

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAKE NELLIE CROSSING, LLC,

Petitioner,

vs.

Case No. 21-2397

LAKE COUNTY, FLORIDA,

Respondent.

SPECIAL MASTER'S RECOMMENDATION TO THE  
LAKE COUNTY BOARD OF COUNTY COMMISSIONERS

On December 22, 2021, a land use and environmental dispute resolution proceeding was, pursuant to notice, convened by Zoom conference before E. Gary Early, an Administrative Law Judge of the Division of Administrative Hearings, serving as Special Magistrate pursuant to section 70.51, Florida Statutes.

APPEARANCES

For Petitioner: Cecelia Bonifay, Esquire  
Thu Pham, Esquire  
Akerman LLP  
420 South Orange Avenue, Suite 1200  
Orlando, Florida 32801

For Respondent: David Langley, Esquire  
Lake County Attorney's Office  
315 West Main Street  
Tavares, Florida 32778

A number of non-party participants appeared at the Zoom conference and were permitted to offer documents and testimony pursuant to limitations

established in the November 4, 2021, Notice of Hearing Before a Special Magistrate.

STATEMENT OF THE ISSUES

The information-gathering hearing was convened for the purpose of determining the impact of Lake County’s Order denying a rezoning application (“Rezoning”) for the Lake Nellie Crossing Planned Unit Development, Lake County Case No. RZ-20-39-23 (“PUD”), whether the denial of the rezoning application was unreasonable or unfairly burdened the real property subject to Petitioner’s rezoning application, and whether some modification of Petitioner’s proposed use of the property or adjustment to the denial of the rezoning application could be reached.

PRELIMINARY STATEMENT

On July 6, 2021, the Lake County Board of County Commissioners (“BOCC”) entered an Order denying the rezoning application for the Lake Nellie Crossing PUD. Thereafter, on August 3, 2021, Lake Nellie Crossing, LLC (“Lake Nellie”), filed a Petition for Section 70.51, Florida Statutes, Relief with Respondent, Lake County, Florida (“Lake County”).

An information-gathering and dispute resolution proceeding was scheduled for September 16, 2021. Prior to the commencement of the proceeding, written comments were received from Lake County residents Dean and Donna Bingaman; Marcia and Thomas Cerzan; Kevin and Linda Gilbert; and Peter Stauder. The parties filed their Stipulated Facts on September 15, 2021.

The proceeding was convened as scheduled. At the commencement of the proceeding, the parties announced that a tentative resolution had been reached, which included a draft Ordinance 2021-XX for consideration by the

BOCC. By the afternoon of September 16, 2021, the parties filed an executed Settlement Agreement. Pursuant to Lake County Land Development Code (“LDC”) section 14.17.22.B, an abbreviated Special Magistrate’s Recommendation was entered and submitted to Lake County.

On October 29, 2021, Lake County filed a Motion to Re-open Case based on the denial of the proposed Settlement Agreement by the BOCC. All procedural issues having been met by the parties, the case was re-opened, and the information-gathering proceeding was scheduled for December 22, 2021. On December 14, 2021, a Procedural Order was entered that established the order of presentation for the parties and public participants.

In accordance with the notice, the information-gathering hearing was held on Wednesday, December 22, 2021, by Zoom conference. Given the failure of the previous efforts at settlement, the mediation and facilitation phase of the proceeding was dispensed with, and the case proceeded with the information gathering phase. *See* LDC §§ 14.17.15 through 14.17.17.

At the information-gathering hearing, Petitioner, Lake Nellie, presented the testimony of Alex Stringfellow, who was found to have the knowledge, skill, experience, training, or education to qualify as an expert in urban planning; and Mohammed Abdallah, who was found to have the knowledge, skill, experience, training, or education to qualify as an expert in traffic planning. Lake Nellie’s Exhibits A through S were received in evidence.

Respondent, Lake County, presented the testimony of Janie Barron, who was found to have the knowledge, skill, experience, training, or education to qualify as an expert in land use and zoning; and Jeff Earhart, P.E., who was found to have the knowledge, skill, experience, training, or education to

qualify as an expert in traffic planning and engineering. Lake County's Exhibits A through E were received in evidence.

The following non-parties were allowed to participate and testify at the proceeding:<sup>1</sup> Donna Bingaman; Peter G. Stauder; Forrest Harvey; Kim Cudmore; and Karen Rodriguez.

The record was held open until January 5, 2022,<sup>2</sup> to allow the parties to provide proposed recommendations. On January 5, 2022, Lake County requested an additional day within which to file a proposed recommended order. That Motion is granted, and the date for closing the record has been extended to January 6, 2022. Both parties thereafter timely submitted proposed recommendations which have been considered in the development of this Recommendation to the Lake County Board of County Commissioners.

#### SUMMARY OF THE TESTIMONY AND EVIDENCE

##### Stipulated Facts

1. The subject property, parcel identification numbers 14325000100001300 (alternate key 1813107), 1325000200005000 (alternate key 3863032), and 132325000100000600 (alternate key 1405351) (collectively, "Property"), is approximately 117.05 acres in unincorporated Lake County, and is subject to Lake County's Comprehensive Plan ("Comprehensive Plan") and LDC.

2. Petitioner, Lake Nellie, is an "Owner," as the term is defined under section 70.51(2)(d). Lake Nellie has a legal or equitable interest in the

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<sup>1</sup> Written statements submitted by Dean and Donna Bingaman; Marcia and Thomas Cerzan; Kevin and Linda Gilbert; and Peter Stauder prior to the September 16, 2021, hearing were received in evidence and are part of the record of this proceeding.

<sup>2</sup> The Procedural Order initially set December 28, 2021, as the date for filing proposed recommendations and closing the record. The parties subsequently agreed to keep the record open until January 5, 2022, to file their proposed recommendations.

Property and is the applicant for the Lake Nellie Crossing PUD, Case No. RZ-20-39-23.

3. The Rezoning Application involves a request to develop 102 residential units on 117.05 acres.

4. The Property has a future land use designation of Rural Transition and zoning designation of Urban Residential District (R-6).

5. The proposed Rezoning is consistent with all elements of the Comprehensive Plan.

6. The future land use designation, zoning, and existing uses for the properties immediately adjacent to the Property are:

<u>Direction</u>	<u>Future Land Use</u>	<u>Zoning</u>	<u>Existing Use</u>
North	Rural Transition and Urban Low Density	PUD and R-6	Residential – Single-Family Dwelling Units (Vista Grande Phases II and III, and Highland Groves Phase III consisting mostly of lot sizes approximately 0.33 acres)
South	Rural Transition and Rural	PUD and R-6	Residential – Single-Family Dwelling Units (Lake Nellie Shores, Vista Grande Phase I, and Hills of Lake Louisa consisting of lot sizes ranging between 0.2+/- to 0.5 +/- acres)
East	Rural Transition	CFD and R-6	Worship Hall (Liberty Baptist Church) and Residential - Single-Family Dwelling Units (Beverly Estates, Aurora Homes, and Saw Mill Run consisting of lot sizes approximately 0.6 +/- acres) adjacent to Lakeshore Drive
West	Rural Transition	AR and A	Residential – single-family dwelling units

7. The Rural Transition land use allows a maximum residential density of one (1) dwelling unit per one (1) net buildable acre, provided that the subdivision is developed as a clustered Rural Conservation Subdivision utilizing a PUD zoning, and that at least fifty (50) percent of the net buildable area is dedicated in perpetuity as common open space with a conservation easement.

8. The proposed development of the Property (102 units on 117.05 acres), as depicted in the Concept Plan (the “Project”), meets the Comprehensive Plan’s density requirements and 50 percent common space requirement for the Rural Transition future land use designation.

9. The development is consistent with the concept of orderly and logical development pattern. The proposed development is of similar character and development pattern as existing single-family developments in the area, as previously approved by the County, and consistent with the immediately surrounding parcels, also zoned R-6 and PUD with densities equivalent to or in excess of the proposed project. The surrounding development ranges from two dwelling units per acre all the way down to 1.1 dwelling units per acre. The proposed development is one dwelling unit per acre.

10. The Rezoning Application satisfies the procedural requirements of LDC section 14.03.00.

11. The general trend in Lake County (based on the University of Florida, College of Liberal Arts and Sciences, Bureau of Economic and Business Research, Florida Estimates of Population 2020) is a 23.5 percent population increase over a ten-year period (2010-2020), resulting in an increased demand for additional housing of all types.

12. The County’s Public Works Department has reviewed the traffic study provided by Lake Nellie for the proposed development and has concluded that the relevant segment of Lakeshore Drive will not be over capacity.

13. Lakeshore Drive appears to have reached a steady state of traffic volume. The historical traffic data indicates that the traffic volume has

stayed at a steady rate. The traffic volume for Lakeshore Drive has flattened or decayed.

14. Per Lake County's policy, roadways can function at a Level of Service ("LOS") D.

15. Lakeshore Drive is currently LOS D.

16. The traffic analysis, included as Exhibit I in the Petition, complied with Lake County's requirements for traffic reports necessary for consideration of rezoning applications.

17. The posted speed limit for Lakeshore Drive is 40 miles per hour.

18. The empirical traffic data for Lakeshore Drive supports a conclusion that, by and large, the public is abiding by the speed limit on Lakeshore Drive. There is no empirical data to support a conclusion that Lakeshore Drive is designed such that it is more conducive for speeding.

19. The empirical data supports a conclusion that most of the accidents on Lakeshore Drive resulted from human errors and other external influences such as drugs and alcohol.

20. There is data to support a conclusion that the proposed development will not contribute to any alleged speeding problems or cause increased accident risks.

21. A four-foot paved shoulder is proposed to be constructed on Lakeshore Drive along the entire length of the Property as part of the off-site improvements for the proposed development in addition to the construction of a left turn lane. The construction of the four-foot paved shoulder and left turn lane enhance safety conditions on this section of Lakeshore Drive.

22. The Lake County School Board has indicated that there is sufficient school capacity to accommodate the proposed development.

23. Central water is available for the proposed development.

24. Sewage created from the proposed development will be treated utilizing a "Distributed Wastewater Treatment System" ("DWTS"), which is a newly-defined category of "Domestic Wastewater Treatment Facility,"

recently approved (in 2019) by the Florida Department of Environmental Protection (“FDEP”). A DWTS consists of multiple individual “Distributed Wastewater Treatment Units” (“DWTU”), each of which are “treatment plants” (as defined in Florida Administrative Code Rule 62-600.200(69)) that treat domestic waste to secondary treatment standards, and all of which are (1) commonly owned, (2) wirelessly networked together and individually (remotely) controllable (e.g. though a SCADA system), (3) operated and maintained by licensed wastewater operators, and (4) subject to the standard inspection, monitoring, and reporting requirements in chapter 62-600.

25. The DWTS is not an individual septic tank system. It is functionally equivalent to a central wastewater treatment system, utilizing similar technology as that employed by municipal wastewater treatment plants, and is regulated by FDEP as a central wastewater treatment system. The individual DWTU processes the wastewater via an activated sludge sequencing batch reactor process to remove approximately 90 percent of the nitrogen. DWTUs are much more efficient than an individual septic system, which uses an anaerobic process and is only capable of removing approximately 30 percent of the nitrogen from the wastewater.

26. LDC section 14.03.03(j), which states that the BOCC’s decision may be based on “[a]ny other matters that may be deemed appropriate by the Lake County Planning and Zoning Board or the Board of County Commissioners, in review and consideration of the proposed rezoning,” does not contain any objective standards or criteria.

27. Specific technical details related to alleged issues from pesticides or fertilizers or water load for the adjacent water body, as well as roadway design details and resultant traffic impact, are required to be submitted as part of a Preliminary Plat Review, not for a rezoning.



### Facts Adduced at the Hearing

28. As acknowledged by the parties, the sole basis for denial of the request for rezoning is related to the issue of transportation safety as affected by the addition of vehicular traffic from the 102 proposed residential units.

### Compliance, Consistency, and Compatibility

29. The Property was previously used for agriculture, likely citrus production. It has not been used for agriculture for many years, with the most recent evidence of such use being a 2004 aerial photograph that depicts trees planted in rows. Such are now long gone. Under current residential zoning, sustained and continuous agricultural use would be allowed, even though non-conforming. However, after 15 years without active agricultural use, it is no longer an allowable use of the Property. The most persuasive evidence indicates that the only currently allowable use of the Property is residential.

30. The Comprehensive Plan provides for three allowable development density alternatives under the Rural Transition future land use designation: a) one dwelling unit per five acres, with no open space requirement; b) one dwelling unit per three net buildable acres with 35 percent of the property dedicated to open space; and c) one dwelling unit per net buildable acre with 50 percent of the property dedicated to open space.

31. The Project meets the Comprehensive Plan requirement of a maximum residential density of one dwelling unit per net buildable acre, developed as a clustered Rural Conservation Subdivision utilizing a PUD zoning, and with the 50 percent open space being perpetually protected with a conservation easement. Furthermore, the open space will be subject to the Plat.

32. Total acreage of the Lake Nellie property is 117 acres. Of that, 102 acres “are high and dry.” The remaining 15 acres, which are open water or wetlands, are preserved from development, but are not included as “open

space” for density calculations.<sup>3</sup> Thus, under the one dwelling unit per net buildable acre, the Project is limited to a maximum of 102 dwelling units.

33. All development is to be between Lakeshore Drive and Royal Vista Drive. Approximately 32 acres of the open space land, in a single block east of Royal Vista Avenue, will be used for passive open space, and will be maintained in a native vegetative state. No development will occur on the Property east of Royal Vista Avenue.

34. The residential subdivisions that surround the Property were constructed prior to the adoption of Lake County’s 2011 Comprehensive Plan. The surrounding developments are, for the most part, of a substantially higher density than the Project. For example, the three phases of Vista Grande, taken together, consist of 232 dwelling units on 113.74 acres, a gross density more than twice that of the Project. *See Lake Nellie Ex. B, page 2 of 12, para. C.*

35. Other than the smaller Highland Groves PH III development (53 percent open space, much of which is open water), the residential subdivisions that surround the Project have substantially less open space, ranging from no open space to 41 percent open space. *See Lake County Ex. D.*

36. The buffers proposed by Lake Nellie match those of the contiguous developments to its north, south, and east.

37. The Project includes five lakeview lots. Those lots do not have private access to Little Lake Nellie. Thus, the Project will not include docks or shoreline structures.

38. Use of native vegetation associated with stormwater facilities was discussed by Mr. Stringfellow and determined to be beneficial where practical.

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<sup>3</sup> Wetlands and open water areas in developments surrounding the Project have previously been considered by Lake County as open space. Thus, for example, the Highland Groves PH III subdivision is calculated to have 53 percent open space, despite much of that consisting of a pond at the eastern end of the subdivision. *See Lake County Ex. D.*

39. The evidence regarding the Lake County land use standards, including the facts stipulated by the parties, indicates that all standards of density have been met.

40. Furthermore, the parties stipulated that the treatment of domestic wastewater by means of the proposed OnSyte DWTS meets or exceeds the standards established by the Lake County Code and FDEP. The efficacy of the OnSyte system was acknowledged at the June 22, 2021, meeting of the BOCC, during which it was described as “the wave of the future for sensitive areas. It fits the comp plan.”

41. Lake Nellie provided convincing testimony that the density proposed for the project is financially and practically necessary to warrant the use of the more centralized OnSyte system, with its requirements for ongoing maintenance and monitoring, as well as its substantial investment cost of roughly \$1,600,000. A development of lesser density would not be able to absorb that cost, and would likely be served by less effective septic tanks, as is the case with the surrounding developments.

42. The evidence in this proceeding demonstrated that the Project meets all requirements for development, including availability of central water, solid waste capacity, availability of fire safety and rescue services, and capacity of schools. The Project is consistent with the concept of an orderly and logical development pattern, is of similar character and development pattern as existing approved single-family developments in the area, and is consistent with surrounding parcels, also zoned R-6 and PUD, with densities generally in excess of the Project.

43. Reports issued by county staff concluded that the project meets the “three Cs” of review, meaning that the Project was found to be in compliance and consistent with the Lake County Code and Comprehensive Plan, and compatible with surrounding development. As a result, the Planning and Zoning Commission unanimously recommended approval of the PUD. Those

conclusions and recommendation are supported by the evidence adduced in this information-gathering proceeding.

### Traffic

44. The Project, at build-out, is expected to generate 1,059 daily vehicular trips. Of that number, 78 trips are expected to be within the morning peak hour (with 20 vehicles entering the Project, and 58 vehicles exiting the Project), and 104 trips are expected to be during the evening peak hour (with 66 vehicles entering the Project, and 38 vehicles exiting the Project).

45. Lakeshore Drive is segmented in the Lake County concurrency database. The segment of Lakeshore Drive that includes the Project boundary has capacity for the projected traffic from the Project at build-out, and will not be over capacity.

46. Except for the segment of Lakeshore Drive north of the Property from Harder Road to Lake Louisa Road, particularly at the bridge that crosses the channel between Lake Minnehaha and Lake Susan and near the intersection with Hammock Ridge Road where the four-lane road pinches down to two lanes (the “bridge segment”), Lakeshore Drive is LOS D.

47. Roadways are designed to operate at or near capacity, and can function at LOS D. Operating at less than capacity is, given the costs of constructing roadways, considered to be a waste of public resources. Lakeshore Drive near the Property, at LOS D, is consistent and in compliance with Lake County policy.

48. The bridge segment exceeds capacity at peak hour and, at LOS F, is considered to be “backlogged” due to traffic volume at peak traffic hour, resulting in a 40- to 80-second delay.

49. The bridge segment is more than two miles north of the boundary of the Property. Generally, Lake County planning staff reviews traffic numbers for an area from one mile to three miles from a proposed project. A three-mile study area would be appropriate for projects much larger than Lake Nellie, which Mr. Earhart characterized as a small project. He stated that Lake

County does not generally perform a safety standard review for an area more than one mile from a proposed project. Mr. Earhart testified that he was not aware of any project in Lake County having previously been denied for traffic concerns occurring more than two miles away.

50. Lakeshore Drive has signaled intersections at Log House Road and Harder Road, north of the Property.

51. The traffic analysis provided with the Rezoning Application indicates that peak hour traffic from the Project “is projected to consume approximately 3% of the [bridge] segment’s capacity.”

52. The traffic study prepared by Lake Nellie was developed using the data and the methodology provided by Lake County. Annual traffic counts are provided by Lake County, and are required to be used as collected. Lake Nellie used the traffic counts provided by Lake County.

53. There was a fair amount of discussion as to the degree to which changes in traffic volumes resulting from the Covid-19 restrictions may have affected the traffic volumes measured in Lake County’s data and, therefore, Lake Nellie’s traffic study. The evidence indicated that initial study data was collected prior to the onset of the Covid-19 pandemic. Data was collected in 2020 to substantiate that data. The study began with existing conditions based on application of Lake County required methodology, and using Lake County supplied trip counts. That Lake Nellie used Lake County data was confirmed by Mr. Earhart. Mr. Earhart also confirmed that an applicant for a development order is only required to use current application year data. Mr. Abdallah concluded that, given the requirement that Lake County data be used as collected, if adjustments were needed they could only be made by Lake County. No such adjustments were requested or made. Mr. Abdallah’s description of the process was not rebutted. Thus, Lake Nellie cannot be faulted for performing its traffic study as directed.

54. Lake Nellie also independently collected data that was not collected during the pandemic. The Lake Nellie data included intersection volume data

for intersections that mark the ends of the designated roadway segments. There was no suggestion that the intersection data was inaccurate or unnecessary.

55. The testimony provided by Mr. Abdallah suggested that in 2020, the LOS for Lakeshore Drive was LOS C “across the board.” Nonetheless, the parties stipulated that Lakeshore Drive is LOS D but for the LOS F bridge segment. In either event, the evidence establishes that the LOS for Lakeshore Drive is, but for the bridge segment, at acceptable levels of use, even with the addition of trips projected for the Project.

56. The fact that the parties stipulated to the primary conclusions of the traffic study, i.e., that Lake County’s Public Works Department concluded that the relevant segment of Lakeshore Drive will not be over capacity, that Lakeshore Drive has reached a steady state of traffic volume, that Lakeshore Drive can function at its current and projected LOS D, and that the Lake Nellie traffic study complied with Lake County’s requirements for traffic reports necessary for consideration of rezoning applications, is strong evidence of the validity of the findings and conclusions reached in the study.

57. The study projected traffic conditions to build-out in 2024 or 2025, and found that the Project would not result in exceedances of allowable traffic standards. The evidence was persuasive that the traffic study prepared by Lake Nellie is accurate, and fairly accounts for the traffic trends along Lakeshore Drive.

58. The evidence was not sufficient to establish any correlation between the additional trips generated from the Project and safety-related concerns on Lakeshore Drive. At most, the additional peak hour trips might exacerbate the inconvenience of peak hour congestion in the Lakeshore Drive bridge segment, though with a three percent peak hour contribution in volume, such would be slight at most.

59. Though the bridge segment of Lakeshore Drive is at LOS F for peak hours, there was no evidence that peak hour traffic congestion resulted in

adverse *safety* impacts. Though there were accidents along Lakeshore Drive, most were south of the signaled intersection at Harder Road and the LOS F bridge segment. *See* Lake County Ex. C. Furthermore, there was no evidence as to whether the accidents occurred at peak hours, whether there were non-traffic related causes for the accidents, e.g., drug or alcohol use, or whether the accidents were related to traffic congestion that warranted the LOS F designation.<sup>4</sup>

60. The evidence established, and it was so stipulated, that for the most part, speed limits on Lakeshore Drive are observed. There is no data to suggest that Lakeshore Drive is designed to encourage speeding. However, as with any road, there are incidents of speeding, carelessness, and reckless behaviors. There was no evidentiary basis upon which to conclude that such behaviors would be increased by the Project.

61. The traffic study included Lake County crash data that showed there were 58 crashes along the 3.7 mile stretch of Lakeshore Drive from the CR 561/Lakeshore Drive intersection south of the Property, to the Hammock Ridge Road/Lakeshore Drive intersection north of the Lake Minnehaha/Lake Susan bridge, over a three-year period from November 2018 through October 2021. The evidence demonstrated that the crashes occur at a rate that is not inconsistent with other comparable -- though certainly not identical -- roads in Lake County. Mr. Earhart did not disagree with Mr. Abdallah's crash study.

62. The denial of the Rezoning, based on concerns with safety, was largely the result of concerns expressed by residents of adjoining or nearby subdivisions who, as might be expected, would prefer to live near a less-traveled roadway. The testimony, taken at the May 5, 2021, Planning and Zoning Board meeting, the June 22, 2021, meeting of the BOCC, the hearing

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<sup>4</sup> A number of the accidents near the Harder Road intersection were "rear-enders" for which a reasonable inference could certainly be drawn that they were the result of inattentiveness to the traffic light at that intersection. Such is not likely to be affected by the expected three percent increase in volume from the Project.

in this proceeding, and as referenced as a basis for the development decision in Lake County's Proposed Recommended Order, was largely anecdotal, supported by no specific evidence of time, place, or circumstance, and occasionally based on a misunderstanding of the scope of the Project itself. Such evidence, as it is, may nonetheless be considered as competent substantial evidence in land use proceedings before a county commission. *See Marion Cnty. v. Priest*, 786 So. 2d 623, 626-627 (Fla. 5th DCA 2001). However, what distinguishes this matter from *Marion County* is that Lake County has an established, required, and data-driven procedure for objectively determining both levels of service and traffic impacts. The traffic study was prepared using the methodology required by Lake County and data provided by Lake County. No witness credibly disputed the conclusions of the report, and such were generally stipulated. The report concluded that the Project will not result in adverse traffic impacts along the Lakeshore Drive corridor. A Rezoning denial here requires that the required traffic report, the accuracy of which is substantiated, be ignored. Under the circumstances, such would be an unreasonable result.

63. In order to address safety concerns that might logically arise from the Project, Lake Nellie has agreed to the construction of a four-foot paved shoulder on Lakeshore Drive along the entire length of the Property. The shoulder will provide a countermeasure to off-road crashes, allowing for vehicles that may drift off-road to recover. The efficacy of paved shoulders is demonstrated by Lake County's construction of paved shoulders along bends in Lakeshore Drive north of the Project, one near Hull Road, and the other near Kingfisher Drive (*see* Lake Nellie Ex. P), which are scheduled for completion in March 2022.

64. Lake Nellie has agreed to the construction of a left turn deceleration lane for southbound traffic turning into the Project, the resurfacing of Lakeshore Drive within the limits of the Project, and construction of



sidewalks along Lakeshore Drive and Royal Vista Avenue within the limits of the Project.

65. Finally, Mr. Earhart confirmed that Lake Nellie agreed to align its entrance road with that of the subdivision across from it on Lakeshore Drive. That continuity will also enhance safety.

66. In sum, Lake Nellie agreed to all of the roadway improvements requested by Lake County staff. The parties stipulated that the construction of the improvements will enhance safety conditions at the Project segment of Lakeshore Drive.

67. In addition to the foregoing, Lake Nellie will, as is the case with all new development, contribute to the Lake County Capital Improvement Program, which includes road improvements, through payment of the required traffic impact fee.

68. Mr. Earhart also suggested that a right turn deceleration lane for northbound traffic turning into the Project would also enhance safety. Mr. Abdallah testified that such could be examined. Such an improvement warrants study and consideration.

69. Lake County is interested in constructing roundabouts at the Lakeshore Drive intersections at Hammock Ridge Road, State Road 561, Autumn Lane, and Osprey Point Boulevard, which would constitute safety improvements. Obtaining right-of-way for a roundabout is a significant cost for such a project.

#### Public Comment

70. The written comments of Dean and Donna Bingaman; Marcia and Thomas Cerzan; Kevin and Linda Gilbert; and Peter Stauder are included in the record.

71. Mr. and Mrs. Bingaman, who reside at 9729 Royal Vista Avenue, objected to the Rezoning, but erroneously believed that the Rezoning

Application included a variance and a rezoning to Urban Low density.<sup>5</sup> Their objections were directed to an increase in traffic resulting from the Project, the effect of additional children on local schools, the use of the Property by gopher tortoises, and the impact of the Project on the residents of Vista Grande. Mr. and Mrs. Bingaman proposed limiting the development of the Property to 40 homes.

72. Mr. and Mrs. Cerzan, who reside at 9717 Royal Vista Avenue, objected to the impact of the Project on their view of Little/Big Lake Nellie and the grove of pine trees on the Property. They argued that “[v]acant land should be left for the next generation to enjoy.” They objected that the area around their property in Vista Grande “already has too many developments and too much traffic.” Mr. and Mrs. Cerzan proposed limiting the development of the Property to one home per five acres.

73. Mr. and Mrs. Gilbert, who reside at 9424 Ivywood Street, objected to the impact of the Project on their view of the “valley and pond” on the Property, and off to the west to the Disney Fireworks. They also objected that Lakeshore Drive has areas of congestion. Mr. and Mrs. Gilbert oppose the Rezoning.

74. Mr. Stauder, who resides at 11637 Grand Bay Boulevard, objected to the number of residences to be allowed on the 117 gross acres of the Property. His objection generally misperceived how density is calculated in a clustered Rural Conservation Subdivision. He also objected that he would be looking at houses across his back yard. It should be noted that his residence is west of Royal Vista Avenue and abuts the 32 acres of the vegetated passive open space land east of Royal Vista Avenue that is proposed to be maintained under a conservation easement. Finally, Mr. Stauder objected to the traffic on Lakeshore Drive, noting several instances of reckless driving.

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<sup>5</sup> An earlier request to amend the Comprehensive Plan Future Land Use designation to Urban Low Density with a substantially higher number of residential units was withdrawn, and the Project was redesigned to its current iteration. *See* Lake Nellie Ex. L, p. 5.

75. Testimony was received at the information-gathering proceeding from Donna Bingaman, Peter Stauder, Forrest Harvey, Kim Cudmore, and Karen Rodriguez.

76. Ms. Bingaman's comments were consistent with her written comments, though more focused on increased traffic on Lakeshore Drive, and on Royal Vista Avenue from residents living at the east end of the Project. She also noted her concern with environmental issues related to residential uses of pesticides and fertilizers. As stipulated, such environmental issues are required to be addressed as part of a Preliminary Plat Review, not as part of the Rezoning.

77. Mr. Stauder's comments were generally consistent with his written comments regarding the proposed density of the Project. He also expressed his desire that Lake Nellie provide sidewalks and bike paths.<sup>6</sup>

78. Mr. Harvey, Ms. Cudmore, and Ms. Rodriguez each spoke in support of the Project. Mr. Harvey and Ms. Cudmore stated that Pillar Homes is a reputable and locally-owned company that has a history of well-planned quality developments. Ms. Rodriguez noted that Lake Nellie had agreed to all of Lake County's requests and that, in her view, the Project, as conditioned, fulfills a legitimate public purpose, and its denial would be arbitrary and unreasonable.

#### APPLICABLE LAW

79. This proceeding is governed by section 70.51 and LDC sections 14.17.00 through 14.17.24.

80. Section 70.51(18) provides that:

The circumstances to be examined in determining whether the development order or enforcement

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<sup>6</sup> The testimony at hearing established that Lake Nellie planned to include sidewalks as part of the Project, but their extent was somewhat unclear. However, the minutes of the Planning and Zoning Board meeting includes a notation that Lake Nellie's representative mentioned "that sidewalks would be required within the development and along Lakeshore Drive and Royal Vista Avenue." Lake Nellie Ex. L, p. 8.

action, or the development order or enforcement action in conjunction with regulatory efforts of other governmental parties, is unreasonable or unfairly burdens use of the property may include, but are not limited to:

(a) The history of the real property, including when it was purchased, how much was purchased, where it is located, the nature of the title, the composition of the property, and how it was initially used.

(b) The history or development and use of the real property, including what was developed on the property and by whom, if it was subdivided and how and to whom it was sold, whether plats were filed or recorded, and whether infrastructure and other public services or improvements may have been dedicated to the public.

(c) The history of environmental protection and land use controls and other regulations, including how and when the land was classified, how use was proscribed, and what changes in classifications occurred.

(d) The present nature and extent of the real property, including its natural and altered characteristics.

(e) The reasonable expectations of the owner at the time of acquisition, or immediately prior to the implementation of the regulation at issue, whichever is later, under the regulations then in effect and under common law.

(f) The public purpose sought to be achieved by the development order or enforcement action, including the nature and magnitude of the problem addressed by the underlying regulations on which the development order or enforcement action is based; whether the development order or enforcement action is necessary to the achievement of the public purpose; and whether there are

alternative development orders or enforcement action conditions that would achieve the public purpose and allow for reduced restrictions on the use of the property.

(g) Uses authorized for and restrictions placed on similar property.

(h) Any other information determined relevant by the special magistrate.

81. The standards established in section 70.51(18) are substantially mirrored in LDC section 14.17.22.

82. Section 163.3180(2), Florida Statutes, provides, in pertinent part, that “[a] local government may meet the concurrency requirement for sanitary sewer through the use of onsite sewage treatment and disposal systems approved by the [FDEP] to serve new development.” The OnSyte DWTS meets the standards approved by FDEP, and is far superior to the use of septic tanks as have been approved for all of the surrounding subdivisions.

83. With regard to transportation concurrency, section 163.3180(5) provides, in pertinent part, that:

(5)(a) If concurrency is applied to transportation facilities, the local government comprehensive plan must provide the principles, guidelines, standards, and strategies, including adopted levels of service to guide its application.

(b) Local governments shall use professionally accepted studies to evaluate the appropriate levels of service. ...

(c) Local governments shall use professionally accepted techniques for measuring levels of service when evaluating potential impacts of a proposed development.

\* \* \*

(h)2. An applicant shall not be held responsible for the additional cost of reducing or eliminating deficiencies. When an applicant contributes or constructs its proportionate share pursuant to this paragraph, a local government may not require payment or construction of transportation facilities whose costs would be greater than a development's proportionate share of the improvements necessary to mitigate the development's impacts.

\* \* \*

b. In using the proportionate-share formula provided in this subparagraph, the applicant, in its traffic analysis, shall identify those roads or facilities that have a transportation deficiency in accordance with the transportation deficiency as defined in subparagraph 4. The proportionate-share formula provided in this subparagraph shall be applied only to those facilities that are determined to be significantly impacted by the project traffic under review. If any road is determined to be transportation deficient without the project traffic under review, the costs of correcting that deficiency shall be removed from the project's proportionate-share calculation and the necessary transportation improvements to correct that deficiency shall be considered to be in place for purposes of the proportionate-share calculation. The improvement necessary to correct the transportation deficiency is the funding responsibility of the entity that has maintenance responsibility for the facility. The development's proportionate share shall be calculated only for the needed transportation improvements that are greater than the identified deficiency.

\* \* \*

3. This subsection does not require a local government to approve a development that, for reasons other than transportation impacts, is not qualified for approval pursuant to the applicable

local comprehensive plan and land development regulations.

4. As used in this subsection, the term “transportation deficiency” means a facility or facilities on which the adopted level-of-service standard is exceeded by the existing, committed, and vested trips, plus additional projected background trips from any source other than the development project under review, and trips that are forecast by established traffic standards, including traffic modeling, consistent with the University of Florida’s Bureau of Economic and Business Research medium population projections. Additional projected background trips are to be coincident with the particular stage or phase of development under review.

84. The primary bases for the denial of the Rezoning were safety concerns on Lakeshore Drive as a result of the addition of peak hour trips from the Project on the LOS F bridge segment. That segment experiences delays at peak hours of between 40 and 80 seconds.

85. Concerns were also expressed that Lakeshore Drive is, more generally, busy and heavily trafficked. Nonetheless, the evidence was uncontradicted that it meets accepted LOS designations at all segments except for the bridge segment.

86. There was no competent substantial evidence that any traffic accidents were the direct result of peak hour congestion at the bridge segment or at any other segment of Lakeshore Drive. There was no competent substantial evidence that safety, as opposed to convenience, was affected at the LOS F bridge segment. More importantly, there was no competent substantial evidence that safety would be affected by the projected three percent contribution from the Project.

87. Section 70.51(18)(a) and LDC section 14.17.22.D.1. allow for consideration of where the Property is located, and how the Property was

initially used. The Property is located in the midst of previously approved residential subdivisions of substantially greater density, and containing substantially less open space. The Property was previously used for agriculture, a use that is no longer allowed under current comprehensive plan and LDC regulations. The only allowable use of the Property is residential.

88. Section 70.51(18)(c) and LDC section 14.17.22.D.3. allow for consideration of the history of land use controls and other regulations, including how and when the land was classified, how use was proscribed, and what changes in classifications occurred. As indicated, the Property in 2004 was previously agricultural land as was, by photographic evidence, the surrounding Vista Grande PH I and Highland Groves PH III subdivisions. The land uses have since, both as a matter of fact and law, changed to residential use.

89. Section 70.51(18)(d) and LDC section 14.17.22.D.4. allow for consideration of the present nature and extent of the Property, including its natural and altered characteristics. The Property is former agricultural land that is gradually being replaced by scrub, bushes, and emergent pine. The Property is suitable for residential development. The open waters and wetlands, including the shoreline of Little Lake Nellie, are subject to protection, and will not be developed.

90. Section 70.51(18)(f) and LDC section 14.17.22.D.6. allow for consideration of:

The public purpose sought to be achieved by the development order or enforcement action, including the nature and magnitude of the problem addressed by the underlying regulations on which the development order or enforcement action is based; whether the development order or enforcement action is necessary to the achievement of the public purpose; and whether there are alternative development orders or enforcement action conditions that would achieve the public



purpose and allow for reduced restrictions on the use of the property.

The public purpose to be achieved as expressed at the BOCC meeting and in this proceeding is the protection of public safety by limiting the added vehicular trips onto Lakeshore Drive from the 102-residence Project. As established herein, the evidence was not sufficient to demonstrate that the addition of peak hour trips into and out of the Project, or for that matter more routine trips during less travelled hours of the day, will have any effect on public safety. While the approximately three percent contribution of peak hour trips to the LOS F bridge segment of Lakeshore Drive may result in some indeterminant increase in “backlog” and the existing 40- to 80-second peak hour delay within that segment, there was no evidence that the contribution will affect the number or severity of traffic accidents, or the incidence of speeding or reckless driving. Furthermore, the conditions agreed upon by Lake Nellie, including road resurfacing, shoulder construction, left turn deceleration lane, and others described herein, are designed to, and should achieve, the public purpose of alleviating traffic safety issues related to the Project.

91. Section 70.51(18)(g) and LDC section 14.17.22.D.7. allow for consideration of the uses authorized for, and restrictions placed on, similar properties by Lake County. As set forth herein, Lake County has, over time, authorized the development of subdivisions of substantially greater density, and with substantially less open space, that literally encircle the Property.

92. Section 70.51(18)(h) and LDC section 14.17.22.D.8. allow for consideration of any other information determined relevant by the special magistrate or agreed upon by the parties. In this case, the evidence, both as stipulated and as developed by evidence adduced at the hearing, demonstrates that the Project meets every standard for approval of the Rezoning that is not related to traffic, including the effective handling of domestic wastewater generated by the proposed Project. Traffic-related

issues are addressed elsewhere herein. The restriction proposed, i.e., limitation of the Project to one residence per three acres, is unnecessary to achieve compliance and consistency with the Lake County Code and Comprehensive Plan, and would result in a development that is not compatible with surrounding development.

93. The competent, substantial evidence in this proceeding as described herein established that the denial of the Rezoning is unreasonable or unfairly burdens use of the property, even under the deferential standard well-articulated in Lake County's Proposed Recommended Order. The evidence was not sufficient, in the view of the undersigned, to warrant the denial of the Rezoning under the color of advancing "the public health, welfare, safety, or morals of the community."

94. The purpose of this proceeding is to develop a Recommendation to the BOCC based on the standards established in section 70.51(18) and LDC section 14.17.22. Lake Nellie provided legal argument in its Proposed Recommended Order based on, *inter alia*, issues of impermissible spot zoning and deprivation of Lake Nellie's constitutionally protected property rights. Lake Nellie also argued that the application of section 163.3180 prohibits Lake County from denying the Rezoning based on pre-existing transportation deficiencies. Lake Nellie's arguments are not without merit but, in the view of the undersigned, go beyond the scope of the information-gathering hearing and factual Recommendation authorized by section 70.51 and the LDC. Thus, this Recommendation is limited to the facts and conclusions set forth previously.

#### RECOMMENDATION

Based upon the foregoing Stipulated Findings, the Findings Adduced at Hearing, and the Public Comment, the undersigned concludes that the proposed Rezoning satisfies the requirements of the Lake County Comprehensive Plan and Land Development Code, that there is no reason

related to transportation safety to deny the Rezoning, and that the denial of the Rezoning, under the circumstances presented here, is unreasonable or unfairly burdens use of the Property. Therefore, it is recommended that the Lake County Board of County Commissioners approve the application for the Lake Nellie Crossing Planned Unit Development, Lake County Case No. RZ-20-39-23, subject to the conditions previously agreed upon by Lake Nellie, and the following:

1. Stormwater facilities shall be vegetated with native species where possible.
2. Sidewalks shall be constructed within the Project and along the Project's frontage on Lakeshore Drive and Royal Vista Avenue.
3. In addition to the left turn lane for southbound traffic, Lake Nellie and Lake County shall examine the feasibility of a right turn deceleration lane into the Project for northbound traffic on Lakeshore Drive. If determined to advance safety on Lakeshore Drive, the right turn lane shall meet Florida Department of Transportation specifications for design and length for a 40 MPH road. Land necessary for the construction of a right turn deceleration lane shall not be deducted from the open space calculation qualifying Lake Nellie for 102 units under the one dwelling unit per acre/50 percent open space requirement.
4. If Lake County determines in the future that a roundabout at the entrance to the Project would facilitate traffic flow and enhance safety, Lake Nellie, or its successor homeowners' association or maintenance entity, shall donate land within its ownership and control to Lake County for use as right-of-way for the roundabout. That donation shall not be deducted from the open space calculation qualifying Lake Nellie for 102 units under the one dwelling unit per acre/50 percent open space requirement.

DONE AND ENTERED this 18th day of January, 2022, in Tallahassee, Leon County, Florida.



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E. GARY EARLY  
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Division of Administrative Hearings  
this 18th day of January, 2022.

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