification of the written order by counsel for Petitioner MaryHelen Wheeler. By a vote of 3-0 the written order, granting preliminary site plan approval, with conditions, on Petition 134-SPA-99DB, site plan for Hidden Lake Apartments, was approved by the Development Review Board [Transcript of 12/9/99 hearing, p. 26]

23. Petitioners are aggrieved and adversely affected parties pursuant to §163.3215, *Florida Statutes* (1999).

IV. STANDARD OF REVIEW AND RELIEF SOUGHT

A circuit court review of an administrative agency decision under *Florida Rule of Appellate Procedure* 9.030 (c)(3) is governed by a three part standard of review: (1) Whether the Development Review Board accorded procedural due process; (2) Whether the Development Review Board observed the essential requirements of law; and (3) Whether the Development

Review Board's administrative findings and judgment were supported by competent and substantial evidence. Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995).

The Petitioners respectfully request that this court enter an order quashing the City of Gainesville Development Review Board Order dated December 9, 1999, In the Matter of Petition 134SPA-99 DB, remanding this matter with instructions and granting any further relief that it deems appropriate under the circumstances.

V. ARGUMENT

Issue 1. WHETHER THE APPLICATION UNDER REVIEW WAS PROPERLY BEFORE THE DEVELOPMENT REVIEW BOARD.

Petition 134-SPA-99DB, as submitted to the planning staff of the Respondent and to the Development Review Board, was incomplete, and should not have been reviewed by the Development Review Board. Petition 134-SPA-99DB lacked four important elements, without which it should not have been presented to the Development Review Board for approval. First, the application did not contain the required signatures of all owners of the subject property. Second, the petition was required to have, and did not have, a detailed description of the storm water treatment plan. Third, the application did not contain the required identification of those portions of the site which were located in the floodplain, including any structures that were to be placed in the floodplain. Finally, the application did not contain an accurate illustration of the existing tree canopy, as required by law. The Applicant should have been required to amend its application to include these four important elements, without which the Development Review Board should not have accepted the application for review.

A. **Petition 134-SPA-99DB did not contain the required signatures of all owners**

of the subject property. Section 30-160 of the *Gainesville Code of Ordinances* requires that applications for development review be signed and notarized by all owners of the subject property. Signatures by persons other than owners are only acceptable when submitted along with notarized proof of authorization from the owners of record. Section 30-160(a) of the *Gainesville Code of Ordinances* provides that incomplete applications will not be processed.

“Owner” is defined in Section 30-23 of the *Gainesville Code of Ordinances* as “...a person...who...alone, jointly or severally with others, or in a representative capacity (including without limitation, an authorized agent, attorney, executor, personal representative or trustee) has legal or equitable title to any property in question...”

The application before the Development Review Board was not executed by all owners as required by Section 30-160 of the *Gainesville Code of Ordinances*. At least seven owners, who are members of the Lawton-Conrad family did not sign the application. [Transcript, p. 480]. These seven members of the Lawton-Conrad family own the property identified by Tax Parcel Number 09970-000-000, which constitutes a portion of the land to be developed under the proposed application. This land is subject to a long-term lease that has been assigned to Applicant. This lease grants the lessee the right to develop the property. However, the lease does not abrogate the Lawton-Conrad family’s ownership of the property. Therefore, pursuant to the requirements of the *Gainesville Code of Ordinances*, the Lawton-Conrad family, as owners of a portion of the property subject to this application for development review, were required to sign the application for development review.

Respondent relied on a letter to the City Attorney provided by one of the Applicant’s attorneys in reaching its conclusion that the Lawton-Conrad family were not “owners” and,

therefore, their signatures were not required on the application. [Transcript, pp. 102-103] The opinion contained in the letter is clearly erroneous because, regardless of the terms of the lease, Section 30-160(a) of the *Gainesville Code of Ordinances* requires that *all owners shall sign the application*. The Applicant argued that the signed, notarized lease itself provided authorization from the Lawton-Conrad family to the Applicant permitting the Applicant to sign for the Lawton-Conrad family. This argument ignores the plain meaning of both the Code provision and the lease itself. There is no authorization contained in the lease for this specific application for development review. The purpose of Section 30-160(a) of the *Gainesville Code of Ordinances* is to avoid problems of interpretation, such as the one at issue. This simple requirement, that all owners must sign the application, prevents Respondent from having to interpret third party agreements, such as the lease in question.

B. Petition 134-SPA-99DB did not contain a detailed description of the storm water treatment plan, as required. The application dated September 13, 1999 before the Development Review Board proposed use of a wet detention system for storm water treatment. The hearing before the Development Review Board took place over four nights and lasted approximately twenty (20) hours. During the third night of the hearing, the Applicant advised the Development Review Board that it would not utilize a wet detention system as originally proposed, but was switching to a dry detention system. [Transcript, p. 495]

Section 30-160(d)(28) of the *Gainesville Code of Ordinances* requires that an application for preliminary development plan review contain a detailed description of the storm water treatment system. The application for development review was not amended to reflect the significant change to the storm water treatment system. No evidence regarding the dry detention

system was offered by the Applicant during the hearing. [Transcript, p. 722] No written evidence, drawings or specifications were presented by the Applicant regarding the dry detention system. [Transcript, p. 722] The Petitioners received no notice of this significant change to the application and were not given an opportunity to review the impact of this change so that they could evaluate and be heard regarding the impact of the change.

During the first two nights of the Development Review Board hearing, a considerable amount of time was devoted to concerns regarding the originally proposed storm water treatment system and its impact on Lake Meta. [See, e.g., Transcript, pp. 211-279, 493-498] Because of the importance of this issue, the Applicant should have been required to resubmit its application with this material change to permit the staff and Petitioners an opportunity to review and evaluate the impact of the newly proposed dry detention system. The law requires a detailed description of the storm water treatment plan to be submitted with the site plan. It also requires that the location of the treatment system be shown on the site plan, along with eleven other specific requirements to describe the storm water management plan. Section 30-160(d)(28), *Gainesville Code of Ordinances*. By permitting the Applicant to change its application radically without providing any information regarding the detention system, the Development Review Board failed to afford the Petitioners due process and failed to follow the essential requirements of the law.

Furthermore, On December 9, 1999, during the process for approving the written order, a member of the Development Review Board stated on the record that he had reviewed an additional memorandum on storm water retention systems. [Transcript of 12/19/99 hearing, p. 16] Based on this memorandum, which was not presented to the public or to affected parties, and regarding which no evidence was ever presented, the Development Review Board arbitrarily

elected to require a storm water retention system for the development, rather than the storm water detention system the Applicant had proposed verbally during the November 16, 1999 hearing. [Transcript of 12/19/99 hearing, p. 20]

C. **Petition 134-SPA-99DB did not contain an identification of the portions of the site which were located in the floodplain, or any indication of which structures would be placed in the floodplain, as required by law.** Section 30-160(d)(26), *Gainesville Code of Ordinances* requires that an application for development review illustrate which portions of the site, if any, are located within the 100-year floodplain as defined on the City's master floodplain maps. This section also requires the identification on the preliminary site plan of any permanent structures that are to be placed within the floodplain. Petition 134-SPA-99DB did not contain any of this information. In fact, until testimony by Dr. Gustafson, neither the Applicant nor the city planning staff seemed to be aware that the project would involve portions of floodplain. [Transcript, pp. 409, 412-3, 616, -----] During Dr. Gustafson's testimony, he offered into evidenced the City's and the Federal Emergency Management Association's floodplain maps. [Transcript, p. 412-3] Until Dr. Gustafson cross-examined staff following their rebuttal testimony, the Applicant and city planning staff never acknowledged the development involved portions of the floodplain. [Transcript, p. 528] The incomplete application was nonetheless permitted to continue through the development review process despite the fact that it omitted this required information.

D. **Petition 134-SPA-99DB did not contain an accurate representation of the tree canopy on the site.** Section 30-160(d)(4) requires that an application for development review contain a tree survey. The application presented to the city planning staff of the Respondent and to the Development Review Board contained a tree survey which showed that no trees existed on

a portion of the site where two of the apartment buildings would be developed. [Transcript, p. 150-151] In reality, that section of the site contains many trees that should have been reported by the Applicant. [Transcript, p. 429] These trees now occupy that portion of the site that separates the single-family uses from the proposed multi-family use. During a meeting between Petitioners Dr. Gustafson and Dr. Wheeler with Respondent's community development director, it was brought to the attention of the Respondent that this mistake had been made. [Transcript p. 429] During the hearing on November 4, 1999, city planning staff failed to correct this mistake. When cross-examined about this obvious error by Dr. Gustafson, along whose property line the trees are growing, the Applicant admitted that the survey was faulty. [Transcript, p. 150] Dr. Gustafson also cross-examined the city planning staff of the Respondent regarding this portion of the application, and the planner simply stated that, while she could not say there were no trees located on that section of the site, she "trusted" the Applicant. [Transcript, p. 150] Although the Development Review Board was made aware of this significant omission in the required documentation, the incomplete application was permitted to proceed through the development review process.

For all the foregoing reasons, the application was not a complete application as defined in Section 30-160 of the *Gainesville Code of Ordinances* and, therefore, was not properly before the Development Review Board. By considering this incomplete application, the Development Review Board failed to accord procedural due process to the Petitioners and failed to observe the essential requirements of the law.

Issue 3. WHETHER THE DEVELOPMENT REVIEW BOARD'S DECISION TO REQUIRE THE USE OF A DRY RETENTION SYSTEM FOR STORMWATER TREATMENT WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

As discussed above, the application for development review proposed the use of a wet detention system for storm water treatment. During the third night of the hearing, the Applicant orally advised the Development Review Board that it was switching a dry detention system. [Transcript, p. 495-6] No evidence regarding the system or its impact on the development and surrounding areas was presented by the Applicant. The Chairman of the Development Review Board admitted on the record that no competent substantial evidence had been presented regarding whether or not the dry detention system would work for this proposed development. The Chairman stated:

“A dry detention system may be suitable for this project. But we haven’t heard competent, substantial evidence indicating that it would. I suspect, given my background and expertise, it wouldn’t.”

[Transcript, p. 722]

Additionally, when another member of the Development Review Board expressed a need for more information on the dry detention system, the Chairman acknowledged that the change to the original design was significant:

Ms. Bojanowski: Mr. Chair, I would like to ask the developer to comment more on the idea of having the option to have a dry retention [sic] basin versus a wet retention [sic] basin...”

Chairman Boyes: I think we’re opening a very large can of worms, because we are talking about some major redesign.

[Transcript, p. 727]

The other member of the Development Board present also expressed his misgivings about the last-minute switch in storm water treatment systems, stating on the record:

“I have to wonder if the dry detention basin might be worse for Lake Meta than a wet detention basin, in that it will be causing less

water to enter the lake from the development site.”

[Transcript, p. 730]

Despite the total lack of evidence presented by the Applicant, and despite their own, openly-admitted doubts about the effects of the change in systems, the Development Review Board’s order required the Applicant to use a dry retention system. No evidence regarding the dry retention system was before the Development Review Board, therefore there was not competent substantial evidence to support the Development Review Board’s finding that a dry retention system was appropriate for this development.

Issue 4. WHETHER THE PROPOSED DEVELOPMENT IS CONSISTENT WITH THE COMPREHENSIVE PLAN PURSUANT TO SECTION 30-161, GAINESVILLE CODE OF ORDINANCES.

A. Both state law and the *Gainesville Code of Ordinances* require that a development plan be consistent with the adopted comprehensive plan of the community. The Petitioners and other affected parties provided competent substantial evidence showing that Petition 134-SPA-99DB violates at least twelve sections of *The Gainesville Comprehensive Plan 1991-2001* and thus did not meet the criteria for approval of a development plan by the City of Gainesville. The violations of The Gainesville Comprehensive Plan 1991-2001 fall into three important categories: failure to protect the quality of life in Gainesville, especially in viable, stable neighborhoods; failure to protect environmental resources; and failure to follow procedural guidelines in the development review process.

B. Competent, substantial evidence shows that Petition 134-SPA-99DB fails to meet the standards for protection of existing quality of life in Gainesville, as required by *The Gainesville Comprehensive Plan 1991-2001*. Throughout the hearing before the

Development Review Board, ample competent, substantial evidence was presented that the plan for Hidden Lake Apartments, as proposed, fails to maintain the quality of life in Gainesville, fails to protect viable, stable neighborhoods, fails to mitigate the negative impact of growth and development, fails to protect low intensity uses from the negative impact of high intensity uses, and fails to provide adequate buffer and transitional uses to ensure compatibility with surrounding properties.

1. The proposed plan fails to achieve the highest quality of life in Gainesville and fails to utilize sound land development practices to minimize detrimental impacts. The stated purpose of The Gainesville Comprehensive Plan 1991-2001, Goal 1 is to:

Achieve the highest long-term quality of life for all Gainesville residents consistent with sound social, economic and environmental principles through land development practices that minimize detrimental impacts to the land, natural resources and urban infrastructure.

Evidence was provided that Petition 134-SPA-99DB will not achieve the highest long-term quality of life for all Gainesville residents. The increase in traffic caused by the proposed development will have detrimental effects on those people living along NW 9th Street, among others. [Transcript, pp. 287, 384-5, 400-8, 641-2, 648-9, 666, 685-686] The Respondent admitted that no traffic study was prepared to evaluate the impact of the additional 600 cars on the urban infrastructure in the area. [Transcript, p. 108] While a simple trip distribution analysis was conducted by the Applicant, there was no full, independent analysis of the potentially detrimental effects on traffic in the area. [Transcript, pp. 134-135, 147-148] In contrast, nearly every affected party presented evidence that traffic in the area is likely to become a significant problem once the

development is built and inhabited. [Transcript, pp. 287, 641-2, 648-9, 666, 685-686]

Evidence was also presented that the Hidden Lake Apartments will adversely impact people living immediately adjacent to the project because of the intrusion of a 260 dwelling unit (272 units requested) development next to their homes. [Transcript, p. 329, 338-9, 378-9, 381, 648] At least three affected parties noted on the record that the homeowners in the neighborhood would suffer a decrease in the value of their homes once the character of the neighborhood was changed by the proposed development. [Transcript, p. 329, 378-9, 387] The evidence indicates that the project is not consistent with sound social principles, because it will disrupt these well-established neighborhoods. Furthermore, the project is not consistent with sound environmental principles because of the potential for damage to the Lake Meta ecosystem. During deliberations, the chairman of the Development Review Board stated that "...there wasn't an environmental review by staff at all." [Transcript, p. 743] Competent substantial evidence was presented to the Development Review Board that this project does not use good land development practices that minimize detrimental impacts to the land, natural resources and urban infrastructure of the community. [Transcript, p. 316, 338-9] With the exception of the Respondent's and Applicant's remarks regarding the traffic trip analysis, the evidence presented by the Petitioners and other affected parties was not contradicted by the Applicant or the planning staff of Respondent.

Thus, Petition 134-SPA-99DB is in contravention to Goal 1 of *The Gainesville Comprehensive Plan 1991-2001* because it does not achieve the highest long-term quality of life for all Gainesville residents consistent with sound social, economic and

environmental principles through land development practices that minimize detrimental impacts to the land, natural resources and urban infrastructure, and should not have been approved.

2. The proposed plan fails to protect viable, stable neighborhoods and preserve the tree canopy in the City. Goals 2 and 3 of *The Gainesville Comprehensive Plan 1991-2001* provide that:

Goal 2 The Land Use Element shall foster the unique character of the City by directing growth and redevelopment in a manner that uses activity centers to provide goods and services to City residents; protects viable, stable neighborhoods; distributes growth and economic activity throughout the City in keeping with the direction of this element; preserves quality open space and preserves the tree canopy of the City. The Land Use Element shall promote statewide goals for compact development and efficient use of infrastructure.

Goal 3 (Housing) The City with the assistance of private and non-profit organizations shall maintain sound viable neighborhoods and revitalize those that have suffered disrepair and neglect.

Petition 134-SPA-99DB is in contravention to Goal 2 because it does not protect viable, stable neighborhoods. It also does not preserve quality open space nor preserve the tree canopy of the City. Substantial evidence was given that Petition 134-SPA-99DB will not protect viable, stable neighborhoods. Affected parties and Petitioners testified that their present neighborhoods are viable and stable. [Transcript, p. 305, 328-9, 338, 377, 381-2] Competent substantial evidence was presented by affected parties, including the Petitioners, that the proposed project will be detrimental to the stability of their neighborhoods and that the viability of the existing neighborhoods surrounding Hidden Lake Apartments will be jeopardized if the project is permitted. [Transcript p. 306, 328-

9, 330-1, 338-9] Evidence was given that the Hidden Lake Apartments will have adverse impacts on those people living immediately adjacent to the project because of the intrusion of a 260 dwelling unit (272 units requested) development immediately adjacent to their homes. [Transcript, p. 309, 330-1, 387-8] This evidence was not controverted by the Applicant or the city planning staff.

3. The proposed plan does not protect low intensity uses from the negative impacts of high intensity uses, nor does it provide for the healthy coexistence and integration of various land uses. Objective 2.2 and Policy 2.2.4 of *The Gainesville Comprehensive Plan 1991-2001* state:

Objective 2.2 By June 1992, the City shall implement regulations that will protect low intensity uses from the negative impacts of high intensity uses and provide for the healthy coexistence and integration of various land uses.

Policy 2.2.4 Prior to a final development order during the Development Review Process, the intensity of use appropriate to any parcel shall be determined based upon ... the compatibility of the proposed land use with that of surrounding existing land uses and environmental conditions specific to the site.

Competent substantial evidence was presented by the Petitioners and other affected parties that Petition 134-SPA-99DB does not protect the low intensity uses adjacent to this project from the negative impacts of high intensity use exemplified by the project. [Transcript, p. 361-2] Arguments were made by Petitioners that the project design does not provide for the healthy coexistence and integration of the various land uses found in this area of the city. [Transcript, p. 287, 386-7, 598] Additionally, Petitioners and others provided evidence that the design of the project is not compatible with that of surrounding existing land uses and environmental conditions specific to the

site. Affected parties presented testimony to the effect that the residents who will live on the second floor of some buildings in the proposed project will be able to look directly down upon the affected parties in their backyards. [Transcript, p. 415, 441] Others expressed concern that the apartment residents would trespass on their property in order to visit Lake Meta, since the proposed project does not afford them any direct access to the lake. [Transcript, p. 442] The Applicant did not controvert this evidence. The Respondent's planning staff countered that the land development regulations of the City of Gainesville implement *The Gainesville Comprehensive Plan 1991-2001* and there need not be any other evidence presented other than the land development regulations are being met. [Transcript, p. 213-4] Such self-serving testimony does not rise to the level of competent substantial evidence.

5. The proposed project does not separate the neighboring low intensity uses from the project's high intensity use by providing transitional uses or other buffering performance measures. Policy 2.2.1 of *The Gainesville Comprehensive Plan 1991-2001* states:

Policy 2.2.1 The City shall adopt Land Development Regulations that provide protection for adjacent residential areas and low intensity uses from the impacts of activity centers and other high intensity uses by separating intense uses from low intensity uses by transitional uses and performance measures. Performance measures shall address the buffering of adjacent uses both by landscape and site design. Regulation of site design shall address orientation; arrangement of functions within a site, such as parking, loading, waste disposal, access points, outdoor uses and mechanical equipment; and the preservation of site characteristics such as topography, natural features and existing tree canopy.

Argument was made that the Applicant's site plan does not provide protection for adjacent residential areas and low intensity uses from the impacts of high intensity uses

by separating intense uses from low intensity uses by transitional uses and performance measures. Evidence was presented by Petitioners and other affected parties that there are no transitional uses to separate the high intensity development from the low intensity single family uses to the south, east and north of the project. [Transcript, p. 287, 386-7, 598] Moreover, affected parties stated on the record that the buffering measures planned by the Applicant and approved by the Respondent will be inadequate to protect the neighboring uses from the impact of the development. [Transcript, p. 374-5, 392, 589-9] Performance measures are supposed to address the buffering of adjacent uses both by landscape and site design which have not been done satisfactorily in this site design. Petitioners contend the site design is supposed to address orientation as well as the arrangement of functions within a site, such as parking, loading, waste disposal, access points, outdoor uses and mechanical equipment. The preservation of site characteristics such as topography, natural features and existing tree canopy are also supposed to be addressed. Petitioners and other affected parties presented competent substantial evidence to the effect that the existing tree canopy and other natural features of the site would not be preserved. [Transcript, p. 331-2, 335-6, 345] Evidence was presented by Petitioner Dr. Gustafson, Professor of Astronomy, University of Florida, that the site design for Hidden Lake Apartments does not address the proper orientation of buildings according to the land development regulations and that the site design for parking, waste disposal, access points, outdoor uses and mechanical equipment; and the preservation of site characteristics such as topography, natural features and existing tree canopy were lacking. [Transcript, p. 77-82] This evidence was not contradicted by the Applicant or

city planning staff, except to the extent that the Applicant reiterated that the application had been approved by the Respondent.

C. Competent, substantial evidence shows that Petition 134-SPA-99DB fails to meet the standards for protection of important environmental resources. During the hearing before the Development Review Board, competent, substantial evidence was presented which showed that Petition 134-SPA-99DB is in contravention to a number of policies of *The Gainesville Comprehensive Plan 1991-2001* which were implemented to protect the lakes, upland resources, and environmentally sensitive areas from the negative effects of development.

1. The proposed project does not protect the significant environmental land adjacent to the property. Objective 1.1 and Policy 1.1.1 of *The Gainesville Comprehensive Plan 1991-2001* state (in pertinent parts):

Objective 1.1 (Conservation, Open Space and Groundwater Recharge Element) Upon adoption of this Plan, the City shall protect all significant environmental lands and resources identified on Map 2 (Environmentally Significant Land and Resources) adopted in the Future Land Use Map Series. The City shall continue to identify environmentally significant open space and recreation sites for acquisition.

Policy 1.1.1 At a minimum the following standards and guidelines shall be used to protect environmentally sensitive resources identified on Map 2 (Environmentally Significant Land and Resources) of the Future Land Use Map Series:

b. Wetlands: Developments containing wetlands must maintain the existing level of wetland acreage and function on the property.

c. Lakes: Developments containing a natural lake (or lakes) must not adversely impact the condition of the lake. Dredge and fill shall be prohibited. Development shall be prohibited within 35 feet of the landward extent of a lake.

f. Upland Areas: Developments within an area identified as Upland must submit an ecological inventory of the parcel. Based on the inventory,

development may be allowed up to the maximum of 75 percent of the parcel.

Lake Meta is classified, according to city planning staff, as a significant environmental land and resource found on Map 2 (Environmentally Significant Land and Resources) adopted in the Future Land Use Map Series. Petitioners and other affected parties presented evidence that Hidden Lake Apartments violates Objective 1.1 and Policy 1.1.1. Dr. Gustafson presented photographic evidence during the hearing that a sinkhole exists on the property. [Transcript, p. 594, 600-1, 604-5] The evidence showed that the sinkhole is a wetland with a viable ecosystem that should not be destroyed. [Transcript, p. 76, 616, The site plan for Hidden Lake Apartments shows that the sinkhole is to be filled in and buildings erected upon it. This destruction of the wetland area is contrary to the mandate set forth in subsection b.

The evidence presented by Petitioners and affected parties showed that the area immediately adjacent to the development contains a natural lake that would be affected by the proposed project. [Transcript, pp.137-8, 306-9, 325-6, 343-7, 373, 410-415, 444-7] This evidence was not contradicted by either the Applicant or the city planning staff. Although the Applicant openly acknowledged that Lake Meta was the discharge point for drainage from the development, the Applicant refused to consider the impact of this discharge on the environmentally sensitive lake. [Transcript, pp.63, 66, 73-5, 211-6] In fact, the Applicant stated repeatedly that Lake Meta should not be considered as part of the development review at all. [Transcript, pp. 73-75; 88-98] Members of the Development Review Board expressed on the record the frustration they felt at the Applicant's refusal to provide information on the potential effects of the development on

Lake Meta, yet this lack of critical information did not prevent them from approving the plan. [Transcript, pp. 94-5]

In addition, Petitioners and other affected parties gave competent substantial evidence the project will not protect the environmentally sensitive resources found on the upland portions of the site that is the subject of Petition 134-SPA-99DB. Evidence was presented that there are unique upland resources continued on the site including a species of turtle that routinely lays eggs in the sinkhole. [Transcript p. 413, 662] Both the Applicant and the Respondent admitted that no environmental impact study or environmental inventory of the project had been done. Thus, whether the Applicant continued to propose the use of a wet detention system, which would allow the runoff from the Hidden Lake Apartment parking lot into the Lake, or whether the Applicant switched to a dry detention or retention system, which would prevent any of the surface water flow from the area to reach the Lake, the effects of the development on the Lake and upland areas will be subject to an adverse impact.

2. The proposed project will not mitigate the adverse effects of development on the Gainesville environment, and will not ensure that the environment is not harmed by a housing development. Petition 134-SPA-99DB is in contravention to Goals 2 and 4 (Conservation, Open Space and Groundwater Recharge Element) of *The Gainesville Comprehensive Plan 1991-2001* because it will negatively affect the Gainesville environment, without mitigation. Goals 2 and 4 (Conservation, Open Space and Groundwater Recharge Element) of *The Gainesville Comprehensive Plan 1991-2001* require that land developments:

Goal 2 Mitigate the effects of growth and development on environmental resources.

Goal 4 Ensure housing development does not negatively affect the Gainesville environment.

Evidence was presented by Petitioner, including Dr. Stone, Dr. Gustafson, Ms. Wheeler and Dr. Wheeler, and other affected parties, including Mary Frances Sheppard, that Hidden Lake Apartments will not meet these goals. Competent substantial evidence was given by the Petitioners and affected parties that the project will negatively affect the Gainesville environment. [Transcript, p. 345, 426] This evidence was not contradicted by either the Applicant or the city planning staff, and the Applicant presented no evidence of any strategy for mitigating the negative effects the development might have on the environment. In fact, on the final night of deliberations, one member of the Development Review Board stated on the record that he “mourned the loss of the inner city wildlife habitat” that this development would cause. [Transcript, p. 712]

3. The proposed project will not improve the quality of storm water entering City lakes, as required by *The Gainesville Comprehensive Plan, 1991-2001*.

Objective 2.2 of *The Gainesville Comprehensive Plan 1991-2001* states:

Objective 2.2 (Conservation, Open Space and Groundwater Recharge Element) The City shall improve the quality of storm water entering City lakes and creeks by requiring development and redevelopment to meet the adopted water quality standards of this Element and the Storm water Management Element.

Competent substantial evidence was given by the Petitioners and affected parties that the project, as proposed, will allow storm water into Lake Meta that

will adversely affect the lake. [Transcript, p. 345] No evidence was presented by the Applicant that the quality of storm water entering the lake would meet water quality standards. This evidence was not contradicted by the city planning staff. At the last moment, the city did hire a limnologist who appeared at the November 16, 1999th meeting of the Development Review Board. This expert had very little to offer, having only visited the site once, and having studied the matter for less than two days. The expert based much of his opinion on a master's thesis which he did not read in its entirety. [Transcript, pp. 562, 575] Evidence presented by the limnologist actually supported the information supplied by the neighbors who appeared as affected parties. [Transcript, pp. 566-7] The chair of the Development Review Board stated during the deliberations of the Development Review Board that no substantial competent evidence had been presented to show the development could meet the requirements for storm water treatment and disposal. [Transcript, pp. 721-3] In fact, at the last moment, the Applicant changed the treatment system for storm water from a wet detention system to a dry detention system yet presented no evidence as to how the dry detention system would work, where it would be located, or how the prevention of the surface water flow might affect the Lake and upland areas.

4. The proposed project does not meet the density or requirements outlined for conservation zones and environmentally sensitive areas. The "Conservation" designation found in *The Gainesville Comprehensive Plan 1991-2001* provides:

Conservation

This category identifies areas environmentally unsuited to urban development, permanent buffers between land uses, areas used for passive recreation and nature parks. Privately held properties within this category shall be allowed to develop at single family densities of one unit per five acres. Land Development Regulations shall determine the appropriate scale of activities, structures and infrastructure that will be allowed.

This land use designation in the comprehensive plan states that this category identifies areas environmentally unsuited to urban development, permanent buffers between land uses, areas used for passive recreation and nature parks.

Evidence was presented to the Development Review Board by Petitioners and affected parties that Petition 134-SPA-99DB, requesting approval of the site plan for Hidden Lake Apartments, violates the requirements of the conservation land use classification. Evidence was presented that the Conservation land use on the western side of the property was meant to be a permanent buffer between land uses. [Transcript, pp. 123, 373] It was meant to protect the established viable, stable neighborhood. The proposed site plan, approved by the Development Review Board, includes the intrusion of a point of ingress/egress, which is the major entrance to the project, into the conservation zone. [Transcript, pp. 146-7, 154-5] Petitioners gave uncontroverted evidence that this is contrary to the comprehensive plan.

In addition, Policy 2.1.2 of *The Gainesville Comprehensive Plan 1991-2001*, which governs density in environmentally sensitive areas, states:

Policy 2.1.2 Underlying densities and intensities of development within the future land use categories shall be consistent with the policies in the Conservation, Open Space and Groundwater Recharge, and Future Land Use Elements providing standards and criteria established for the protection of environmentally sensitive land and resources.

Argument was made that the underlying densities and intensities of development

within the future land use categories are not consistent with the policies in the Conservation, Open Space and Groundwater Recharge, and Future Land Use Elements providing standards and criteria established for the protection of environmentally sensitive land and resources. Evidence was presented by Petitioners and affected parties that the implementation of Policy 2.1.2 is flawed taking into context the manner in which Hidden Lake Apartments was granted increased densities on the site. Argument was made that this policy is violated because of inconsistencies with various policies in the Conservation, Open Space and Groundwater Recharge, and Future Land Use Elements. The Land Development Regulations under which this project are being reviewed do not provide standards and criteria that protect the environmentally sensitive land and resources of this area of the city.

6. The proposed project does not meet the required limitations on impervious surface in a conservation zone. No evidence was presented by affected parties that Hidden Lake Apartments complies with Policy 2.2.2 (Conservation, Open Space and Groundwater Recharge Element) in that the plan presented in 134 SPA-99 DB is within an environmentally sensitive area and the project has not decreased, by at least 10 percent, the amount of impervious parking surface allowed in the development.

7. The proposed project does not protect flood plains, because it does not prevent the location of permanent structures in the floodplain and allows unpermitted development in the flood plain. Policy 1.1.8 and Policy 2.4.11 (Conservation, Open Space and Groundwater Recharge Element) of *The Gainesville Comprehensive Plan 1991-2001* states:

Policy 1.1.8 The City shall protect floodplain areas through existing Land Development Regulations which:

- e. Prohibit development within the floodplain which would reduce the capacity of the floodplain;
- f. Prohibit development which would cause or create harmful soil erosion, stagnant water, and irreversible harmful impacts on existing flora and fauna

Policy 2.4.11 (Conservation, Open Space and Groundwater Recharge Element) The City shall protect floodplains through existing Land Development Regulations which at a minimum:

- a. Prohibit development within the flood channel or floodplain without a City permit;
- b. Prohibit filling in the flood channel by junk, trash, garbage, or offal;
- c. Prohibit permanent structures in the flood channel, except for those necessary for flood control, streets, bridges, sanitary sewer lift stations, and utility lines;
- d. Prohibit the storage of buoyant, flammable, explosive, toxic or otherwise potentially harmful materials in the flood channel;
- e. Prohibit development within the floodplain which would reduce the capacity of the floodplain;
- f. Prohibit development which would cause or create harmful soil erosion, stagnant water, and irreversible harmful impacts on existing flora and fauna

Dr. Gustafson gave competent substantial evidence that Hidden Lake Apartments project violates Policies 1.1.8 and 2.4.11. Dr. Gustafson presented evidence the proposed plan, 134 SPA-99 DB, does not demonstrate that it meets or exceeds this policy because there would be permanent structures in the floodplain and the development will reduce the capacity of the floodplain to the detriment of those already living on the shores of Lake Meta. There was no evidence presented by the Applicant to counter this evidence. City planning staff's only response was that there would be a city permit for the development in the floodplain. It must be pointed out that the city planning staff did not identify any portion of the site as being in the floodplain prior to Dr. Gustafson giving his

evidence and presenting the city and Federal Emergency Management Administration flood maps for the area.

8. The proposed project does not protect environmentally significant lands and resources. The City's Comprehensive Plan contains the following policy mandate:

Policy 2.4.12 The City shall amend its current Land Development Regulations to include performance-based standards to protect environmentally significant lands and resources that will at a minimum:

- e. Allow for, or require, the clustering of development away from environmentally significant resources;

Dr. Gustafson reminded the Development Review Board that the Applicant's development was required to be clustered away from environmentally significant resources. [Transcript, p. 607-8, 610] He pointed out the fact that the Applicant's building sites were placed adjacent to, rather than away from the environmentally significant Lake Meta. [Transcript, pp. 412-5] In addition, it was shown that the site plan calls for the placement of buildings in the area of the sinkhole which is located adjacent to Lake Meta. The Development Review Board's approval of the site plan is in direct conflict with this legal requirement.

D. Competent, substantial evidence shows that Petition 134-SPA-99DB fails to follow the guidelines in The Gainesville Comprehensive Plan 1991-2001 for the calculation of base density.

The description of "Residential Medium Density (8-30 units per acre)" found in *The Gainesville Comprehensive Plan 1991-2001*.

This land use classification shall allow single-family and multi-family development at densities from 8 to 30 dwelling units per acre. Lots that existed on November 13, 1991 and are less than or equal to 0.5 acres in size shall be exempt from minimum density requirements. The land shown as Residential Medium Density on the land use plan identifies those areas within the City of Gainesville that, due to topography, soil conditions, surrounding land uses and development patterns, are appropriate for single-family and medium intensity multi-family development. Land Development Regulations shall determine gradations of density and specific uses. Land Development Regulations shall specify criteria for the siting of appropriate medium intensity residential facilities to accommodate special need populations and appropriate community level institutional facilities such as places of religious assembly, private schools and libraries. Land Development Regulations shall allow Home Occupations within certain limitations.

This land use designation in the comprehensive plan states that the base density is eight (8) dwelling units per acre. Yet, when the city implements this through zoning, it sets a base of ten (10) dwelling units per acre for purposes of determining the appropriate density based upon density bonus points. Thus rather than using eight (8) dwelling units per acre as a base, the city uses ten (10) dwelling units per acre as a base. [Transcript, pp. 546-8] This in effect gives an automatic bonus of two (2) dwelling units per acre for development without meeting any of the criteria set by the city for increased density. The section states in part, "Land Development Regulations shall determine gradations of density and specific uses." By setting the standards at ten (10) dwelling units per acre to start, the Respondent disregards the density set by the Comprehensive Plan.

Dr. Gustafson and other affected parties questioned city planning staff about the density issue in this land use plan category. Dr. Gustafson presented evidence that a correction in the zoning category implementing this land use plan designation had been made as late as 1999 by the city commission. [Transcript, pp. 151-4] Dr. Gustafson

presented *Ordinance 980735/O-99-29 of the City of Gainesville* dated September 27, 1999 which modified the density of the RMF-6 zoning district from 10-15 dwelling units per acre to 8-15 dwelling units per acre. However, city planning staff stated that the calculations for density bonus points began at ten (10) dwelling units per acre rather than the eight (8) dwelling units per acre which is the lower end of the density for Residential Medium Density land use designation and for the RMF-6 zoning district. [Transcript, pp. 546-8] Dr. Gustafson and other affected parties contend that the lower end of the density spectrum for this land use designation should be used for the determination of the beginning density for bonus points. Affected parties and Dr. Gustafson presented evidence that Hidden Lake Apartments does not protect viable, stable neighborhoods and that the Land Development Regulations are supposed to determine gradations of density and specific uses which protect viable, stable neighborhoods. Evidence was given that the Land Development Regulations of the City of Gainesville are supposed to specify criteria for the siting of appropriate medium intensity residential developments that protect viable, stable neighborhoods, but fail to do so. This evidence was not contradicted by the Applicant or the city planning staff.

In summary, competent, substantial evidence was presented which showed clearly that the proposed project fails to comply with essential provisions of The Gainesville Comprehensive Plan 1991-2001, and for that reason, the Development Review Board should not have approved the project as presented.

Issue 5. WHETHER THE PROPER NUMBER OF DWELLING UNITS WERE APPROVED BY THE DEVELOPMENT REVIEW BOARD

The site which is subject of Petition 134-SPA-99DB is zoned RMF-6, MU-1 and CON.

The Development Review Board accepted the city planning staff's treatment of the area zoned MU-1 as being zoned RMF-8 for the purposes of density calculations and permitted 9 dwelling units to be built. [Transcript, pp. 151-4] The planning staff's rationale was that, even though the MU-1 property had not been rezoned, it would be possible to rezone the MU-1 area to RMF-8. [Transcript, pp. 242, 520, 524-5, 629] This is contrary to the zoning law. If the MU-1 zoning would have been properly recognized, then only 4 dwelling units could have been allowed on the property. [Transcript, p. 607] The action by the city planning staff and the baseless acceptance of this arbitrary zoning reclassification by the Development Review Board resulted in 5 additional dwelling units being allowed on the Applicant's property. Accordingly, the city planning staff and the Development Review Board did not adhere to the essential requirements of the law.

Issue 6. WHETHER MEMBERS OF THE DEVELOPMENT REVIEW BOARD ENGAGED IN IMPROPER EX PARTE COMMUNICATIONS AND/OR CONSIDERED EVIDENCE OUTSIDE THE RECORD.

On December 9, 1999, the Development Review Board met to approve the form of the written Order. During this hearing, one member of the Development Review Board stated that he had spoken in-depth with "... at least six people" since the previous hearing. [Transcript of 12/9/99, p. 11] No information regarding the nature and content of those communications was provided. In addition, this board member appeared to read from a prepared statement during deliberations on the night of November 16, 1999. [Transcript, pp. 707, 711-2] This gave the impression that he had reached a decision before the close of the evidence.

At a bare minimum, due process in a quasi-judicial proceeding requires impartial decision makers. Cherry Communications, Inc. v. Deason, 652 So.2d 803 (Fla. 1995). In a quasi-judicial

proceeding, board members should avoid all contacts with third parties; ex parte communications are inherently improper. Jennings v. Dade City, 589 So.2d 1337 (3rd D.C.A. 1992). Rev. den. 598 So.2d 75 (Fla. 1992). At least one board member admitted he engaged in ex parte communications and reviewed items outside of the record, which is clearly a violation of the essential requirements of the law. [Transcript, 173-4, 463] Upon an aggrieved party's proof that the ex parte contact occurred with a board member in a quasi-judicial proceeding, its effect is presumed to be prejudicial unless the board member proves to the contrary by competent substantial evidence. Jennings.

During the December 9, 1999 hearing, the chairman of the Development Review Board stated, on the record, that he reviewed additional information regarding Lake Meta which was not in evidence and not part of the record. [Transcript of 12/9/99 hearing, pp. 75-76] In particular, the Chairman admitted to reviewing photography of Lake Meta taken in 1937, 1949, and in the 1950s. [Transcript of 12/9/99, pp. 75-76] However, only the 1937 photography was entered into evidence. [Transcript, pp. 593-594, 675] The chairman, by reviewing information outside of the record, also engaged in improper conduct since, in a quasi-judicial hearing, parties must be able to present evidence, cross examine witnesses and be informed of all facts upon which the board acts. See Jennings. The Petitioners were not informed of all facts upon which the board acted, a violation of both the essential requirements of the law and due process.

The Chairman also made a comment during the final hearing night that, according to him, "In the 50s that sinkhole was filled by a developer. And then a water table was formed and allowed to develop a lake." [Transcript of 12/9/99, p. 76] This statement by the Chairman includes information that was never presented at the hearing. The Chairman clearly obtained this

information from persons or evidence obtained outside of the hearing. This search for evidence outside the confines of the hearing chambers violates fundamental due process and cannot be permitted.

At the December 9, 1999, hearing, the Board unanimously voted to require a dry retention system instead of a dry detention system based on information purportedly contained in a memo one of the Board member's had received in February. [Transcript of 12/9/99, pp. 16, 19-20] This memo was never introduced into evidence during the hearing. Accordingly, relying on this type of evidence is fundamentally improper.

From the record, it is clear that every member of the Development Review Board engaged in improper review of evidence that was obtained outside of the hearing or improper ex-parte communications. This improper conduct constitutes fundamental error on behalf of the Board.

Issue 7. WHETHER THE DEVELOPMENT REVIEW BOARD AND CITY STAFF ACTED IN A MANNER THAT VIOLATED DUE PROCESS AND/OR WAS CONTRARY TO THE ESSENTIAL REQUIREMENTS OF LAW

The following incidents, especially when viewed together, illustrate that certain actions of the Development Review Board and/or city planning staff violated the essential requirements of due process and/or were contrary to the essential requirements of law:

A. The Development Review Board permitted multiple minor changes to the application during the course of the hearing, as well as changes which substantially altered the application. These changes included the change to the dry detention system, changing traffic access to the proposed development, substituting bonus points for a neighborhood park instead of a community park and deleting an entire building from the plan. [Transcript, pp. 39, 48-9, 52, 495] The Petitioners were left in the difficult position of responding to a constantly shifting

target, and they did not have time to research the impact of these last minute changes.

B. The first hearing on October 14, 1999 ran past midnight and had to be continued. The Development Review Board continued the hearing until November 4, 1999 over the objection of Petitioners. [Transcript, pp. 162-166] Petitioner Dr. Stone was designated to provide expert testimony regarding issues concerning Lake Meta. [Transcript p. 24] He was present at the October 14 hearing, but was scheduled to be out of the country on November 4, 1999. [Transcript, p. 161-2] The Development Review Board refused to continue the hearing to a date when Dr. Stone could be present. The Petitioners requested that the Development Review Board permit Dr. Stone to briefly give testimony before adjourning the hearing on October 14. [Transcript, p. 167-8] The Development Review Board refused Petitioners' request. [Transcript, pp. 167-168] This decision was extremely prejudicial to the Petitioners.

C. The Development Review Board accepted city planning staff's statement that it relied upon legal opinion of the Applicant's attorney regarding whether the application for development review had been properly completed. [Transcript, p. 104] No independent legal interpretation was relied upon by the city planning staff and Development Review Board, which was highly prejudicial to the affected parties. [Transcript, p. 104-5]

D. The Applicant stated on the record that there was a drainage pipe to Lake Meta. [Transcript, pp. 89, 90] The City planning staff was aware of this false information but never brought this to the attention of Board on its own initiative. [Transcript, pp. 427-428] Only during cross-examination by Dr. Gustafson did city planning staff finally admit that this was incorrect information, and that no such drainage pipe existed. [Transcript, p. 149] The Development Review Board did not inquire as to why the city planning staff remained silent

when the Applicant presented false information to the Board. The Board also never requested the Applicant to explain why he presented false information to them.

E. Dr. Gustafson testified that he met with Thomas Saunders, Respondent's Community Development Director and secretary to the Development Review Board. [Transcript, p. 429] During that meeting, Dr. Gustafson made Mr. Saunders aware of various errors made by the Planning Division staff of Respondent. [Transcript, p. 429]. These errors were not revealed to the Board during the hearing, and the errors were never corrected. [Transcript, p. 428]

F. The first three hearings each lasted late into the evening. During one meeting, the Development Review Board continued taking testimony despite a statement by one member that he did not want to continue because his mind was "muddled." [Transcript, p. 451] Even more prejudicial, the Development Review Board allowed one hearing to continue in excess of four hours even after being advised by the Petitioner's court reporter that the record was being jeopardized because of her fatigue. [Transcript, pp. 368-9]

G. During the hearing on November 4, 1999, one board member asked the attorney for Ms. Wheeler why he kept asking the same questions of various affected parties who were opposing the application. [Transcript, pp. 317-8] This Board member's comments clearly reveals that he did not want to hear any more evidence from the affected parties. [Transcript, pp. 317-318]

H. Dr. Elizabeth Bolton, an affected party opposed to the application, attempted to enter a petition from persons living in the surrounding neighborhood who were opposed to the development but unable to attend the hearing. [Transcript, pp. 695-700] The Development Review Board did not permit the petition to be entered into the record. [Transcript, pp. 695-700]

I. During the hearing held on October 14, the chairman's wife, who is an attorney, sat and conversed with the Applicant. [Transcript, pp. 60-61] When the issue was raised by counsel for the Petitioners, the chairman failed to recuse himself and refused to even inquire as to the nature of the contact. [Transcript, pp. 60-61] This troubling occurrence and ruling questions the Development Review Board's required position of neutrality.

J. A city staff member, Mr. Hillard, was permitted to cross-examine one of the Petitioners, Dr. Gustafson. [Transcript, pp. 431-433] In addition, Carolyn Morgan, city planner, was permitted to cross-examine Dr. Gustafson. [Transcript, pp. 627-629] Cross-examination is questioning by one who is opposed to the witness being examined. The city clearly displayed its adversarial position against the Petitioners when Mr. Hillard attempted to cross-examine Dr. Gustafson. This lack of neutrality violates the Petitioners due process rights.


In sum, when taken together, all of the above incidents demonstrate that the Petitioners were denied procedural due process and/or that the Board did not observe the essential requirements of law.

VI. CONCLUSION

Based on the foregoing, the Petitioners respectfully request this Court to enter an order quashing the City of Gainesville Development Review Board's Order dated December 9, 1999, In the Matter of Petition 134-SPA-99 DB, and remanding this matter back to the Development Review Board with appropriate instructions.

Respectfully submitted,

MUTCH & YOZGAT, P. A.

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

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