

**Revised Attachment #1  
and Additional Attachment #5  
for Agenda Item #18**

**September 24, 2018**


**PUBLIC HEARING**

18. First and Only Public Hearing to Consider the Recommended Order on the Site and Development Plan Application for Market District Housing  
*(County Attorney)*

# BOARD OF COUNTY COMMISSIONERS

## INTER-OFFICE MEMORANDUM

TO: Honorable Chairman and Board of County Commissioners

FROM: Herbert W.A. Thiele, County Attorney 

DATE: September 21, 2018

SUBJECT: Additional Attachment for Item #18 – Exceptions to the Recommended Order filed by Petitioner Wynona Braswell (filed late and improperly)  
Revised Attachment #1 for Item #18 – Revised Proposed Final Order

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Enclosed please find an additional attachment to Agenda Item # 18, First and Only Public Hearing to Consider the Recommended Order on the Site and Development Plan Application for Market District Housing. This attachment is Attachment #5, Exceptions to the Recommended Order Filed by Petitioner Wynona Braswell (filed late and improperly). Additionally, please find a Revised Attachment #1, Revised Proposed Final Order.

Exceptions are filed in situations where a party would like the Board to consider changing certain parts of the Recommended Order. Section 10-7.414(K) requires parties to file exceptions within ten (10) days from the date the recommended order is served. The exceptions must be filed with the Clerk of the Board of County Commissioners and should include appropriate references to the record before the Special Master.

The Recommended Order was served on August 31, 2018, which means the deadline to file exceptions was on September 10, 2018. The Exceptions to the Recommended Order Filed by Petitioner Wynona Braswell (“Braswell’s Exceptions”) were filed with the Division of Administrative Hearings (“DOAH”) on September 20, 2018.

Braswell’s Exceptions are untimely because they were filed ten days beyond the deadline date. Further, the Leon County Code requires exceptions to be filed with the Clerk of the Board of County Commissioners. Braswell’s Exceptions were not filed with the Clerk of the Board but instead were filed with DOAH.

Since Braswell’s Exceptions were filed late and were filed with DOAH and not the County, we recommend the Board strike the exceptions. The Revised Attachment #1, Revised Proposed Final Order, reflects a finding by the Board that Braswell’s Exceptions were untimely filed and improperly filed pursuant to Section 10-7.414(K).

If the exceptions are not stricken, the Board must either grant or deny each listed exception in turn during the hearing. Pursuant to Section 10-7.415(H), the Board may not change the Findings of Fact in the Recommended Order unless the Board determines that the Findings of Fact are not supported by competent substantial evidence in the record before the Special Master. Therefore, for the Board to grant any of Braswell’s Exceptions to the Recommended Order’s Findings of

Fact, the Board must make a determination that those Findings of Fact for which Ms. Braswell takes exception are not supported by competent substantial evidence.

Braswell's Exceptions also include exceptions to the Recommended Order's Conclusions of Law. The Board may modify the Conclusions of Law in the Recommended Order if it finds that the Special Master's application or interpretation of law is erroneous. The Board may make reasonable legal interpretations of the Tallahassee-Leon County 2030 Comprehensive Plan and the Leon County Land Development Code without regard to whether the Special Master's interpretation is labeled as a finding of fact or a conclusion of law.

As a result of the recent filing of Braswell's Exceptions, the options and staff's recommendation are amended to read as follows:

**Amended Options:**

1. Strike the Exceptions to the Recommended Order filed with DOAH by Petitioner Wynona Braswell as being improperly and untimely filed.
2. Enter the proposed Final Order (Revised Attachment #1) adopting the Recommended Order, thereby approving the Market District Housing Site and Development Plan, subject to the conditions outlined in the written preliminary decision.
3. Board direction.

**Amended Staff Recommendation:**

- Option #1: Strike the Exceptions to the Recommended Order filed with DOAH by Petitioner Wynona Braswell as being improperly and untimely filed.
- Option #2: Enter the proposed Final Order (Revised Attachment #1) adopting the Recommended Order, thereby approving the Market District Housing Site and Development Plan, subject to the conditions outlined in the written preliminary decision.

**Revised Attachments:**

1. Revised Proposed Final Order
2. – 4. No change
5. Exceptions to the Recommended Order filed by Petitioner Wynona Braswell (filed late and improperly)

Enclosure

cc: Vincent S. Long, County Administrator  
Alan Rosenzweig, Deputy County Administrator  
David McDevitt, Director of Development Support and Environmental Management  
Carly Schrader, Outside Counsel for Leon County Department of Development Support and Environmental Management  
Doug Hall, Counsel for the Applicant, Palafox, LLC  
Jefferson Braswell, Counsel for Petitioner Wynona Braswell  
Vickie Goodman, Petitioner

LEON COUNTY  
BOARD OF COUNTY COMMISSIONERS

WYNONA C. BRASWELL AND  
VICKIE GOODMAN,

Petitioners,

Leon County Project ID# LSP180013  
DOAH CASE NO. 18-2734

vs.

PALAFX, LLC, AND LEON  
COUNTY DEPARTMENT OF  
DEVELOPMENT SUPPORT AND  
ENVIRONMENTAL  
MANAGEMENT,

Respondents.

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**FINAL ORDER**

An Administrative Law Judge with the Division of Administrative Hearings (“DOAH”), serving as a special master for purposes of the quasi-judicial hearing prescribed by section 10-7.414, Leon County Land Development Code, submitted a Recommended Order (“RO”), on August 31, 2018, to the Leon County Board of County Commissioners (“Board”) in the above-captioned proceeding. This proceeding is an appeal of the preliminary conditional approval of a site and development plan for Market District Housing, Leon County Project ID No. LSP 180013, by Wynona C. Braswell and Vickie Goodman (collectively “Petitioners”). As described in the RO, the proposed project is a 36 unit townhome development to be located on Martin Hurst Road and Palafox Lane (“Project”). Additional details about the Project are set out in the RO. The RO finds that the Project is consistent with all requirements for approval, and recommends that the Board enter a Final Order approving the Project, consistent with the written preliminary decision of approval dated April 27, 2018.

The RO advised that all parties had the right to file written exceptions within 10 days from the date of the RO, pursuant to section 10-7.414(K), Leon County Land Development Code. No exceptions were timely filed by any party. On September 20, 2018, Petitioner Braswell filed Exceptions to the Recommended Order with DOAH. The Exceptions to the Recommended Order filed by Petitioner Braswell were filed beyond the deadline outlined in the RO and section 10-7-414(K), Leon County Land Development Code. Further, section 10-7.414(K), Leon County Land Development Code, requires exceptions to be filed with the Clerk of the Board of County Commissioners. The Exceptions to the Recommended Order filed by Petitioner Braswell were not filed with the Clerk of the Board but instead were filed with DOAH.

This matter is now before the Board for review of the RO, as provided in section 10-7.415, Leon County Land Development Code. Pursuant to the County's Land Development Code, a duly noticed public hearing before the Board was held on September 24, 2018. All parties who participated in the quasi-judicial hearing before DOAH, including Petitioners, Palafox, LLC, and the County, were given the opportunity to provide oral argument.

The hearing before the Board is limited to matters of record and argument based on the record. §10-7.415(E), Leon County Code. No new evidence may be presented. Id.

As set forth in the County's Code, the Board of County Commissioners "is bound by the special master's findings of fact unless the findings of fact are not supported by competent substantial evidence in the record before the special master." §10-7.415(H), Leon County Code. However, the Board "may modify the conclusions of law if it finds that the special master's application or interpretation of law is erroneous." Id. Ultimately, the Board must approve, approve with conditions, or deny the Project. Id. The label assigned a statement is not dispositive as to whether it is a finding of fact or conclusion of law. Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Goin v. Comm. on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995).

Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or finding based upon the statement itself and not the label assigned.

**ORDER**

IT IS THEREFORE ORDERED as follows:

1. The Exceptions to the Recommended Order filed by Petitioner Braswell are stricken as being untimely and improperly filed.

2. The findings of fact and conclusions of law in the Recommended Order are ADOPTED. The Recommended Order is incorporated by reference and made a part hereof as Exhibit A.

3. The Administrative Law Judge's recommendation is ACCEPTED.

4. The Leon County Board of County Commissioners enters this Final Order, approving the Project with conditions consistent with the written preliminary decision dated April 27, 2018.

APPROVED by the Board and EXECUTED by the Chairman on the \_\_\_\_ day of September 2018.

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NICK MADDUX  
Chairman  
Leon County Board of  
County Commissioners

## CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that this Final Order has been filed with the undersigned Clerk of the Board of County Commissioners, and that true and correct copies have been furnished to the persons listed below in the manner described, on this \_\_\_\_\_ day of September, 2018.

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Clerk

### **By Electronic Mail:**

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STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WYNONA C. BRASWELL AND  
VICKIE GOODMAN,

Petitioners,

vs.

Case No. 18-2734

PALAFIX, LLC, AND LEON COUNTY  
DEPARTMENT OF DEVELOPMENT  
SUPPORT AND ENVIRONMENTAL  
MANAGEMENT,

Respondents.

\_\_\_\_\_ /

RECOMMENDED ORDER

The quasi-judicial hearing in this case was held on July 11 and 12, 2018, in Tallahassee, Florida, before Francine M. Ffolkes, Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), acting as the Special Master under section 10-7.414 of the Leon County Land Development Code.

APPEARANCES

For Petitioner Wynona C. Braswell:

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For Respondent Leon County:

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Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Leon County Application Review Committee's preliminary decision approving a site and development plan for the Market District Housing (LSP 180013) is consistent with the Tallahassee-Leon County Comprehensive Plan ("Comp Plan") and the Leon County Land Development Code ("Code").

PRELIMINARY STATEMENT

On April 27, 2018, the Application Review Committee issued a letter which conditionally approved the site and development plan submitted by the Respondent, Palafox, LLC ("Palafox"), for the Market District Housing, a 36-unit townhome development to be located on the southwest corner of Martin Hurst Road and Palafox Lane ("Project"). The Project required review and approval of a "Type A" site and development plan, and Palafox chose the final design plan approval ("FDPA") review track. The FDPA review

track provides for concurrent land use and environmental permitting approval. On May 23, 2018, the Petitioners, Wynona C. Braswell, Scott Hampton, and Vickie Goodman, filed a joint petition challenging the Application Review Committee's preliminary approval as inconsistent with certain provisions of the Comp Plan and Code.

Pursuant to a contract between DOAH and the Respondent, Leon County Department of Development Support and Environmental Management ("Leon County"), Leon County sent the matter to DOAH to appoint a Special Master and conduct a quasi-judicial hearing. A notice of the hearing was provided in accordance with section 10-7.414(J) (ii) of the Code.

Prior to the hearing, the Petitioner, Scott Hampton, filed a notice of withdrawal as a petitioner, and was dismissed as a petitioner by Order dated June 20, 2018. At the hearing, Leon County's pending motions for official recognition were granted. The Petitioners presented the testimony of Vickie Goodman; Wynona Braswell; Ryan Culpepper; Cheryl Poole, P.E.; Kevin Songer; Steve Stinson, P.L.S.; Scott Hampton; and Sal Arnaldo, P.E. The Petitioners' Exhibits 1, 2, 3, 9, 10, 12, 15, 16, 17, and 19 were admitted into evidence. The Petitioners' Exhibits 4, 5, 6, 7, 8, 11, 13, 14, and 18 were marked for identification but were not admitted into evidence. The Respondents presented the testimony of Gary Zins, Shawna Martin, and Nawfal Ezzagaghi, P.E. The

Respondents' Joint Exhibits 1 through 36, 63, 65, 70, and 92 through 116 were admitted into evidence.<sup>1/</sup>

At the hearing, an opportunity was provided to receive comments from the public. One person, George E. Lewis, II, offered comments in opposition to the Project. A copy of this Recommended Order is being sent to Mr. Lewis.

The Transcript of the hearing was filed with DOAH on July 30, 2018. The parties submitted proposed recommended orders that were considered in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2018 version, unless otherwise indicated.

#### FINDINGS OF FACT

##### The Parties

1. The Petitioner, Wynona C. Braswell, lives at 2784 Palafox Lane, which is the single-family lot located at Lot 5, Block A, of the 2008 Palafox Preserve Subdivision Plat ("Plat"). The Petitioner, Vickie Goodman, lives at the single-family lot located at Lot 1, Block A, of the Plat.

2. The Petitioners are concerned that changes in the storm water management facility on Lot 1, Block B, of the Palafox Preserve Subdivision will reduce the size of the storm water pond. The Petitioners are concerned that changes in the storm water pond will cause the conservation easement to overflow and

burden the storm water facilities owned by residential homeowners.

3. Leon County is a political subdivision of the State of Florida and has adopted a comprehensive plan that it amends from time to time pursuant to chapter 163, Florida Statutes. Leon County is responsible for enacting and applying relevant Comp Plan and Code provisions to the development of property located within its political boundaries.

4. Palafox is a limited liability corporation that is the applicant seeking approval for the "Type A" site and development plan, which is the subject of this proceeding. Palafox is the sole member of the Palafox Preserve Commercial Property Owners' Association, Inc. Gary Zins owns and controls Palafox through its managing member, Evergreen Communities, Inc., and is also the president of the Palafox Preserve Commercial Property Owners' Association, Inc., and controls the association as its only officer and director.

#### Land Use Designations

5. The Project is located on approximately 2.75 acres of the approximately 6-acre parcel of land identified as Lot 1, Block B, on the Plat. The parcel is within the Suburban ("SUB") and Lake Protection ("LP") categories on the Future Land Use Map of the Comp Plan. The parcel is split zoned Office Residential 3

("OR-3") and LP. The Project is proposed only within the OR-3 zoned portion.

6. Policy 2.2.5 of the Future Land Use Element ("FLUE") of the Comp Plan provides that the major function of the SUB designation is to mix placement of employment and shopping opportunities, with convenient access to low and medium density residential land uses. The proposal for 36 dwelling units which equates to a density of approximately 13 dwelling units per acre ("du/a") meets the gross density requirement of the OR-3 zoning district.

7. The Project is located within the Urban Services Area established by the FLUE, which is the area identified by Leon County as desirable for new development based on the availability of existing infrastructure and services.

8. The parcel contains a localized closed basin, wetlands and 100-year floodplain. Consistent with Comp Plan Conservation Element Policies 1.3.2 and 1.3.6, the areas of the site that contain environmentally sensitive features were previously placed in a perpetual conservation easement, and Palafox does not propose to disturb the area in the conservation easement.

#### Background

9. Leon County previously approved development of 19 single-family lots located on Lots 1 through 19, Block A, of the Plat. This development included infrastructure such as

Palafox Lane, which is the entrance to the subdivision, and storm water management facilities in both Block A and Block B of the Palafox Preserve Subdivision. The Palafox Preserve Subdivision is a common scheme of development, and the storm water management facilities are operated under a single operating permit. It is also a private subdivision with all of the storm water management facilities dedicated to private entities and not to Leon County.

10. A wetland of approximately seven acres was identified as part of the Natural Features Inventory ("NFI") and placed in a perpetual conservation easement in 2006. The wetland was initially delineated in 2001 by Kevin Songer who represented the applicant at that time. Mr. Songer's wetland delineation was field reviewed by representatives from Leon County and the Florida Department of Environmental Protection, adjusted, and finally approved by Leon County in 2006 as part of the NFI approval.

11. The wetland and perpetual conservation easement straddle the boundary between Block A and Block B with about two-thirds in Block A and about one-third in Block B. With the required buffer area added to the approximately seven-acre wetland, the perpetual conservation easement in total covers approximately nine acres.

12. Subsequent permits for the development of the Palafox Preserve Subdivision, such as for the 19 homesites, relied on the

2006 NFI, which included the 2001 wetland delineation and the perpetual conservation easement. Leon County did not require new wetland delineations prior to development of each homesite even though homes were built as recently as 2012, 2013, and 2014.

13. The storm water management facility constructed in Block B of the Plat is labeled as SWMF #1. SWMF #1 was designed to retain the additional runoff from the first 500 feet of Palafox Lane up to the 100-year, 24-hour storm. SWMF #1 has a concrete weir that allows a controlled discharge into the adjacent conservation easement wetlands. Storm water management facilities constructed in Block A included SWMFs #6 and #7 that collect the runoff from the homesites located on the west side of the conservation easement, namely Lots 11 through 19. Lots 11 through 19 all contain a portion of the conservation easement area as well as platted drainage easements.

14. SWMFs #6 and #7 are constructed in the platted drainage easements on Lots 11 through 19 in Block A. SWMFs #6 and #7 are constructed in a horseshoe shape adjacent to the conservation easement, are designed as detention facilities, and discharge to the conservation easement wetlands.

15. The SWMF #1 retention facility, the SWMFs #6 and #7 detention facilities, and the conservation easement containing the wetlands are within the localized closed basin. There is another SWMF to the west behind homesites located on Lots 1

through 7 that is labeled SWMF #5. SWMF #5 is not within the localized closed basin and discharges to the Lake Jackson drainage basin.

16. The conservation easement also contains a "pop-off" or outfall which allows for discharge of water from the wetlands to the west if it reaches a certain elevation, which based on the plans is 223.57 feet. It was designed to mimic pre-development conditions and only discharges if the 100-year, 24-hour storm is exceeded. If discharged, the water would travel west through drainage easements to SWMF #5 and ultimately to Lake Jackson. Because the localized closed basin retains up to the 100-year, 24-hour storm, it is a closed basin under the Code.

17. Leon County also previously approved commercial development on Lot 1, Block B, of the Plat, which is still active (Palafox Preserve Commercial Project). The site development approval and environmental permits for the Palafox Preserve Commercial Project are current but would be superseded by final approval of the site and development plan and environmental permit for the current Project.

#### The Project

18. In 2014, an earlier application for Site Plan and Development Review was submitted for the Market District Housing Project. An Environmental Permit Application ("EMP") was also reviewed concurrently under the Code. Leon County issued a



preliminary written decision of approval, which was appealed by Robert and Wynona Braswell, and the case was assigned to DOAH. Based on certain issues, the application was withdrawn, and the parties litigated in circuit court. That litigation concluded with a Final Judgment in favor of Evergreen Communities, Inc., and Palafox.

19. Palafox then submitted the current site and development plan application for the Project dated April 4, 2018, which was designated LSP 180013. Palafox concurrently submitted an EMP application for the Project, which was designated as LEM 18-00034.

20. The Project's current Plan application was reviewed by various departments within Leon County, as well as several other entities and agencies. Ms. Shawna Martin, principal planner with the Leon County Development Services Division, coordinated the review gathering comments and feedback from the various departments and agencies and coordinated the preparation of a Staff Report for the Application Review Meeting ("ARM") held on April 25, 2018.

21. The Staff Report recommended approval of the Project finding that the Project's proposed development was consistent with the Comp Plan, met applicable zoning standards and requirements, and met the applicable provisions of the County's

Environmental Management Act ("EMA") and the provisions of chapter 10 of the Code.

22. Leon County's Environmental Services Division ("Environmental Services"), under the supervision of Nawfal Ezzagaghi, a licensed professional engineer, reviewed the EMP application for the Project concurrently with the site plan and development review. Mr. Ezzagaghi has been the environmental review supervisor for Leon County since 2005, and is responsible for the review by Environmental Services' staff of environmental management plans, engineering calculations, engineering plans, and providing input on site plans and to the public works department.

23. During the review of the application, both in 2014 and 2018, Environmental Services under Mr. Ezzagaghi's supervision reviewed the application including the storm water design, modeling, and construction plans, and coordinated and communicated with the applicant. Environmental Services received and reviewed the materials, conducted an independent analysis, and ultimately verified compliance with the EMA.

24. The Petitioners received notice of the ARM meeting, submitted verbal and written comment, and ultimately challenged the written preliminary decision of approval.

25. The Petitioners' challenge raised three primary issues: (1) that the Project is inconsistent with the Plat; (2) that the

perpetual conservation easement wetland should have been re-delineated as part of the Project's current permitting application; and (3) that the storm water plan for the Project does not meet the requirements of the Code.

Palafox Preserve Subdivision Plat

26. The Plat designates a portion of Lot 1, Block B, as the "POA Drainage Easement." The dedication provisions of the Plat convey the POA Drainage Easement to the Palafox Preserve Commercial Property Owners' Association, Inc. Palafox, the applicant, is the sole member of the Palafox Preserve Commercial Property Owners' Association, Inc. The dedication provisions of the Plat convey all "drainage easements" to the Palafox Preserve Home Owners Association, Inc., which is the owners' association for Block A--the residential area of the subdivision.

27. Plat Note 5 states that "the construction of permanent structures, including fences but excluding driveways, by the Property Owner is prohibited within drainage and utility easements." The Petitioners claim that the Project is inconsistent with the prohibition in Plat Note 5.

28. SWMF #1 is located within the POA Drainage Easement on Lot 1, Block B, of the Plat and does not serve any part of the residential area of the subdivision. On its face, the prohibition in Plat Note 5 does not apply to the POA Drainage

Easement. In addition, words such as "fences" and "driveways" more reasonably refer to residential areas of the Plat.

#### Wetland Delineation

29. The application for the Project did not contain a new NFI. Leon County informed Palafox that the parcel had already been through the NFI process and held a valid and active EMP. As a matter of policy, Leon County does not require submission of a new NFI or new wetland delineation once previously delineated wetlands are under a perpetual conservation easement that is dedicated to Leon County as a preservation area.

30. Unlike the 2001 wetland delineation line submitted in the 2006 NFI and placed under the perpetual conservation easement, Kevin Songer's 2015 wetland delineation work for the Petitioners was neither checked by independent peer review nor confirmed by any state or local environmental regulatory agency. Mr. Songer's 2015 wetland delineation does not represent a recognized wetland jurisdictional line.

#### Storm Water Plan

31. The storm water management system for the Project is a "two-step system" designed to address both the water quality and volume control standards of the EMA. For water quality, the Code requires a one and one-eighth-inch standard for storm water treatment and the Project would satisfy this requirement through a new storm water detention and treatment facility. The

detention pond is designed to treat the volume determined from the one and one-eighth-inch standard, or slightly more than 14,000 cubic feet. This is the more critical volume for which the new facility must be designed.

32. For volume control, the closed basin standard requires the runoff volume in excess of the pre-development runoff volume to be retained for all storm events up to a 100-year, 24-hour duration storm. That difference is approximately 9,650 cubic feet. The closed basin for which retention must be demonstrated includes the conservation easement wetlands, and modeling demonstrated a change in elevation from 221.51 to 221.54 over approximately six acres. This difference in elevation is retained in the wetlands up to and including the 100-year, 24-hour storm. The post-development elevation of 221.54 does not approach the 223.57 "pop-off" elevation of the wetlands.

33. SWMF #1 was designed to retain runoff from the first 500 feet of Palafox Lane up to the 100-year, 24-hour storm. The evidence established that SWMF #1 was "over-designed" because of circumstances in 2006 to 2007, which may have included different Code requirements and the wishes of the original developer.

34. The Petitioners' engineer, Sal Arnaldo, who did not have any previous experience with the Code, opined that the existing SWMF #1 could not be replaced by the proposed detention with treatment facility. Mr. Arnaldo's understanding of the Code

was that all storm water that falls on Block B and runoff from the first 500 feet of Palafox Lane must be retained in a retention pond up to and including the 100-year, 24-hour storm. He viewed SWMF #1 as the "closed basin" or the "site" that was not allowed to discharge to the conservation easement wetlands. In his opinion, the proposed detention facility for the Project did not provide the same function.

35. Different pond sizes, designs, and storm water management methods can be used to meet the requirements of the Code exemplified by the fact that the two-step approach used for the Project is the same approach used on the west side of the wetlands for Lots 11 through 19, Block A. SWMFs #6 and #7 are also detention facilities which were designed to treat storm water and discharge to the conservation easement wetlands.

36. Leon County's expert engineer, Mr. Ezzagaghi, testified that the SWMF #1 retention facility, the SWMFs #6 and #7 detention facilities, and the conservation easement containing the wetlands are part of the closed basin under the Code. Thus, the standard is not a comparison of the capacity of existing SWMF #1 to the capacity of the proposed detention facility, but whether the storm water system as a whole controls for the post-development volume that is in excess of pre-development conditions.

37. The evidence demonstrated that the Project's proposed storm water system will not significantly impact the conservation easement wetlands and will not cause flooding or other adverse impacts to downstream areas.

#### Summary

38. The preponderance of the evidence, which includes Leon County's interpretation and application of applicable provisions of the Comp Plan and Code, demonstrated that the Project is consistent with all requirements for approval. See § 10-7.407, Leon Cnty. Code.

### CONCLUSIONS OF LAW

#### Jurisdiction

39. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to section 10-7.414 of the Code.

40. The Petitioners did not raise any specific issue regarding the procedures followed by Leon County for the decision under review, including public notice.

#### Burden and Standard of Proof

41. The burden is on the applicant for site plan approval to demonstrate that the application complies with the procedural requirements of the applicable ordinance and that the use sought is consistent with the applicable provisions of the Comp Plan and Code. See, e.g., Alvey v. City of N. Miami Bch., 206 So. 3d 67,

73 (Fla. 3d DCA 2016) (citing Bd. of Cnty. Commr's of Brevard Cnty. v. Snyder, 27 So. 2d 469, 472 (Fla. 1993)).

42. The standard of proof to establish a finding of fact is preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

Consistency with the Comp Plan

43. Under section 10-7.414(J)(vii) of the Code, the standard of review to be applied by the Special Master in determining whether the Project is consistent with the Comp Plan is "strict scrutiny in accordance with Florida law." Strict scrutiny in this context means strict compliance with the Comp Plan, based on the document as a whole. See Snyder, 27 So. 2d. at 475; Arbor Props. v. Lake Jackson Prot. Alliance, 51 So. 3d 502, 505 (Fla. 1st DCA 2010).

44. Palafox carried its prima facie burden to show by a preponderance of the evidence that the Project is consistent with the Comp Plan. The Petitioners did not raise any specific issues regarding compliance with the Comp Plan.

Consistency with the Code

45. Under section 10-7.414(J)(vii) of the Code, the standard of review to determine whether the Project is consistent with the Code "shall be in accordance with Florida law." Florida law requires that Leon County's determination that the Project is consistent with relevant provisions of the Code must be based on



competent substantial evidence. See Premier Dev. v. City of Fort Lauderdale, 920 So. 2d 852, 853 (Fla. 4th DCA 2006).

46. Local governments are entitled to broad deference in interpreting their land development regulations. Unless the local government's interpretation is clearly erroneous, it should be affirmed. See, e.g., Pruitt v. Sands, 84 So. 3d 1267, 1268 (Fla. 4th DCA 2012); Palm Beach Polo, Inc., v. Vill. of Wellington, 918 So. 2d 988, 995-996 (Fla. 4th DCA 2006).

47. The three primary issues raised by the Petitioners involve interpretation and application of the Code. Other arguments raised by the Petitioners during the hearing, such as allegations of trespass, use rights pursuant to drainage easements or storm water facilities reflected on the Plat, and compliance issues surrounding the previously approved and constructed storm water facilities in the Palafox Preserve Subdivision, are not issues within the scope of this proceeding. Palafox Preserve Subdivision Plat

48. Note 5 on the Plat clearly addresses the residential "drainage easements," not the "POA Drainage Easement." The Plat separately identifies the easements and dedicates them to different entities.

Previous NFI Approval and Wetlands Delineation

49. The Code requires an NFI prior to an application for site and development plan approval. See § 10-4.202, Leon Cnty.

Code. As part of this requirement, preservation areas, including wetlands, were mapped and inventoried, and were placed in a perpetual conservation easement to ensure such areas are protected and preserved, including a setback. See §§ 10-4.202, 10-4.322, Leon Cnty. Code.

50. Leon County's interpretation that the Code does not require an applicant to submit a new NFI for a development on a site with an existing NFI and a recorded perpetual conservation easement is reasonable. Private parties and Leon County have relied on the NFI and perpetual conservation easement for development and regulation of the Palafox Preserve Subdivision.

51. No statute, ordinance, rule or regulation requires a wetland to be re-delineated after it has been identified and placed in perpetual preservation under a conservation easement. The Petitioners' argument would lead to the absurd result of re-surveying and re-recording allegedly "perpetual" conservation easements every time a lot was developed within the Plat.

#### Storm Water Regulations

52. The Code's closed basin standards require that "[r]unoff volumes within regulated closed basins in excess of the pre-development runoff volume shall be retained for all storm events up to a 100-year, 24-hour duration storm." § 10-4.301(3)(b), Leon Cnty. Code. The Code defines "retention" to mean "the collection and storage of stormwater without subsequent

discharge other than through percolation, evaporation, or transpiration." § 10-1.101, Leon Cnty. Code. The Code defines "site" as "the total area within the property boundaries of a principal parcel to be developed, or contiguous parcels intended for development under a common scheme or plan." § 10-1.101, Leon Cnty. Code.

53. The Palafox Preserve Subdivision is an integrated or common scheme of development. It was platted as a single subdivision and designed with an integrated storm water system under a single operating permit. Additionally, there is one common subdivision entrance road, and all conservation easements for the subdivision were created within a single document.

54. The Code allows discharge of post-development runoff to a wetland under circumstances where it is "of sufficient capacity at the time of discharge to sustain the effects of, and to convey such discharges, without detriment to the continued natural function of the resource." § 10-4.301(6), Leon Cnty. Code. The Code's rate provisions do not apply "to approved discharges directly into water bodies, watercourses, wetlands and constructed conveyances which are of sufficient size and capacity to receive the discharges without significant adverse effects." § 10-4.302(1), Leon Cnty. Code. Also it must be demonstrated that "[t]he stormwater discharge shall not cause flooding or

other adverse impacts for the downstream areas." § 10-4.302(2), Leon Cnty. Code.

55. The preponderance of the evidence demonstrated that the Project's proposed storm water system will not significantly impact the conservation easement wetlands and will not cause flooding or other adverse impacts to downstream areas.

56. The Project as proposed does not violate section 10-4.304 of the Code regarding storm water easements because the Code authorizes discharges into a wetland area capable of sustaining the effects of such discharge without the need to acquire an easement.

57. During the hearing, the Petitioners argued that discharge of storm water into the conservation easement was not allowed by the terms of the recorded conservation easement and the applicable statute. However, the conservation easement on its face does not prohibit the discharge for this Project.

58. Section 704.06, Florida Statutes, which governs conservation easements, prohibits among others things, "[a]ctivities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife conservation habitat preservation." These statutory provisions are not violated by the Project, where the application and supporting material and Leon County's independent review and

analysis of the same demonstrate no adverse impacts to drainage and flood control.

Summary

59. The County's interpretations of the relevant provisions of the Code are reasonable and are not clearly erroneous.

60. The preponderance of competent substantial evidence in the record of this proceeding supports the determination of the Application Review Committee that the Project is consistent with all applicable provisions of the Comp Plan and Code.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Leon County Board of County Commissioners enter a final order approving the Project, subject to the conditions outlined by the Application Review Committee in its written preliminary decision dated April 27, 2018.

DONE AND ENTERED this 31st day of August, 2018, in  
Tallahassee, Leon County, Florida.



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FRANCINE M. FFOLKES  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of August, 2018.

ENDNOTE

<sup>1/</sup> Over the hearsay objections of the Petitioners, Respondents' Joint Exhibits 1, 3 through 20, 22, and 23 were admitted into evidence under the public records exception to the hearsay rule. Martin 530:9-539:17. Respondents' Joint Exhibits 92 through 116 were admitted into evidence under the public records exception to the hearsay rule. Ezzahaghi 580:19-581:10. Respondents' Joint Exhibits 24-25, 27 through 36, 63, 65 and 70 were also admitted into evidence over the Petitioners' hearsay objection under the public records exception to the hearsay rule. Ezzahaghi 585:1-586:18.

The public records exception to the hearsay rule applies to records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The exception encompasses two types of public records and reports: (1) records setting forth the activities of the office or agency; and (2) records of a public office or agency which set forth matters observed pursuant to duty imposed by law

as to which matters there was a duty to report. Philip Morris USA, Inc. v. Pollari, 228 So. 3d 115, 120 (Fla. 4th DCA 2017). The application materials (Respondents' Joint Exhibits 1 through 36 and 92 through 116) generally fall within the first category of the exception because they are records or reports of the activities of Leon County in carrying out its essential function to process and review applications in accordance with the Code including sections 10-4.203 and 10-7.403.

After review of the three issues identified by the Petitioners as the bases for their challenge, it is highly probable that the application materials are not subject to the hearsay rule at all, i.e. not hearsay. Foster v. State, 778 So. 2d 906, 914 (Fla. 2000) ("A statement may, however, be offered to prove a variety of things besides its truth."); T. 530:19-20. The Petitioners' assertions in this proceeding concern disputes about interpretation of Code provisions and the plain language on a plat. Thus, the application materials do not need to be offered for the truth of the matters asserted therein, but are admissible as evidence relevant to show that Palafox applied and Leon County reviewed the application and provided a preliminary approval.

To the extent that any application materials, e.g., storm water calculations and modeling, are hearsay, they are admissible under sections 120.569(2)(g) and 120.57(1)(c), Florida Statutes. Such information supplemented or explained the testimony of Leon County's engineer, Nawfal Ezzagaghi, P.E., regarding Leon County's independent evaluation of those calculations and modeling. See Bellsouth Advertising & Publishing Corp. v. Unemployment Appeals Comm'n, 654 So. 2d 292, 294 (Fla. 5th DCA 1995).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the clerk of the Board of County Commissioners of Leon County. See § 10-7.414(K), Leon Cnty. Code.



STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WYNONA C. BRASWELL and  
VICKIE GOODMAN,

Case No.: 18-002734

Petitioners,

vs.

PALAFIX, LLC, AND LEON COUNTY  
DEPARTMENT OF DEVELOPMENT SUPPORT  
AND ENVIRONMENTAL MANAGEMENT,

Respondents,

\_\_\_\_\_ /

**EXCEPTIONS TO THE RECOMMENDED ORDER**

A duly-noticed final hearing was held in this case by Administrative Law Judge, Francine Ffolkes (hereafter referred to as ALJ), on July 11 and 12, 2018, in Tallahassee Florida. The Petitioner, Wynona Braswell (hereafter referred to as Petitioner), by and through the undersigned counsel, files these Exceptions to the Recommended Order. This document will identify and restate the paragraph of the Recommended Order to which the Petitioner takes exception, and after each paragraph, the Petitioner will describe why the paragraph of the Recommended Order is not supported by competent and substantial evidence or is inconsistent with the Leon

County code or other applicable laws, and in support Petitioner states:

**The Application Materials are Hearsay and were not properly introduced into evidence**

The ALJ correctly defines the public records exception to the hearsay rule in her ruling. The hearsay exception for public records only applies to records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency. See Section 90.803(8). Every exhibit introduced by Leon County was prepared by a third party that did not testify at the hearing. Nothing was introduced into evidence at the hearing that were records, reports, or statements prepared by a public office or agency. The Petitioner properly objected to the introduction of the Developer's application through the staff members of Leon County.

The exception under Section 90.803(8), Florida Evidence Code, encompasses two types of public records and reports: (1) records setting forth the activities of the office or agency; and (2) records of a public office or agency which set forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report. Philip Morris USA, Inc. v. Pollari, 228 So. 3d 115, 120 (Fla. 4th DCA 2017). The ALJ does not deny that the application materials (Respondents' Joint Exhibits 1 through 36 and 92 through 116) were admitted into evidence as public records under

the public records exception to the hearsay rule. However, the lack of legal integrity in here explanation at the end of the Recommended Order is palpable. A professional engineer's stormwater plans and project designs are not records or reports of the activities of Leon County in carrying out its essential function to process and review applications in accordance with the Code including sections 10-4.203 and 10-7.403. The reports prepared by Leon County staff analyzing the application may fall within the exception, but the application materials are not in this category. The ALJ has clearly improperly applied the public records hearsay exception to every one of the Developer's exhibits introduced into evidence at the hearing.

It is truly ironic that the ALJ cites to Bellsouth Advertising & Publishing Corp. v. Unemployment Appeals Comm'n to support her change of position on this issue. After the hearing and the record is closed, she attempts to modify her ruling that, "it is highly probable that the application materials are not subject to the hearsay rule at all, i.e. not hearsay". Bellsouth Advertising & Publishing Corp., 654 So. 2d 292, 294 (Fla. 5th DCA 1995). As stated in Bellsouth by the Court:

If the referee had made a ruling on the hearsay offered in this case at the appropriate time, BAPCO may have been able to remedy the defect in its proof when the hearing was continued. In an evidentiary proceeding, it is unfair to a party who offers

evidence to have it received by the fact finder without objection from the adversary or without any limitation by the fact finder only to discover later that its evidence was secretly rejected.

Likewise, if the ALJ had stated the ruling in her Recommended Order timely during the hearing, the Petitioner could have responded, so the ALJ's cited case really stands for the proposition that the judge cannot alter her ruling after the hearing. This is unfair. The application materials were admitted into evidence with the limited proffer given by Leon County under the specific hearsay exception for public records. Nothing was said or done at the hearing. The Petitioner objected, and the evidence was admitted over the objection. The ALJ can alter or modify her hearing at this time.

The application materials, e.g., storm water calculations and modeling, are hearsay. These are not the records of the Leon County staff prepared by the Leon County staff. They are not admissible under sections 120.569(2)(g) and 120.57(1)(c), Florida Statutes. "For the rule to apply, the document must either set forth the activities of an office or agency or must relate to "matters observed pursuant to a duty imposed by law as to matters which there was a duty to report." University of North Florida v. Unemployment Appeals Com., 445 So. 2d 1062 at 1063 (Fla 1<sup>st</sup> DCA

1984); citing Sikes v. Seaboard Coast Line Railroad Company, 429 So.2d 1216, 1221 (Fla. 1<sup>st</sup> DCA 1983).

It is fallacious logic to say that the engineer can discuss hearsay application materials and convert them to admissible evidence. Second, Mr. Ezzagaghi did not discuss each of the exhibits, so again the ALJ's logic is fallacious. Third, the ALJ did not make this ruling at the hearing. Fourth, Leon County never made the request for admission of the application materials under the newly created theory of the ALJ. The application materials were admitted as public records not because Mr. Ezzagaghi discussed them or under 120.569(2)(g) or 120.57(1)(c). The ALJ can change the rules after the trial is over. See Bellsouth Advertising & Publishing Corp. v. Unemployment Appeals Comm'n, at 294. Everything that Leon County admitted under the public records exception to the hearsay rule was in error, and the application should be denied as a result.

#### **EXCEPTIONS TO FINDINGS OF FACT**

**8. The parcel contains a localized closed basin, wetlands and 100-year floodplain. Consistent with Comp Plan Conservation Element Policies 1.3.2 and 1.3.6, the areas of the site that contain environmentally sensitive features were previously placed in a perpetual conservation easement, and Palafox does not propose to disturb the area in the conservation easement.**

Petitioner takes exception with this finding of fact because Palafox proposes to discharge all of its stormwater into the conservation easement. Therefore, Palafox does propose to disturb the conservation easement, and the issue for the hearing was to the impact of the disturbance. In paragraph 32 of the Recommended Order, the ALJ acknowledges that the proposed system will discharge a minimum of 9,650 cubic feet of water which will alter the elevation of the water from 221.5 to 221.54. The Recommended Order is inconsistent on this point since the ALJ's own findings of fact clearly indicate that stormwater will be discharged into the wetland.

**28. SWMF #1 is located within the POA Drainage Easement on Lot 1, Block B, of the Plat and does not serve any part of the residential area of the subdivision. On its face, the prohibition in Plat Note 5 does not apply to the POA Drainage Easement. In addition, words such as "fences" and "driveways" more reasonably refer to residential areas of the Plat.**

Whether the prohibition in Plat Note 5 applies to the POA Drainage Easement is a legal issue and not a factual issue. It is a matter of interpretation and is subject to de novo review. No testimony, other than the testimony of the drafter of the plat, was provided at the hearing. Ms. Poole testified that when she drafted the language she did not intend for anything to be constructed in

any of the drainage easements. As noted by the ALJ in the hearing, the interpretation of the plat language is one of legal interpretation and should not be included as a finding of fact. It is improper for the ALJ to rule that the plat language is a legal issue then place in the Recommended Order as a finding of fact.

29. The application for the Project did not contain a new NFI. Leon County informed Palafox that the parcel had already been through the NFI process and held a valid and active EMP. As a matter of policy, Leon County does not require submission of a new NFI or new wetland delineation once previously delineated wetlands are under a perpetual conservation easement that is dedicated to Leon County as a preservation area.

One of the principal objectives of the Administrative Procedure Act is to prevent state agencies from adopting unpromulgated and often unwritten policies that are to be generally applied and that affect persons regulated by the agency or having a substantial interest in the policy. Another objective is to prevent agencies from changing such policies at will without notice or without following formal rule making procedures. Gar-Con Development, Inc. V. State, Dep't of Environmental Regulation, 468 So.2d 413 (Fla 1<sup>st</sup> DCA 1985). The Leon County Staff does not have the authority to prepare or draft policies for the Leon County Commission.

By the ALJ's own findings of fact, the developer has not analyzed the off-site impacts of the development and the application has not had an adequate study of the proposed revision. Arnaldo 413:10-414:11. The pending application has not updated the natural features inventory and environmental impact analysis since it was prepared in 2007. Arnaldo 414:12-3. The impact of constructing the project in SWMF #1 has never been analyzed by the developer. Arnaldo 414:24-415:3.

The Leon County Commission has no stated policy that a natural features inventory will not be required by a proposed new development. The Leon County Commission has never prepared any policy statement that would suggest that Leon County does not require an NFI. The policy is completely manufactured by staff members to provide a response in this proceeding, and such a policy is unenforceable and wholly without substance. See Gar-Con.

**30. Unlike the 2001 wetland delineation line submitted in the 2006 NFI and placed under the perpetual conservation easement, Kevin Songer's 2015 wetland delineation work for the Petitioners was neither checked by independent peer review nor confirmed by any state or local environmental regulatory agency. Mr. Songer's 2015 wetland delineation does not represent a recognized wetland jurisdictional line.**



Mr. Songer is the only person that has evaluated the wetland jurisdictional boundary since it was performed originally in 2001 by the same Mr. Songer. Mr. Songer's new wetland delineation was provided to Leon County when it was completed in 2015. Leon County had the delineation for over three years and knew that the affected property owners claimed that the wetland had expanded. Leon County did nothing.

It would take nominal effort for the Leon County staff to send a qualified staff person to the site to evaluate the claims of the affected parties. The markings of the expanded wetland are clearly identifiable through a simple field visit. Leon County has had over 4 years to determine the truth on this issue, and according to the efforts of the Leon County staff, it is clear that they don't care!

Fundamentally, the wetland delineation used by Leon County does not comply with applicable law. Leon County's rule requires compliance with Section 10-4.322 dealing with wetlands which has not occurred. There is no exception to this rule.

Specifically the rule requires a wetland jurisdiction determination to comply with Chapter 62-340, FAC. and Sec. 373.421, Florida Statutes. Sec. 373.421, Florida Statutes, establishes that, "A formal determination is binding for a period not to exceed 5 years as long as physical conditions on the property do not

change, other than changes which have been authorized by permit pursuant to this part, so as to alter the boundaries of surface waters or wetlands, as delineated in subsection (1)." Leon County has accepted a delineation in this case that is more than 17 years old. This does not comply with any applicable law.

The same scientist that performed the delineation in 2001 was called as a witness by the Petitioner. He was requested to reset the jurisdictional boundary and testified that the wetland had expanded by as much as 35 feet toward the applicants development. Therefore, the jurisdiction determination submitted by the applicant is incorrect, outdated, and is rejected as complying with the requirements of the code.

The rule for the wetland boundary determination is specific. Section 10-4.322(b) states, "Determination of the actual extent of a wetland area on a development site shall be made by a qualified professional retained by the applicant." The Developer failed to meet the requirements of this section since Developer never hired anyone to do the delineation. It relied on the files from the original development and completely failed to account for changes caused by that new construction.

**32. For volume control, the closed basin standard requires the runoff volume in excess of the pre-development runoff volume to be retained for all storm events up to a 100-year, 24-hour duration**

storm. That difference is approximately 9,650 cubic feet. The closed basin for which retention must be demonstrated includes the conservation easement wetlands, and modeling demonstrated a change in elevation from 221.51 to 221.54 over approximately six acres. This difference in elevation is retained in the wetlands up to and including the 100-year, 24-hour storm. The post-development elevation of 221.54 does not approach the 223.57 "pop-off" elevation of the wetlands.

Petitioner takes exception with this finding of fact because the new stormwater basin will retain 40,000 cubic feet less than Stormwater Basin #1. This is undisputed fact. However, it should be noted that the ALJ determined that facility will discharge an additional 9,540 cubic feet to the Petitioner's property. Petitioner takes exception with this finding to the extent that the ALJ's Finding of Fact supports the conclusion that the Petitioner has the vested property right to use land that it does not own. The ALJ made it clear that the developer owns 1/3 of the conservation easement and that the Association owns 2/3 of the conservation easement. The finding should include the fact that the developer is using the Petitioner's land for the discharge of their stormwater.

**33. SWMF #1 was designed to retain runoff from the first 500 feet of Palafox Lane up to the 100-year, 24-hour storm. The**

evidence established that SWMF #1 was "over-designed" because of circumstances in 2006 to 2007, which may have included different Code requirements and the wishes of the original developer.

The finding of fact that SWMF #1 is over-designed is not supported by competent evidence and is not relevant. When the subdivision was developed and the Petitioners purchased their properties, SWMF #1 was already constructed and the rates of stormwater discharge were set by the design of the systems. The facts show that the Developer's proposal would discharge stormwater onto the Petitioners' land every time it rains. The developer is using someone else's land to store his stormwater. This is fundamentally wrong and must be stopped. The Developer does not possess the property rights to use the adjoining property for the storage of its stormwater.

**37. The evidence demonstrated that the Project's proposed storm water system will not significantly impact the conservation easement wetlands and will not cause flooding or other adverse impacts to downstream areas.**

No witness testified to support this finding of fact. Leon County argued that because the amount of increase was so small they did not believe it would have much impact, but no one from Leon County was called as a qualified expert on the issue of impacts to the wetlands and could not substantiate this finding of fact. The

condition of the Conservation Easement requires the property to be maintained in its "natural condition." The dumping of an additional 9540 cubic feet of stormwater into the conservation easement is not keeping it in its natural condition as a matter of law.

#### EXCEPTIONS TO CONCLUSIONS OF LAW

47. The three primary issues raised by the Petitioners involve interpretation and application of the Code. Other arguments raised by the Petitioners during the hearing, such as allegations of trespass, use rights pursuant to drainage easements or storm water facilities reflected on the Plat, and compliance issues surrounding the previously approved and constructed storm water facilities in the Palafox Preserve Subdivision, are not issues within the scope of this proceeding.

The ALJ makes this statement, and these issues are fundamentally in the purview of Leon County Code. The proposed development plan is inconsistent with the approved plat which designates all of Lot 1 Block B as a drainage easement that specifically prohibits any permanent structures within the drainage easement. The developer in this matter is restricted by the plat for the subject property and the plain language of the plat.

The approval of the development plan is a violation of plat Note 5. Note 5 states:

The construction of permanent structures, including fences but excluding driveways, by the Property Owner is prohibited within drainage and utility easements.

As noted at the hearing, the Plat is to be legally interpreted by the ALJ based on the plain language of the document. Now the ALJ takes the position that the rights of the parties to use drainage easements on the plat is not within her jurisdiction. She specifically stated:

Other arguments raised by the Petitioners during the hearing, such as allegations of trespass, use rights pursuant to drainage easements or storm water facilities reflected on the Plat, and compliance issues surrounding the previously approved and constructed storm water facilities in the Palafox Preserve Subdivision, are not issues within the scope of this proceeding.

Therefore, the critical issue of whether the Developer has the necessary property right to discharge and store water on the Petitioner's property has never been determined by the ALJ.

The fact is that the Developer does not have a drainage easement to discharge onto the Petitioners' land. That right does not exist, and Leon County's code clearly requires an easement. The code addresses two types of stormwater easements. The first is "on-site easement", and Sec. 10-4.304(1)(a) requires all new development shall include drainage easement as necessary to ensure

that parcels adjacent and uphill have access to adequate stormwater conveyances. The second is "off-site easements" the rule states that if a newly concentrated flow or increased concentration of stormwater is discharged off-site into any conveyance other than a public drainage conveyance, or an approved watercourse (having defined banks), wetland, or water body capable of sustaining the effects of such a discharge, an adequate easement shall be obtained for the off-site conveyance. It is undisputed that Lot 1 Block B does not possess an easement to discharge to the conservation easement. It is also undisputed that Lot 1 Block B does not possess a drainage easement to discharge stormwater onto Block A.

It is important to note that area between the proposed project and the residential homes is not only a wetland - it is also a dedicated conservation easement with limitations on its use. Conservation Easement is defined in relevant part, "the possessor of the land from which the easement issues is prohibited from altering the topography or vegetative cover of the area subject to the easement." Similar to what is stated as the conditions of the Conservation Easement discussed above, "The purpose of such an easement is to ensure that the owner or the servient land, and his agents, assigns, and successors in interest, maintain the area subject to the easement predominantly in a natural, scenic, open, or wooded condition."

Mr. Ezzagaghi testified that because the area in the center of the property was a wetland, that Lot 1 Block B could discharge its stormwater to that wetland. There are many issues with that theory. First, the Developer does not own the entire wetland, and without a drainage easement to use the Association's property, the use of the neighbor's land to store stormwater is inappropriate. Second, the definition of the conservation easement, and the specific conditions in the easement, establish that the conservation easement can not be altered. Mr. Ezzahaghi continued to argue that it was only a little change in the wetland and saying it would only change it a little bit. The code prohibits any addition to the volume of stormwater to the conservation easement. The evidence shows that the new project will discharge over 40,000 cubic feet of additional stormwater to the conservation easement. This is a violation of the terms of the conservation easement and violation of the applicable code.

SWMF #1 was designed as a retention pond meaning that it would hold up to the 100 year 24 hour storm event without discharging to the wetland. This has been used for this purpose since it was fully constructed and approved in August 2007. Exhibit 70. The developer now wants to fully develop the drainage easement on Lot 1 Block B and discharge from that basin into the wetland including land owned by the Association. Sec. 10-4.201 requires that every permit issued by Leon County is issued with the condition that it



comply with all other local agency permits. The construction of the proposed condominium development on land designated as a drainage easement on the plat and other development permits violates those orders since the drainage easement strictly prohibits construction. Therefore, Leon County's own development order (the plat) does not permit construction on Lot 1 Block B.

The issue of trespass can also properly be considered by Leon County. Leon County requires an applicant to possess the necessary stormwater easements to be entitled to discharge water off site. In this case, the developer seeks to dump its water on the adjacent property that it does not own.

**49. The Code requires an NFI prior to an application for site and development plan approval. See § 10-4.202, Leon Cnty. Code. As part of this requirement, preservation areas, including wetlands, were mapped and inventoried, and were placed in a perpetual conservation easement to ensure such areas are protected and preserved, including a setback. See §§ 10-4.202, 10-4.322, Leon Cnty. Code.**

It is undisputed that the Developer did not conduct and present a Natural Features Inventory as discussed in Section 10-4.202. The application used old data and reports that were prepared in 2007 and earlier. The Developer presented no new analysis of the site in any regard to make its application. It is

also undisputed that the applicant submitted the NFI map with no narrative. Additionally, the NFI map was prepared well before the houses, roads, and stormwater ponds were built, so no data has ever been collected on the functioning systems that are constructed.

The application in this matter required the many parts mandated by Section 10-4.202. The NFI required that the NFI must be performed by a qualified professional, must include endangered and threatened species, must include species of special concern, and must include wildlife corridors. Leon County required none of this.

Section 10-4.202 required discussion of population sizes. It required a narrative on plant communities. This site contains a conservation area that was established since the NFI map, and the applicant failed to update the NFI in that regard. The NFI is legally deficient of these required items and does not comply with the rule.

Section 10-4.202(a)(2) states that the Developer shall propose measures to mitigate the adverse effects of the development on conservation areas, and the Developer put forth no such measures. Section 10-4.202(a)(2)(1) requires that wetlands, such as the conservation easement in this case be protected and to have a 50 foot setback from the wetland boundary. The Developer failed to comply with this requirement

This rule requires compliance with Section 10-4.322 dealing with wetlands which has not occurred. Specifically the rule requires the wetland jurisdiction determination to comply with Chapter 62-340, FAC. and Sec. 373.421, Florida Statutes. Sec. 373.421, Florida Statutes, establishes that, "A formal determination is binding for a period not to exceed 5 years as long as physical conditions on the property do not change, other than changes which have been authorized by permit pursuant to this part, so as to alter the boundaries of surface waters or wetlands, as delineated in subsection (1)." Leon County has accepted a delineation in this case that is more than 17 years old. This does not comply with any applicable law.

The same scientist that performed the delineation in 2001 was called as a witness by the Petitioner. He was requested to reset the jurisdictional boundary and testified that the wetland had expanded by as much as 35 feet toward the Developer's proposed development. Therefore, the jurisdiction determination submitted by the Developer is incorrect, outdated, and is rejected as complying with the requirements of the code.

The rule for the wetland boundary determination is specific. Section 10-4.322(b) states, "Determination of the actual extent of a wetland area on a development site shall be made by a qualified professional retained by the Developer." The Developer failed to meet the requirements of this section since Developer never hired

anyone to do the delineation. It relied on the files from the original development and completely failed to account for changes caused by that new construction. Moreover, Leon County attempted to impeach the very same scientist that they used to conduct the wetland delineation in 2001, so if Mr. Songer is not a credible witness it begs the question of why Leon County would rely on a 17 year old delineation from the same scientist.

Continuing to review the requirements of Section 10-4.202(a)(2)(1), the rule requires, "A minimum 50-foot vegetated buffer must be maintained from the jurisdictional boundaries of all wetlands." Witnesses for Leon County testified that the setback of 50 feet was from the boundary of the conservation easement once that dedication was accepted by Leon County; in effect Leon County stopped requiring a set back from wetlands once the delineation was done once. No such provision under the Leon County code nor state law seems to support staff's interpretation. The code unambiguously establishes that the 50 foot buffer is from the jurisdiction wetland boundary, so the proposed plan violates that requirement by more than 35 feet in one area and over 28 feet in another. The evidence establishes that the proposed development including the retaining wall will be built in the 50 foot buffer in violation of the required setback. For these reasons, the proposed plan violates the code requirements for a 50 foot buffer from the jurisdictional wetland line.

It is also an undisputed fact that Lot 1 Block B is located in a Closed Basin as previously determined by Leon County. This places limitations on development, but it also kept Lot 1 Block B out of the Lake Jackson basin. As property in a closed basin, the Developer must comply with 10-4.202(a)(2)(b)6 related to development in closed basins. This provision states that, "Development activity within closed basins must meet the standard outlined in Section 10-4.301.

First, Section 10-4.301(3) states the standards for development in closed basins. The rule applies to any basin that has been identified by previous analysis which is true for the instant case. The rule could not be more clear. Section 10-4.301(3)(b) states, "Runoff volumes within regulated closed basins in excess of the pre-development runoff volume shall be retained for all storm events up to a 100 year, 24 hour duration storm." "Retention shall mean the collection and storage of stormwater without subsequent discharge other than through percolation, evaporation, or transpiration." Sec. 101, Definitions.

The SWMF for the new development is designed with a filter mechanism that will not meet the total retention requirement, since its design depends upon discharge after filtration of the volume that it is designed to treat. The system is only designed to treat the volume from the first 1-1/8<sup>th</sup> inches of runoff from the development site (the county minimum standard under 10-

4.103(2)(iii), detention with filtration). Environmental staff has applied the wrong section of the stormwater code for the required design feature. Again, Leon County was very clear that the proposed system was detention with filtration where nearly all of the stormwater would be discharged to the conservation easement after it received a measure of treatment. "Detention shall mean the collection or temporary storage of stormwater for subsequent gradual discharge." Sec. 101, Definitions. The rule requires retention of the stormwater in a closed basin, the original development was designed as a retention facility, and now the Developer wants to have detention and discharge its stormwater to a conservation easement that it only partially owns. This proposal does not comply with the requirements of the code as discussed above where retention is mandated, and the application should be denied.

**50. Leon County's interpretation that the Code does not require a Developer to submit a new NFI for a development on a site with an existing NFI and a recorded perpetual conservation easement is reasonable. Private parties and Leon County have relied on the NFI and perpetual conservation easement for development and regulation of the Palafox Preserve Subdivision.**

The Petitioner adopts and incorporates the Exception to Paragraph 49 stated above. Additionally, it should be noted that

Leon County did not place a complete NFI into evidence even if it was hearsay. The NFI did not meet the standards as set forth in the Leon County Code. The Leon County Code does not relax its requirements for an NFI simply because the subject property contains a conservation easement. This is again an unwritten policy not supported by any competent and substantial evidence. Gar-Con Development, Inc. V. State, Dep't of Environmental Regulation, 468 So.2d 413 (Fla 1<sup>st</sup> DCA 1985).

**51. No statute, ordinance, rule or regulation requires a wetland to be re-delineated after it has been identified and placed in perpetual preservation under a conservation easement. The Petitioners' argument would lead to the absurd result of re-surveying and re-recording allegedly "perpetual" conservation easements every time a lot was developed within the Plat.**

The rule for the wetland boundary determination is specific. Section 10-4.322(b) states, "Determination of the actual extent of a wetland area on a development site shall be made by a qualified professional retained by the applicant." The applicant failed to meet the requirements of this section since applicant never hired anyone to do the delineation. It relied on the files from the original development and completely failed to account for changes caused by that new construction.

The original wetland delineation that was used by Evergreen and accepted by Leon County was performed on October 15, 2001. Pet. Ex. 9; Songer 244:24-245:19. Mr. Songer observed changes in the site since the original delineation was performed including the construction of the road, the SWMF's, the houses, the removal of trees, and changes in the vegetation. Songer 210:17-211:11. Mr. Songer testified that his work delineating the wetland complied with the requirements of Florida Statutes 373 in performing the new delineation, and based on his experience, he witnessed a clear break in the upland/wetland lines. Id. The construction of the road and other improvements impacted the boundary of the wetland as depicted in the 2001 delineation. Poole 162:7-14. The wetland delineation performed in 2015 established that the wetland line had expanded diameter wise from the 2001 line. Songer 214:25-215:12. The construction of the roads, houses, and additional construction on the site pressed down and built up which restricted the lateral flow of the water in the area. Songer 216:4-14. The fact that a wetland jurisdiction line moves is fairly common. Songer 217:15-218:1. Mr. Songer also observed other factors that indicated that the wetland boundary for the area had expanded. Songer 218:19-219:13. The wetland had also expanded toward the 19 residential homes and toward the adjacent offices. Songer 220:4-9.

**54. The Code allows discharge of post-development runoff to a wetland under circumstances where it is "of sufficient capacity**



at the time of discharge to sustain the effects of, and to convey such discharges, without detriment to the continued natural function of the resource." § 10-4.301(6), Leon Cnty. Code. The Code's rate provisions do not apply "to approved discharges directly into water bodies, watercourses, wetlands and constructed conveyances which are of sufficient size and capacity to receive the discharges without significant adverse effects." § 10-4.302(1), Leon Cnty. Code. Also it must be demonstrated that "[t]he stormwater discharge shall not cause flooding or other adverse impacts for the downstream areas." § 10-4.302(2), Leon Cnty. Code.

It is an undisputed fact that the change in the SWMF from a retention basin to detention with filtration will add up to an additional 40,000 cubic feet of stormwater to the conservation easement that lies on the border of the applicant's land and the Association's land. The conservation easement contains several provisions impacted by this decision.

The following activities are prohibited within the Conservation Easement:

5. Surface use except for purposes that permit the land or water area to remain predominately in its natural condition.
6. Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife conservation habitat preservation.

7. Acts or uses detrimental to such retention of land or water areas.

Inserting an additional 40,000 cubic feet of stormwater into a basin does not permit the conservation area to remain in its predominately natural condition. Permitting the construction of 36 homes, parking lots, and other features, and discharging all of the stormwater to conservation easement is not natural.

Although the County takes the position that it will only raise the water level in the conservation easement by a small amount, no analysis has been performed to determine the full lateral expansion of the wetland that might be created by an additional 40,000 cubic feet of stormwater. No analysis of how items 5, 6, and 7 will be impacted has been conducted. The language of the 5, 6, and 7 are strictly construed in favor of the conservation easement, so natural condition means no outside impacts, detrimental to drainage would prevent the additional volume of stormwater, and the addition of stormwater to the basin is potentially damaging to the natural system. Leon County required no analysis to be conducted on how an additional 40,000 cubic feet will impact the conservation easement.

The conversion of SWMF #1 from a retention basin, that essentially holds all of the stormwater and prevents discharge to the conservation easement up to the 100 year 24 hour storm, to a detention basin, that discharges nearly all of the stormwater to

the conservation easement, would not allow the conservation easement to remain in its natural state.

**56. The Project as proposed does not violate section 10-4.304 of the Code regarding storm water easements because the Code authorizes discharges into a wetland area capable of sustaining the effects of such discharge without the need to acquire an easement.**

The code addresses two types of stormwater easements. The first is "on-site easement", and Sec. 10-4.304(1)(a) requires all new development shall include "drainage easements as necessary to ensure that parcels adjacent and uphill have access to adequate stormwater conveyances". The second is "off-site easements" the rule states that if a newly concentrated flow or increased concentration of stormwater is discharged off-site into any conveyance other than a public drainage conveyance, or an approved watercourse (having defined banks), wetland, or water body capable of sustaining the effects of such a discharge, an adequate easement shall be obtained for the off-site conveyance. It is undisputed that Lot 1 Block B does not possess an easement to discharge to the conservation easement. It is also undisputed that Lot 1 Block B does not possess a drainage easement to discharge stormwater onto Block A.

It is important to note that area between the proposed project and the residential homes is not only a wetland - it is also a

dedicated conservation easement with limitations on its use. Conservation Easement is defined in relevant part, "the possessor of the land from which the easement issues is prohibited from altering the topography or vegetative cover of the area subject to the easement." Similar to what is stated as the conditions of the Conservation Easement discussed above, "The purpose of such an easement is to ensure that the owner or the servient land, and his agents, assigns, and successors in interest, maintain the area subject to the easement predominantly in a natural, scenic, open, or wooded condition."

Mr. Ezzagaghi testified that because the area in center of the property was a wetland, that Lot 1 Block B could discharge its stormwater to that wetland. There are many issues with that theory. First, the applicant does not own the entire wetland, and without an drainage easement to use the Association's property, the use of the neighbor's land to store stormwater is inappropriate. Second, the definition of the conservation easement, and the specific conditions in the easement, establish that the conservation easement can not be altered. Mr. Ezzahaghi continued to argue that it was only a little change in the wetland and saying it would only change it a little bit. The code prohibits any addition to the volume of stormwater to the conservation easement. The evidence shows that the new project will discharge over 40,000 cubic feet of additional stormwater to the conservation easement.

This is a violation of the terms of the conservation easement and violation of the applicable code.

**57. During the hearing, the Petitioners argued that discharge of storm water into the conservation easement was not allowed by the terms of the recorded conservation easement and the applicable statute. However, the conservation easement on its face does not prohibit the discharge for this Project.**

Conservation Easement is defined in relevant part, "the possessor of the land from which the easement issues is prohibited from altering the topography or vegetative cover of the area subject to the easement." Similar to what is stated as the conditions of the Conservation Easement discussed above, "The purpose of such an easement is to ensure that the owner or the servient land, and his agents, assigns, and successors in interest, maintain the area subject to the easement predominantly in a natural, scenic, open, or wooded condition." The use of the conservation easement for stormwater discharge and storage is not permitted by the terms of the conservation easement and applicable statute.

WHEREFORE, the Petitioner respectfully requests that the County Commission deny the development application submitted by Palafox, LLC.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been served on the following addressee(s) by electronic mail this 20th day of August, 2018.

/s/ Jefferson Braswell

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