

# **BAY COUNTY, FLORIDA FOR SALE TO THE HIGHEST BIDDER**

## **A PEER WHITE PAPER**

Bay County, Florida is now for sale to the highest bidding developer, or at least that is the present situation faced by Bay County residents. And if experience is any guide the same situation will soon exist in Escambia, Gulf, Franklin and Leon Counties.

This paper describes what appears to be a systematic campaign to unduly influence Bay County officials by private individuals and/or corporations. The campaign has resulted in a pervasive and improper disregard for a significant number of state laws and local land development regulations. The victims are the residents of Bay County and the environment in which they live.

### **I. FACTUAL BACKGROUND**

#### **A. PEER's June 14, 2000, Petition to Governor Bush Regarding Bay and Gulf Counties**

On June 14, 2000, PEER filed a Petition ("2000 Petition") with Jeb Bush, Governor of the State of Florida. In that petition PEER asked Governor Bush to appoint a special prosecutor for the purpose of investigating activities in the Fourteenth Judicial Circuit (which includes Bay County).<sup>1</sup> Those activities requiring investigation included (a) the

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<sup>1</sup> A copy of the 2000 Petition may be reviewed on PEER's website at [www.peer.org/florida/panamacity\\_petition.html](http://www.peer.org/florida/panamacity_petition.html).

construction of an underwater pipeline across St. Andrews Bay in violation of Chapter 403, Florida Statutes by Phoenix Construction, (b) the illegal destruction of wetlands associated with the expansion of Frank Brown Park in Panama City Beach, (c) the existence of at least 50 stormwater discharge pipes from Panama City Beach directly into the Gulf of Mexico without routine bacterial or nutrient monitoring, (d) the existence of at least 90 stormwater outfalls in Panama City Beach that discharge into stormwater treatment ponds with the potential to leach into the ground water, (e) the operation of the Bay County Incinerator without required dioxin monitoring of its air emissions and without normally required acid-gas scrubbers, (f) the existence of a 60-acre solid waste site with unlined disposal ponds owned by Smurfit-Stone and adjacent to Martin Lake with resulting contamination possibly including dioxin, (g) the disposal of up to 125,000-cubic yards per year of sludge at Gulf Farms, said sludge likely being contaminated with cadmium, copper, lead, nickel and zinc, (h) DEP's failure to conduct dioxin testing in St. Andrews Bay, despite numerous dioxin sources discharging directly into the bay and air in Bay County, and (I) the continued and increased discharge of effluent from Panama City Beach's sewage treatment plant into a small channel that flows directly into the Class II waters of West Bay—a shellfish harvesting area.

As noted in the 2000 Petition, Phoenix Construction (one of the entities under suspicion) was represented by members of a law firm that employed two attorneys who were also employed by Jim Appleman, the State Attorney for the Fourteenth Judicial Circuit. In addition, Mr. Appleman's daughter was also employed as an attorney by the same law firm. The same law firm represented the City of Callaway, a part owner of the Military Point Advanced Wastewater Treatment ("AWT") Facility implicated in the

sewage pipeline controversy. Again, the same law firm represented the city of Panama City Beach in the matter involving Frank Brown Park. The overwhelming appearance of a conflict of interest by the Office of the State Attorney fully justified the appointment of a special prosecutor under these circumstances. Yet, Governor Bush denied the request on July 12, 2000, stating that a special prosecutor would not be appointed unless the local State Attorney, i.e. Mr. Appleman, requested the same.

### **B. PEER's February 2001, Petition to the Governor**

In February 2001, PEER submitted another petition ("2001 Petition") to Governor Bush asking him to direct the Florida Department of Law Enforcement ("FDLE") to investigate alleged misconduct of public officials in Bay County, Florida.<sup>2</sup> The 2001 Petition informed Governor Bush of his statutory authority under § 943.03(2), Fla. Stat., to direct FDLE to undertake such an investigation into the alleged misconduct of public officials and employees who are subject to suspension or removal by the Governor.

The allegations contained in the 2001 Petition involved activities that violated Florida's Sunshine Law. In addition to that, there was evidence of undue influence being placed upon members of the Bay County Planning Commission, as well as the forced resignation of the Bay County Planning Manager who was attempting to uphold the County's Comprehensive Plan. Moreover, there were continued conflicts of interest by the County Attorney that were routinely ignored by the attorney and Bay County officials. These types of violations have not been curtailed. Rather, they continue unabated to this day.

The 2001 Petition sought an investigation into the alleged criminal actions and ethical violations taking place in Bay County. An independent investigation was more than warranted given the fact that the State Attorney for the Fourteenth Judicial Circuit, Jim Appleman, continued to operate under the same conflicts of interest that existed at the time of the filing of the 2000 Petition. Governor Bush not only refused to act on the petition—he virtually ignored it. No response was received from the Governor or anyone on his staff.

## **II. THE CORRUPTION IN BAY COUNTY CONTINUES**

### **A. Bay County Planning Commission Targeted By Developers**

The issue of land development has become an increasingly important matter with which the Bay County Commission (BCC) has had to deal. Development of the coastal sections of the county, and particularly the barrier islands paralleling its coast has steadily increased. A lack of zoning laws magnifies the problem. Section 3.7 of the Comprehensive Plan requires Bay County to adopt a zoning code by 2001. This still has not occurred. In addition, existing land development regulations (LDRs), as embodied in the December 1, 1990, Land Use Code, conflict with the controlling Comprehensive Plan approved for Bay County. LDRs serve to constrain unchecked development into historically residential neighborhoods and environmentally sensitive areas of the county. On September 3, 2002, the Bay County Commission, upon motion by Commissioner Michael J. Ropa, finally issued a statement to all residents of Bay County informing them that new zoning ordinances were under consideration for adoption.

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<sup>2</sup> A copy of the petition may be reviewed on PEER's website at

The Planning Commission was assigned the task of beginning this process by implementing a revised set of LDRs that would govern the future development of Bay County. Revised LDRs were needed because of the existing conflict between the 1990, Land Use Code and the Comprehensive Plan that was adopted in 1999.

It was with this background, together with the public's increasing calls for decisive action, that the BCC decided in early 2003 to reconstitute its Planning Commission to allow for a diversity of opinions to be brought to the table. The reconstituted Planning Commission was made up of nine members, pursuant to § 11.03.02 of the Land Development Regulations of Bay County adopted by the BCC. Of the nine members, three were to be pro-development, three were to be pro-environment, and three were to be non-aligned members of the community. This new commission was charged with, inter alia, developing a new set of LDRs that would be formally adopted by the BCC. These new LDRs would also be the precursor to the implementation of zoning laws that would govern development in the county.

The pro-development members of the Planning Commission were Bayne Collins, Sean McNeil and Tom Ledman.

The pro-environment members of the Planning Commission were Dr. Neil Lamb, Robert D. McGill and Fred Beauchemin.

The non-aligned members of the Planning Commission were Brian Humboldt<sup>3</sup>, Barbara Miner<sup>4</sup> and Diane Brown<sup>5</sup>.

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[www.peer.org/florida/baycounty\\_petition.html](http://www.peer.org/florida/baycounty_petition.html).

<sup>3</sup> The BCC, by a unanimous vote, appointed Brian Humboldt on January 7, 2003.

<sup>4</sup> Planning Commissioner Miner was appointed on January 7, 2003, over the dissenting votes of Commissioners Brock and Gainer.

<sup>5</sup> The BCC, by a unanimous vote, appointed Diane Brown on January 7, 2003.

One of the pro-developer Planning Commission members, Bayne Collins, is an architect who is closely aligned with developer Charles Faircloth and attorney, Charles Hilton. He is affiliated with the following companies: (1) The Raintree Inc., (2) Eastwood, Inc., (3) Wilcox, Collins & Jenkins, Inc., (4) Collins & Associates, Inc., (5) Bay County Council of Registered Architects, Inc., (6) Martin Theatre Foundation, Inc., (7) Greenfield Village Homeowners, Inc., (8) Architrave, Inc., (9) The Coalition for Coastal Redevelopment, Inc., and (10) JC Development Corporation.

Bayne Collins' appointment to the Planning Commission was not without controversy. Bay County Commissioner Ropa asked Mr. Collins, at the BCC meeting on January 7, 2003, how many years he had served at the position<sup>6</sup>. Mr. Collins replied that he was not sure, but that he had served in the 1980s or 1990s. Mr. Ropa then indicated that under County Ordinance 01-19 an individual was limited to a total of eight years of service. (The BCC had adopted the ordinance in 2001 upon motion by Commissioner Ropa.) Commissioner Cornel Brock now excepted to this characterization of the meaning of Ordinance 01-19. After a significant amount of debate Commissioner Brock moved to amend the ordinance to state the intent of the BCC that the eight year cap on term limits would begin to run only with the current position held by the candidate. Commissioner George B. Gainer seconded Commissioner Brock's motion. It passed over the dissenting votes of County Commissioners Ropa and John G. Newberry, Jr. Mr. Collins was then re-appointed to the Planning Commission.

The new Planning Commission came under fire almost from its inception. County Commissioner Gainer raised concerns about the make-up of the Planning Commission at

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<sup>6</sup> See, Minutes of Bay County Commission, January 7, 2003.

the BCC regular meeting held on February 4, 2003. He indicated at that time that he felt the Planning Commission was illegally constituted and that its membership should be increased by three members. His attack was directed at two of the non-aligned members, Barbara Miner and Diane Brown, though it went nowhere at that time due to the advice of Planning Commission Chairman Beauchemin that there were sufficient members on the Planning Commission. When asked for his opinion, County Attorney Mike Burke added that the members' resumes were on hand when they were elected to their positions and that the Planning Commission appeared to be legally constituted.

The developers did not let the matter drop. Ultimately a lawsuit<sup>7</sup> was filed on June 11, 2003, in the Circuit Court in Bay County by a local attorney, L. Charles Hilton, on behalf of developer Andrew A. Gothard. This lawsuit was filed against Bay County and the Planning Commission. It alleged that Planning Commissioners Miner and Brown were actually aligned with the pro-environment community in violation of § 11.03.02 of the LDRs. It sought injunctive relief in the form of their removal from office.

During its next scheduled meeting on June 17, 2003, the BCC took up the question of how to defend this lawsuit. It was counseled in the matter by the Bay County Attorney, Michael Burke. Mr. Burke's firm, Burke & Blue, P.A., represents a significant number of developers in the area; including, Edgewater Beach Resort, Leeward/Windward Condominiums, Summit Condominiums, Nautical Watch Condominiums, Sugar Beach Condominiums, Long Beach Resort Condominiums, Pinnacle Port Condominiums, Peachtree Place Condominiums, The Empress at Seascape, Emerald Hill Condominiums, The Palms of Dune Allen Condominiums, Hidden Dunes Condominiums, The Beach

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<sup>7</sup> Case Number: 03-2036-CA-K.

House Condominiums, High Point Condominiums, Maravilla Condominiums, Grand Mariner Condominiums, Island Princess Condominiums, Destin Yacht Club, Pirate's Bay Condominiums, Holiday Surf and Racket Club Condominiums, Destin Beach Club Condominiums, Jade East Towers Condominiums, Emerald Towers West Condominiums, Veranda Condominiums, Miracle Strip Amusement Park and Shipwreck Island Water Park, Baytown Office Plaza, Shoppes at Edgewater, Hombre Golf Course, Lawyers Title Ins. Corp. of Richmond, VA, Chicago Title Insurance Co., First American Title Insurance Co., Fidelity National Title Insurance Co. and American Pioneer Title Insurance Company.<sup>8</sup>

The official minutes of the June 17 meeting do not fully detail the events that transpired during the meeting. What is noticeably absent is the nature of the exchange that took place during the discussion of the lawsuit. The commission had been advised that there would be an agenda item allowing the commissioners to be briefed by Mr. Burke on the status of the Gothard lawsuit. The briefing was necessary, in part, because of Gothard's motion for a temporary injunction to be imposed prohibiting further action

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<sup>8</sup> It should be noted that on April 1, 2003, the Bay County Commission took up the issue of retaining another lawyer to represent the commission on land use matters. This was apparently in response to complaints that were voiced over the developer ties with Burke & Blue. The minutes also reflect that there was a perceived need for this additional attorney because of a lack of land use experience in the Burke & Blue firm. Further, the BCC was expecting an increased need for such advice over the next few months. On April 15, 2003, the county manager's office was directed to initiate a search for the new attorney. Then on July 15, 2003, the BCC directed the county manager to schedule interviews for a select number of applicants. After conducting interviews, the BCC decided at its August 15, 2003, regular meeting to retain Terrell K. Arline as its land use attorney. Commissioner Brock appeared to continue to lobby in favor of hiring Burke & Blue to handle the land use issues on behalf of the BCC in spite of that firm's obvious conflict of interest with its other clients. Commissioner Brock eventually agreed to support Mr. Arline's retention, although Commissioner Gainer and Chairman Girvin opposed the same.



of the Planning Commission until the issue was decided. Burke had provided the BCC with a memorandum on the lawsuit the previous day. The lawsuit had been served on the county the week before. Mr. Burke indicated that one commissioner had suggested that the issue could be handled in executive session, i.e. closed to the public. This was fortunately discarded as an option. The identity of the commissioner who wanted an executive session was not disclosed to the public.

As Mr. Burke began his briefing, it quickly became evident that the county could defend the lawsuit, and in Burke's opinion, the defense would be successful. He further indicated that the lawsuit could be mooted by taking the BCC taking action to amend the ordinance to recognize the Planning Commission as properly constituted. Commissioner Ropa immediately moved for that option. Commissioner Newberry seconded the motion. Mr. Burke also indicated, however, that a defense of the lawsuit would be a waste of taxpayer's money, because the defense could cost \$10,000. Further options, he stated would be to (1) remove the offending members, or (2) amend the ordinance to eliminate any question that the Planning Commission was lawfully constituted. Then Commissioner Brock asked the County Attorney what, specifically, the County Attorney recommended. When Chairman Girvin reminded Brock that there was a pending motion, Brock responded that the motion could be withdrawn. The County Attorney indicated that the ordinance could be amended to specifically state that the Planning Commission was properly constituted, though public hearings would be required to amend the ordinance. Commissioner Gainer indicated that he believed that if the BCC made a mistake it would be inappropriate to try and rectify by way of an amendment. Besides, he

felt that amending the ordinance would invite similar actions in the future. Burke stated that the BCC had the authority to amend the ordinance any number of times.

Shortly thereafter, discussion ensued about whether, in fact, the BCC believed that the Planning Commission was properly constituted. Commissioner Gainer immediately discussed “complaints” that he had received regarding the functioning of the Planning Commission. When Chairman Girvin asked if there was any further discussion, Commissioner Brock began a lengthy discussion of the Planning Commission’s history. He indicated that the Planning Commission had not taken the route that he intended when he helped establish it, and that it was flawed. He said that he lawsuit could force them to evaluate the issue, but in his opinion it needed to be reviewed anyway. What is evident from the discussion is the extent to which both Commissioners Brock and Gainer attempted to heap superficial praise upon the current members of the Planning Commission while at the same time advancing a position that would eliminate their positions. The commissioners attempted to couch their arguments in the thinly veiled guise that the duties of the Planning Commission were now changing, thus justifying the recomposition<sup>9</sup>. It would now serve a “maintenance” function. This was, at best, a mischaracterization since the Planning Commission was still involved in spirited discussions over the new LDRs that it would propose to the BCC for approval. Commissioner Brock nevertheless persisted in erroneously stating that the LDR process was over and that he wanted to see the Planning Commission changed to a five member

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<sup>9</sup> Interestingly, Commissioner Brock indicated that some of the current members of the Planning Commission were qualified to be Bay County’s Planning Director. He specifically mentioned that an engineer was included in this group. The engineer, of course, was Sean McNeil.

deliberative body. His position was strongly opposed by Commissioner Ropa, who pointed out that the zoning maps had not been completed.

When Commissioner Ropa's motion was called it failed. Only Ropa and Newberry voted in favor of its passage. Then Commissioner Brock indicated that since the motion had failed it meant that the lawsuit would be defended. Brock then immediately indicated that he had "scribbled out" a motion that morning, at which time he read a carefully drafted motion, the effect of which was to reduce the Planning Commission from nine to five members. Commissioner Ropa immediately questioned the motives behind this motion since, as Commissioner Ropa pointed out, there was no indication on the agenda that there would be any action taken on this agenda item—it was merely a briefing by the County Attorney. Commissioner Gainer seconded the motion.<sup>10</sup> It became even more evident at that point that there was a concerted effort to reduce the size of the Planning Commission. Both Commissioners Ropa and Newberry indicated their concern over the process being employed. Commissioner Newberry stated his concern that there was no advance notice to the BCC or to the public that any action would be taken at this meeting. He maintained that there was no need for any motions, as is evidenced by the fact that the defeat of Commissioner Ropa's motion meant that the County Attorney would proceed to defend the lawsuit. This was simply supposed to have been a briefing process. He further pointed out that the BCC's credibility and integrity was on the line. Ultimately Commissioner Brock's motion passed over the dissenting votes of Commissioners Ropa

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<sup>10</sup> Commissioner Gainer's previous concern about the implications of amending the ordinance in the face of a lawsuit strangely seemed to have disappeared in the 45 minutes it took to reach this point.

and Newberry. Two public hearings would be needed before the government action would become final.

The BCC next raised this issue at its regular meeting on July 15, 2003. The BCC took public comment at this meeting on the controversy. After comments were taken Commissioner Ropa offered a motion to demonstrate the commission's intent behind the original ordinance that had been the subject of the litigation. This effect of the motion would be to more clearly provide a defense for the Planning Commission as presently constituted. Commissioner Newberry seconded the motion and it passed unanimously. Commissioner's Gainer, Girvin and Brock then embarked on their own defense against the strong perception of impropriety that was evidenced in the public comments. In what appears to have been a face saving measure, the County Attorney then asked the BCC for a new motion. This motion would be to effectively amend the present ordinance to show that the categories of "developer" and "environmentalist" were goals that were to be met "whenever possible." This was under the guise of giving the County Attorney a greater ability to defend the present lawsuit. The other effect would be to allow the present composition of the Planning Commission to continue. Commissioner Ropa moved this matter and Commissioner Newberry seconded it. The motion carried by a unanimous vote.<sup>11</sup> The second public hearing was then scheduled for August 5, 2003, at which time a final decision on Commissioner Brock's June 17 motion and Commissioner Ropa's July 15 motion would be made.

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<sup>11</sup> The fact that Commissioners Brock, Gainer and Girvin voted for a motion that in effect was in opposition to Commissioner Brock's June 17 motion appears to have been nothing other than a face saving measure. At the next regular meeting all three would change their positions again, only to approve the dismantling of the Planning Commission.

At the August 5, 2003, meeting of the BCC public comment was again heard on the controversy. Commissioner Ropa's motion to support the nine member Planning Commission was defeated by Commissioners Gainer, Brock, and Chairman Jerry L. Girvin. Commissioner Gainer then moved adopt the ordinance moved by Commissioner Brock at the June 17 regular meeting, i.e. to reduce the size of the Planning Commission from 9 to 5 members. Commissioner Brock seconded the motion. The BCC then approved the measure over the dissenting votes of Commissioners Ropa and Newberry. The result was that the Planning Commissioners would be appointed by the BCC with each County Commissioner appointing one member to the Planning Commission.

The newly constituted Planning Commission was predictably developer-friendly. Commissioner Brock appointed James T. Lipham, the president of Emerald Bay Construction, Inc. and Emerald Bay Services, Inc. Commissioner Gainer appointed Mike Thomas, the vice president of Smugglers Cove Amusements, Inc., and owner of a beach restaurant. Chairman Girvin appointed Sean McNeil,<sup>12</sup> a previous planning commission member and owner of McNeil Engineering. McNeil is also affiliated with Venture Tek of the Emerald Coast, Inc. and JC Development Corporation (where he serves as a director with his colleague, Bayne Collins). Commissioner Newberry appointed Dr. Neil Lamb, a previous planning commission member who is friendly towards environmental interests. Commissioner Ropa chose to name himself to the commission on a temporary basis, indicating that he needed time to find a qualified candidate. He then appointed Fred Beauchemin, a previous planning commission member. Thus, the Planning Commission now has a 3 to 2 majority in favor of developer interests. The further signal has been sent

to the residents of Bay County that should they wish to volunteer to help build their county they will only be welcomed if their intent is to develop the same at the expense of the environment.

### **B. Select Public Records Missing And Restrictions On Access**

In October 2003, a Bay County resident asked to review certain public records involving the land development regulations that were then under consideration. Specifically, the resident wished to review letters sent to the Bay County government by local residents. There were more than 100 such letters—the vast majority of which were thought to be in opposition to the massive development efforts underway in the county.

Bay County responded to the resident’s request by informing her that the letters in question had been “lost” and were therefore unavailable for review. The hundreds of lost letters were from residents of the West Beaches area who were opposed to the increased development. But not all letters were lost. Indeed, letters from motel owners in the area were still located in the files—those letters were in support of the increased development.

When one resident brought the loss of these records to the attention of Commissioner Newberry, it was suggested that a criminal investigation needed to be opened. Within twenty-four hours of this suggestion being made the records reappeared—however, their reappearance was too late to assist the residents in a lawsuit that was then pending in the local circuit court. The investigation behind the loss of the documents was dropped without any charges or action taken against those individuals who attempted to prevent their disclosure.

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<sup>12</sup> Chairman Girvin’s Campaign Treasurer’s Report Summary indicates that McNeil

On different occasions the public has advised the BCC of difficulties that the public is having in reviewing documents that are covered under § 119.07, Fla. Stat. The records requested are public records that Bay County has an obligation to make available under Florida law. Nevertheless, there have been repeated instances of failures to provide public records—particularly by the Bay County Planning Office. In addition, as stated by the Bay County Attorney at the October 21, 2003, regular meeting of the BCC, it is now the County’s policy to charge a fee to the public if the public’s review of documents exceeds fifteen (15) minutes in duration.

### **C. Ebb Tide**

In April 2001, Ebb Tide Condominium, Inc. (“Ebb Tide”) applied to Bay County for a permit to develop a high density 334 dwelling unit complex on 3 –5 acres on a narrow strip of land on Thomas Drive. Thomas Drive runs parallel to the Gulf of Mexico in an east-west direction on a spit of land known as Bitmore Beach. It is surrounded by water on both the north and south. The site chosen for development was one of Bay County’s last undeveloped beach tracts. Ebb Tide’s sole director, Judy Foister, is a business partner of Charles Faircloth and Charles Hilton, Esq. Faircloth and Foister are the co-owners of the development. Bayne Collins (at the time of the application, a future member of the Planning Commission) is the architect for the same. Sean McNeil (another member of the Planning Commission) is the project engineer. The proposal was opposed by residents of Gulf Drive—the area to be most directly affected by the proposed development.

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Engineering contributed \$100.00 to Girvin’s campaign on October 10, 2002.

The 1999 Bay County Comprehensive Plan, together with the Land Development Code, governs Bay County's decisions on this issue. Significantly, a seasonal/resort designation for this complex would require that no permanent, year-round residences be allowed. See, Table 3A, Land Use Categories. In addition, no more than 15 dwelling units per acre would be allowed. In contrast, a residential designation would mean that those areas platted as residential prior to the adoption of the 1999 Comprehensive Plan would remain residential in order to protect property values. No commercial uses are allowed. The 1991 Land Use Code is more lenient inasmuch as it allows Neighborhood Commercial and Commercial Uses to be intermingled with residential designations. See, 2.02.03, Land Use Code. See also, Table 3A, Land Use Categories. Proposed land use designations are required under Section 3.9 of the Comprehensive Plan to be compatible with adjacent land uses.

The density for this proposed development equated to approximately 70 units per acre. This would be 55 units larger than allowed under Table 3A of the Comprehensive Plan regardless of whether the project were designated seasonal/resort, residential (urban/coastal) or commercial. The development would also include a parking garage, as well as accessory uses. The company also proposed to dedicate two public beach accesses and attendant public parking. All of these concepts were packaged together by Ebb Tide in a proposed Development Agreement that it submitted to the Board of County Commissioners for approval.

In order to secure the legal ability to develop the Thomas Drive site, Ebb Tide proposed transferring up to 240 dwelling units from its site on Holley Lane in a procedure the county termed a type of "density rights transfer." In exchange for allowing



this transfer, the company agreed to transfer ownership of the Holley Lane property to Bay County. Section 1.10.3 of the Comprehensive Plan allows the transfer of development rights. However, the problem presented to Bay County was that it had no established program that allowed what is commonly referred to as the transfer of density rights, or TDRs. Thus, if the Bay County Commission were to approve the plan it would be setting precedent. But more importantly, it would mean that the BCC would have to approve a project when its existing land use code did not allow the same.

These were not the only hurdles that the development would need to cross, however, because the proposed site would also have been in violation of Florida's Coastal Construction Control Line ("CCCL"). Thus, the State of Florida would also be involved in the decision-making. The site, which is subject to beach erosion, was the previous home of the Ebb Tide Hotel, which was swept away by Hurricane Opal. Much of the very land that Ebb Tide now wanted to develop had been washed away in that storm. Taxpayers' monies were then used to replenish it. The State of Florida, Department of Environmental Protection ("FDEP") advised the developers that it would only allow construction seaward of the CCCL if additional, more costly, criteria were met. Therefore, Ebb Tide proposed to develop landward of the CCCL.

The concept of developing landward of the CCCL presented additional, perhaps even greater problems to the developers. In order to proceed on the concept they would need several townhouse owners to sell their homes to them. These owners were refusing to sell.

The initial public hearing at the BCC took place on October 16, 2001. Significant opposition to the project was voiced at that hearing. Therefore, the Board of County

Commissioners, by a vote of 3-2 voted to move forward with a second public hearing on November 20, 2001.

Faced with significant opposition from adjacent landowners, Ebb Tide's owners elected to change tactics. Whereas the original plans called for building residential condominiums, the new plans were for resort condominiums. The owners reasoned that the change meant that even more units could be built on the same site. Although compliance with the CCCL would still be required, the principal issue with which they would now have to deal was compliance with stormwater regulations. In addition, there would actually be fewer obstacles to approval, since Ebb Tide would now only need to secure an approved Development Order.

The resulting change in the Ebb Tide proposal was made via letter dated November 7, 2001. It resulted in a change in government dynamics. County staff and ultimately the BCC could have approved the old Development Agreement. It thus would have bypassed the Planning Commission. The developer preferred that county staff, specifically Planning Director, Gary Ament, make that decision, because it was generally understood that Ament approved of the concept. It was Ament's opinion that the change in classification meant that the enterprise was now a commercial as opposed to residential endeavor.

The new proposal for resort condominiums meant, however, that county staff would not be the entity that would decide the fate of this development. Rather, the Planning Commission would be charged with the responsibility of ensuring that the plans were consistent with local ordinances as well as Bay County's Comprehensive Plan. Compliance with the Comprehensive Plan was questionable at best since by all accounts

the development exceeded the 15 units per acre limit. By a 3-2 vote, the BCC decided at its November 20, 2001, meeting to transfer consideration of the proposal to the Planning Commission.

On December 4, 2001, the BCC suddenly reversed its previous decision when Commissioner Cornell Brock changed his mind and decided that Ament should make the decision. The change in his vote occurred after one of the owners, Charles Faircloth, strenuously lobbied the BCC after its November 20, 2001, vote. Commissioners Ropa and Newberry became the only commissioners to oppose the development.

The BCC heard public comment at the December 4 meeting. Members of the public protested their concern about the lack of notice of this project, as well as their belief that the application to develop was not even complete and therefore not ripe for review.

Predictably, Ament quickly approved the density levels that Ebb Tide proposed. He allegedly based his decision on his finding that the Bay County 1999 Comprehensive Plan classified condominiums as seasonal resort units with no cap on density. The county's Land Use Code had not been revised to impose limits on the new "seasonal resort" classification—thus, he reasoned, units built with this classification were considered neither residential nor commercial. Landowners immediately appealed his decision to the County Commission. Ironically, Ebb Tide challenged the appeal in circuit court, arguing that the appeal should have been filed with the Planning Commission. Then the parties agreed to withdraw the appeals and stay the circuit court action pending actions by Bay County.

The project was entangled in the Bay County Planning Division until October 15, 2002, when the FDEP issued a permit to build the condominiums seaward of the CCCL

providing higher building standards were met. Adjacent property owners administratively challenged this permit; however, they subsequently dropped the challenge, thus clearing the way for Bay County to act on the application.

On March 26, 2003, Ament's office notified Ebb Tide that its application for a development order, i.e. permit, had now been deemed complete, thus allowing the Bay County Planning Division to act upon the application. It approved the application on May 21, 2003. Its decision was immediately appealed to the Bay County Planning Commission.

On June 12, 2003, the Planning Commission, itself the subject of intense pressure being applied by developers,<sup>13</sup> decided to hear the appeal filed by the landowners. Ebb Tide responded to this decision two weeks later by filing a motion to intervene in Gothard's circuit court lawsuit challenging the composition of the Planning Commission. Gothard's lawsuit, of course, had been filed by Charles Hilton, Faircloth's close business associate. In its papers seeking intervention in the Gothard lawsuit, Ebb Tide asked the circuit judge to enjoin the Planning Commission from acting on the appeal of its development order. The court, on July 8, 2003, allowed Ebb Tide to intervene in the Gothard appeal—but it denied Ebb Tide's efforts to enjoin the Planning Commission's consideration of the appeal.

On July 15, 2003, the Planning Commission, by a 3-2 vote, affirmed Ament's decision—thus approving issuance of the development order. The matter is currently pending in circuit court after being challenged by affected property owners in the area.

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<sup>13</sup> See, Section II. A., above.

#### **D. Wavecrest**

St. Joe Company/Arvida (“St. Joe”) is the single largest private landowner in the Florida Panhandle.<sup>14</sup> It has now proposed the construction of a residential development known as Wavecrest on a 6-acre parcel in the Hollywood Beach section of Bay County. The location of the proposed development is in an area designated as an Urban Service Area under Section 3.2.3 of the Comprehensive Plan. This particular Urban Service Area is located in a Beaches Special Treatment Zone, pursuant to Section 3.2.5 of the Comprehensive Plan. Its future land use classification is “Seasonal Resort.” Under the Comprehensive Plan, no permanent residential developments are allowed. See, Table 3A, Land Use Categories.

St. Joe proposed the concept by way of a 10-year Development Agreement that it submitted to the Bay County Commission (“BCC”) in September 2002 (although it was amended several times). According to the proposal, Wavecrest would include up to 88 residential units. The residential units would include single family homes, townhouse- and multi-family units of up to seven floors with a height of 100 feet. If actually constructed these units would be the tallest buildings on Panama City Beach.

The construction of this residential development is controversial because its location, which is on Front Beach Road, parallels the Gulf of Mexico. The actual dwelling units are proposed to be built on the north side of this road, but “accessory uses” deemed by the developer to increase the residents’ use and enjoyment of the property are slated to be

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<sup>14</sup> St. Joe sells part of its pulpwood to Smurfit-Stone, an affiliate of Stone Container Corporation, under a July 1, 2000 contract. This is a multi-million dollar contract, according to St. Joe’s February 2001, 10-K filing with the Securities & Exchange Commission. According to their respective Campaign Treasurer’s Report Summaries,

constructed on the south side of the road. These accessory uses are small-scale commercial shops—and the public would be excluded from this area. The densities on the south side of the road would be smaller than those on the northern side where the residential dwellings would be located.

This matter initially came before the BCC on July 1, 2003, at its regular meeting. Initial consideration was given to postponing consideration of the Development Agreement until after the Bay County Planning Commission had completed its LDR workshops. Commissioner Ropa suggested that once these workshops were concluded the BCC would have a better idea whether or not this proposal would meet the future requirements expected to be embodied in the new LDRs.<sup>15</sup> Planning Director, Gary Ament, noted that given the existing zoning of SR1 there would be no height restrictions on the development. However, the Planning Commission was considering amending this portion of the code to impose a 60-foot requirement. Billy Buzzett, spokesperson for St. Joe, suggested that the BCC should move forward with public hearings ostensibly so that the public that would be affected by the development could voice their opinions.

The initial public hearing on the proposed Development Agreement was held on July 15, 2003. Notice of the hearing was published in the newspaper of record, however, from discussion at the hearing it appears as though no written notice in accordance with § 163.3225(2)(a), Fla. Stat., was provided to all affected property owners. Given the public concern over the lack of notice the BCC voted to send written notice to all property owners within 500 feet of the proposed development. It was also decided that the July 15

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Stone Container contributed \$500.00 to Commissioner Gainer's campaign on September 24, 2002, and \$100.00 to Commissioner Gainer's campaign on October 11, 2002.

“public hearing” would be continued to August 5, 2003. By that time notice would have been provided to the affected property owners.

At the BCC regular meeting on August 5, 2003, County Manager, Pamela D. Brangaccio informed the BCC that this was the second public hearing on the Wavecrest project. She also advised them that the terms of the Development Agreement had been changed since the last meeting on July 15. Mike McCauley, a staff employee in the Planning and Zoning Department also referred to the previous meeting as the first public hearing and he also confirmed that changes to the agreement had been made since that meeting. At this point a property owner within 100 feet of the proposed development challenged the characterization of the hearing as the second public hearing and reaffirmed the concern that proper notice had not been provided prior to the July 15 hearing. The County Attorney then erroneously informed the BCC that the matter had been decided adversely to the citizen at the last public hearing. He informed Commissioner Newberry that the first hearing was held after proper notice. His assurances appeared to assuage the concerns of the Commissioners. He ignored the fact that the terms of the Development Agreement were changed after the first meeting, a fact that would have negated the effectiveness of the first “public hearing.”

Members of the public were then allowed to further comment on the development. They asserted that (1) the development would violate the county’s Comprehensive Plan, and (2) that this matter should have been decided by the Planning Commission before coming before the BCC. These issues were not addressed by the BCC; however, upon

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<sup>15</sup> At the same time, however, the move was underway to reconstitute the Planning Commission so that it would be friendlier towards developers.

motion by Commissioner Ropa the public hearing was continued to the August 19, 2003, regular meeting of the BCC.

At the August 19, 2003, BCC regular meeting Mike McCauley began the county's presentation by incorrectly asserting that the August 19 meeting was the continuation of the second public hearing held on August 5. Citizens who spoke at this hearing again advised the BCC that the Development Agreement violated Bay County's Comprehensive Plan. They were upset that the proposed height allowances would be 100 feet, as opposed to the 35-foot restriction of the other buildings in the neighborhood. Upon questioning by Commissioner Newberry, County Attorney, Burke assured the BCC that it had followed all procedures. At that point, the issue was called for vote and the BCC unanimously approved the Development Agreement.

Residents filed suit in circuit court in an effort to block the development from going forward. The suit is principally based upon violations of the Bay County Comprehensive Plan. The violations include height restrictions, e.g. placing a multi-story building next to residential housing, and density transfers that are not allowed in the LDRs or in the Comprehensive Plan. St. Joe is attempting to have the case dismissed; however, the court has not yet ruled on their latest attempts in this regard.

### **III. FLORIDA LAW GOVERNING PUBLIC CONDUCT**

#### **A. The Citizens' Right to Honest Government**

Official misconduct in Bay County related to local government regulation of land development and related processes involves some or all of the following acts or omissions: abuse of the public trust (Article II, Section 8(a), Florida Constitution); breach



of the public trust for private gain and inducing others to breach the public trust for private gain (Article II, Section 5, Florida Constitution); violations of the Sunshine Law (Section 286.011, Florida Statutes); violations of the Public Records Law (Section 119.07, Florida Statutes); Ethics Code violations (Sections 112.313 and 112.3143, Florida Statutes); willful violations of, and conspiracy to violate, the Local Government Comprehensive Planning and Land Development Regulation Act (Part II, Chapter 163, Florida Statutes); corruption by threat against public servants (Section 838.021, Florida Statutes); violations of Rules 4-1.7 and 4-1.10 Regulating the Florida Bar; and conspiracy to violate the Sunshine Law, the Ethics Code, and Rules Regulating the Florida Bar, and to corrupt by threat public servants (Section 777.04, Florida Statutes). Further, taken together, the pattern of pro-developer control and official misconduct has been so pervasive in Bay County's regulation of land development and related processes as to constitute part of an enterprise that should be the subject of an investigation for possible violations of Florida RICO (Racketeer Influenced and Corrupt Organization) Act, Sections 895.01-895.06, Florida Statutes.

*1. The Ethics Laws Governing Public Officials*

Several legal provisions govern the actions of public officials. First, "A public office is a public trust." See Art. II, § 8(a), Fla. Const. Moreover, "[t]he people shall have the right to secure and sustain that trust against abuse." *Id.* Further, "[a]ny public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions." See Art. II, § 5, Fla. Const.

Under Section 112.313(7), Florida Statutes, no public officer or employee shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others.

Under Section 112.3143(3)(a), Florida Statutes, no county public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. A disclosure memorandum must also be filed within 15 days after the vote occurs.

Under Section 112.3143(4), Florida Statutes, no appointed public officer shall participate in any matter which would inure to the officer's special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter.<sup>16</sup>

The penalties for violation of Florida's ethics laws are severe. Under § 112.317(1)(a), Fla. Stat., they include impeachment, removal from office, suspension

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<sup>16</sup> Effective January 1, 2001 (see Chapter 243, Section 14, Laws of Florida), disclosure of financial interests is not required for citizen advisory committees who only have the power to make recommendations to planning or zoning boards. See § 112.3145(1)(a)2e, Fla. Stat. (2000 Supp.). However, before January 1, 2001, disclosure of financial interest

from office, public censure and reprimand, forfeiture of no more than one-third salary per month for no more than 12 months, a civil penalty not to exceed \$10,000, and restitution of any pecuniary benefits received because of the violation committed.

### **B. The Duty Of Officials To Abide By Comprehensive Plans**

Compliance with the Bay County Comprehensive Plan, adopted pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, Part II, Chapter 163, Florida Statutes, is a public duty of all Bay County officials and staff. It is not an option but rather a "minimum" requirement. § 163.3161(7), Fla. Stat.

Governmental bodies must comply with the provisions of each Comprehensive Plan:

(5) It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act **and that no public or private development shall be permitted except in conformity with comprehensive plans**, or elements or portions thereof, prepared and adopted in conformity with this act.

§ 163.3161(5), Fla. Stat. (Emphasis Added)

### **C. Government in the Sunshine**

Subsection (1) of the Sunshine Law, Section 286.011, Florida Statutes, requires all meetings of any board or commission of any authority of any county, except as otherwise provided in the Constitution, at which official acts are to be taken to be open to the public at all times. No commissioner or staff member may act as a liaison between board members to circumvent the open meeting requirement. This subsection also provides that

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was required by July 1 of each year by members of advisory bodies with land planning,

no resolution, rule, or formal action may be binding except as taken or made at an open meeting. It also requires the board or commission to provide reasonable notice of all such meetings.

In addition, the public has the unfettered right (subject to limited exceptions) to review public records. Under the Public Records Law, Section 119.07(1)(a), Florida Statutes, any person has the right to inspect any public record, including personnel records, which must be kept open and accessible.

#### **D. The Obligations of Attorneys**

Rule 4-1.7 Regulating the Florida Bar ("Conflict of Interest") states in pertinent part:

(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

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zoning, or natural resources responsibilities. See § 112.3145(1)(a)(2), Fla. Stat. (1999).

Carrying this rule one step further is Rule 4-1.10 ("Imputed Disqualification"), which provides in pertinent part,

(a) Imputed Disqualification of All Lawyers in Firm.  
While lawyers are associated in a firm, none of them shall knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7, 4-1.8(c), 4-1.9, or 4-2.2.

#### **IV. FINDINGS WITH RESPECT TO BAY COUNTY OFFICIALS**

##### **A. Interference With The Planning Commission**

What is most disturbing about the questionable activities that occurred in Bay County in 2003 is that many of them occurred in the open, on the record, with an attitude that the players were above the law. This is no doubt the direct result of the Governor's failure to consider seriously the calls of individuals and PEER in 2000 and 2001. The signal was thus sent that Bay County is available for unrestrained development.

The Bay County Planning Commission was on the receiving end of much of the attacks in 2003. The attacks, it must be remembered, came at a time when the Planning Commission was reviewing a new set of Land Development Regulations to be adopted by the County Commission. These LDRs were potentially a significant threat to the plans of local developers.

The attacks on the Planning Commission appear to have been initiated in February 2003; when County Commission member Gainer unsuccessfully attempted to enlarge the Planning Commission. Commissioner Gainer's sudden stated concern was the perception that Planning Commission members, Barbara Miner and Dianne Brown were overly

concerned about the environment.<sup>17</sup> It is interesting that Commissioner Gainer had voted in favor of Ms. Brown's appointment on January 7, 2003. He opposed Ms. Miner at that time. Then, less than a month later he unexpectedly tried to change the composition of the Planning Commission, expressing displeasure with one of the people that he had voted to install within the past month. It was at this point that efforts to remove these two members apparently accelerated. The filing of the Gothard lawsuit by local attorney, Charles Hilton was nothing less than an effort to ensure that the Planning Commission would eventually become an unbalanced body that would serve as nothing more than a formalistic mechanism to approve any development application put before them. This lawsuit provided a convenient out for the County Commission. Commissioners Brock and Gainer immediately seized on the opportunity to reconstitute the Planning Commission using the lawsuit as political cover. The Planning Commission was quickly reformed into a tool for local developers.

To their credit, County Commissioners Ropa and Newberry have resisted the actions of their colleagues on the County Commission. However, their resistance has been in vain. Their colleagues went out of their way to ensure that a prominent local architect, Cornell Brock, would be allowed to serve an extended term on the Planning Commission—even if it meant rewriting a county ordinance to achieve such a result. This action, which preceded the reconfiguration of the Planning Commission, is a significant indicator of the long-term intentions of the remaining three County Commissioners.

The County Attorney counseled the County Commission that the lawsuit filed by Mr. Hilton could be successfully defended. But he hardly pressed this approach upon the

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<sup>17</sup> The inference was that no local resident could possibly exhibit such concerns.

County Commission. Instead, they were told their options and left to choose. The County Attorney has labored under a glaring conflict of interest throughout this episode. As shown above, his law firm is known for its representation of developer interests in the Bay County area. Rule 4-1.7 of the Florida Bar clearly sets forth the requirements governing the actions of the County Attorney. And while it may be argued that the County Commission was well aware of his firm's representation of developer interests and consented to the representation, a fair question exists as to whether an attorney would reasonably believe that he or she could impartially represent the Bay County residents while deriving such a significant portion of his or her income from local developers. Further, an impartial County Commission would arguably never have retained an attorney who would be forced to labor under such a conflict on a daily basis. The County Commissioners should put their constituents' interests first. Likewise, they should be concerned about the appearance of impropriety on their part for continuing to retain a law firm with such an obvious conflict of interest.

#### **B. The Existing Members Of The Planning Commission**

Three of the Planning Commissioners currently serving on the five-member body are employed by, or own companies, that will benefit directly, or indirectly, from a majority of the decisions that they render as commissioners. James t. Lipham is the president of Emerald Bay Construction, Inc. and Emerald Bay Services, Inc. Mike Thomas is the vice president of Smugglers Cove Amusements, Inc., and owner of a local beach restaurant. Sean McNeil is the owner of McNeil Engineering and is also affiliated with Venture Tek of the Emerald Coast, Inc. and JC Development Corporation (where he serves as a

director with his colleague, Bayne Collins<sup>18</sup>). According to the Department of State's records the two remaining members, Fred Beauchemin and Dr. Neil Lamb are not affiliated with any companies that would benefit either directly or indirectly from the decisions that they are called upon to make in their official capacities as planning commissioners. Both of these planning commissioners were appointed by County Commissioners Ropa and Newberry.

At best, the appointment and continued retention of Planning Commissioners Lipham, Thomas and McNeil creates a situation in which virtually every development plan considered by them calls for them to make a decision, the effects of which can directly impact their private business ventures. In addition, the Planning Commission is currently considering the adoption of new LDRs that will govern the future of land use throughout Bay County. It would be disingenuous to suggest that these revised LDRs will have no impact on the business ventures enjoyed by these three individuals. The residents of Bay County are entitled to a Planning Commission comprised of commissioners who are able to give unfettered consideration to the vast majority of issues that come before it.

The County Commission should never have appointed Messrs. Lipham, Thomas and McNeil to the Planning Commission. However, now that they are seated and have voted on such critical measures as the new LDRs they have violated §§ 112.3143(3)(a) and 112.3143(4), Fla. Stat. They are thus subject to the penalties of § 112.317(1)(a), Fla. Stat.

### **C. Public Records Violations**

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<sup>18</sup> Bayne Collins was a previous member of the Planning Commission. He is an architect by profession and affiliated with the following companies: (1) The Raintree Inc., (2) Eastwood, Inc., (3) Wilcox, Collins & Jenkins, Inc., (4) Collins & Associates, Inc., (5) Bay County Council of Registered Architects, Inc., (6) Martin Theatre Foundation, Inc.,



There is little question that § 119.07, Fla. Stat., was violated by Bay County employees when access to citizen letters opposing development were temporarily “lost” only to resurface at a later date when they would not have been as useful to the citizen who requested them. There has been no investigation into this single violation, even though the employees’ actions constitute a first-degree misdemeanor under § 119.07(3)(s)4., Florida Statutes.

Similarly, Bay County’s expressed policy that it will levy a charge for all public records reviews that exceed fifteen minutes in length is in violation of § 119.07(1)(b), Florida Statutes. This statutory provision allows a charge to be levied for public records reviews only if they require an “extensive” use of clerical or supervisory assistance. It strains credulity to suggest that a sixteen-minute review of public records would require extensive use of clerical or supervisory personnel. The policy constitutes a direct violation of the aforesaid public records law and as such is punishable as a first-degree misdemeanor under § 119.07(3)(s)4., Florida Statutes.

#### **D. Ebb Tide**

The Florida Constitution states that “[a] public office is a public trust.” See Art. II, § 8(a), Fla. Const. Under the same Constitution, the residents of Bay County “... have the right to secure and sustain that trust against abuse.” *Id.* What has thus far occurred in the Ebb Tide matter seriously questions whether the residents have received the honest government to which they are entitled.

The Comprehensive Plan adopted by Bay County is unambiguous in its density restrictions for residential, seasonal/resort uses. Residential restrictions are capped at 15

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(7) Greenfield Village Homeowners, Inc., (8) Architrave, Inc., (9) The Coalition for

units per acre in urban/coastal areas. Seasonal/resort restrictions are capped at 15 units per acre. Commercial uses carry the same density restrictions as do residential uses. Thus, the application of a density rights transfer would be the only way that the County could approve the development. However, the 1991 Land Use Code does not authorize such a transfer.

It is clear that the Bay County Commission, in conjunction with the developers, maneuvered this project to allow Gary Ament to exercise his authority to approve the application. His finding that no densities applied to seasonal/resort uses constituted a blatant disregard for Bay County's Comprehensive Plan. His decision violated § 163.3161(5), Fla. Stat., which requires that public officials comply with their county's Comprehensive Plan.

It was a seriously weakened Planning Commission that ultimately heard (and approved) the Ebb Tide application in July 2003. Ament had deemed Ebb Tide's application complete on March 26, 2003. The Planning Division approved it on May 21, 2003. Then, less than 3 weeks later two members of the Planning Commission were themselves the subjects of the Gothard lawsuit. The allegations in the lawsuit were that these two members were anti-development. Thus, the odds of approval of this project by the Planning Commission were significantly increased in July, when the two members were themselves under attack.

More fundamentally, it must be remembered that the property upon which Ebb Tide would be built is property that was replenished subsequent to the property being eroded after Hurricane Opal devastated the area. Taken in context, therefore, the citizens of Bay

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Coastal Redevelopment, Inc., and (10) JC Development Corporation.

County are faced with expending taxpayers' money to rebuild a portion of Florida's coastline, only to then have their local officials use every tool at their disposal to bend existing laws to allow this project to be built against their wishes.

**E. Wavecrest**

The public has not been given the opportunity for public comment to which it is entitled. Significantly, Billy Buzzett, a spokesman for the developer, St. Joe, pressed the BCC on July 1 to move forward with public hearings—despite the fact that the Bay County LDRs were about to be revised to include height restrictions that would have affected the project. The initial public hearing was held on July 15, 2003, but was deficient inasmuch as proper notice had not been provided to affected property owners under § 163.3225(2)(a), Fla. Stat. Consequently, that hearing was continued to August 5, 2003. However, on August 5, 2003, efforts were successfully made to characterize the August 5 hearing as the second public hearing. In reality, however, the August 5 hearing was a continuation of the July 15 hearing.

In addition, the project specifics had changed by the time of the August 5 hearing. Thus, the public was now faced with commenting upon a changed development application without being given ample opportunity to review the same in advance. The comments made by those residents on July 15 were potentially still valid. However, it is unclear whether those residents would have supplemented their comments had they known what the new project plans would entail. In short, the residents were faced with shooting at an ever-moving target with the BCC and St. Joe controlling the target's movements.

The BCC held another hearing on the application on August 19, 2003. This hearing was described as a continuation of the August 5, 2003, hearing. In reality, it was the first opportunity that the public had been given to comment after first having the ability to review the application completely. Public comments were largely negative. Yet, the BCC approved the application.

In hindsight it is evident that the public was unwittingly engaged in a shell game in which its ability to comment on St. Joe's application was significantly compromised because of the failure by the BCC to provide adequate advance notice of the actual, final application that would be considered.

In addition, the public has requested that the Department of Community Affairs review the proposed development plan, particularly in light of the numerous violations of the county's Comprehensive Plan. The DCA's response has been less than satisfactory, essentially a recommendation to mediate what are clear violations. Its job is to enforce the law if the county chooses to circumvent the same. Its job is not to act as an enabler for developers.

## **V. GENERAL RECOMMENDATIONS**

PEER recommends the following actions be taken regarding the issues raised in this report:

1. If the public is to have any confidence in the actions taken with respect to development issues in Bay County it is necessary to dissolve the current Planning Commission. The vacant seats on the Planning Commission should be advertised and filled with individuals from the

community. Membership on the new Planning Commission should be limited to individuals whose private employment is of a nature that would not render the majority of their decisions suspect because of perceived conflicts of interest.

2. The Florida Commission on Ethics should initiate an investigation into those Planning Commissioners who are currently serving on the Planning Commission and who are privately employed in positions that directly conflict with their obligation to serve Bay County residents. The decisions rendered by these officials should be reviewed to determine the extent to which, if any, they directly or indirectly benefited financially by those decisions.

3. It is clear that certain members of the Bay County Commission supported the reduction in size of the Planning Commission from nine to five members. It is equally clear that certain members of the Bay County Commission are staunch supporters of those members on the Planning Commission who labor under ongoing conflicts of interest. Therefore, PEER recommends that the Florida Commission on Ethics also investigate these members of the Bay County Commission.

4. The Bay County Commission has also distinguished itself in its ability to disregard the dictates of the Bay County Comprehensive Plan. This is particularly true in the votes it cast approving the Ebb Tide and Wavecrest developments. Florida law is clear that county commissions are obligated to abide by Comprehensive Plans that govern their respective counties.

The actions of the Bay County Commission with respect to the Comprehensive Plan must be considered in light of the County Commission's relationship with the Planning Commission. PEER suggests that the Florida Commission on Ethics should therefore include the actions of the county commissioners vis-à-vis the Comprehensive Plan in its investigation.

5. The legal representation received by the Bay County Commission is suspect in light of the overwhelming conflict of interest existing with the Burke & Blue law firm. It is admirable that the commission took the step of retaining another attorney to advise it on land use issues. However, the fact remains that Burke & Blue (as well as Mr. Arline) continues to render legal assistance on the critically important adoption of new Land Development Regulations. Thus, it is difficult to see how the taint of conflict of interest has been overcome. PEER recommends that the BCC take immediate steps to retain a new general counsel. Failing that, the BCC must ensure that Burke & Blue is completely removed from any issues involving land use in Bay County.

6. The violations of public record laws are particularly troubling and should be investigated by law enforcement. The concern in this area is the ability to obtain an honest assessment of the violations, together with a commitment to prosecute the offender(s). As has been addressed in the prior petitions filed by PEER, the elected State Attorney, Jim Appleman, labors under his own conflict of interest in this area. That has not changed.

Thus, PEER recommends that the investigation and prosecution be referred to the Office of the Statewide Prosecutor if Bay County residents are to have any degree of confidence in such an investigation.

7. Planning Director, Gary Ament should be removed from his position in light of the manner in which he handled the Ebb Tide application. His efforts to secure approval of the application in spite of direct violations of the Comprehensive Plan ran afoul of Florida law. The fact that his actions were countenanced by a majority of those on the Bay County Commission should not absolve him of the responsibility to recommend adherence to the Comprehensive Plan.

8. Finally, PEER calls for the appointment of a Special Grand Jury to investigate the activities of the Bay County Commission and the Planning Commission over the past three years. Simply stated, the numerous problems found in the land development arena in Bay County all emanate from the Bay County Commission. That body has shown itself not to be of a nature to insist upon open, honest government that is free from the pressure imposed by the monied interests. It is clear that the future will bring significant sustained efforts to bring massive development to the region. The recent general permit to be issued by the Florida Department of Environmental Protection to the St. Joe Company is but one example. If the residents of Bay County are to receive the honest, straightforward leadership that they deserve it will not likely be with the present commission. The only way to bring back the trust that the residents need

to have in their elected officials is to go through the process of an investigation so that the facts can be ascertained by individuals empowered with subpoena power and the ability to issue indictments if necessary.

## **VI. CONCLUSION AND FINAL RECOMMENDATION**

The current political situation in Bay County is one that engenders a high level of mistrust amongst the county residents. Development, in and of itself, is not something that should be disfavored inasmuch as it typically brings employment and higher standards of living to the people that it touches. However, the development seen in Bay County is being accomplished through the continual bending, if not breaking, of the county's laws. These laws are meant to protect all residents by ensuring that all development is managed in a way that will preserve the area's neighborhoods and ecosystem.

What is particularly troubling is that Bay County residents have repeatedly called for reforms in their county government. PEER has filed two prior petitions documenting significant problems in the area. Notwithstanding these repeated requests, local officials, most notably the local State Attorney, have done nothing to rectify the problems. The same must be said for the Governor, whose approach also appears to be that if the problem is ignored it will simply go away.

The events and actions of government officials described in this White Paper are serious. What is most disconcerting, however, is that these are hardly an exhaustive list of the problems facing Bay County residents on issues involving land development and



environmental protection. Thus, PEER firmly believes that a Special Grand Jury should be appointed to look into the actions detailed herein, together with other similar issues that the residents may raise.

That said, in light of the past actions of the State Attorney and Governor, one must conclude that there is little cause for hope that the system will change if left to the State of Florida. Therefore, PEER strongly recommends that a federal grand jury be appointed in order to evaluate the actions of Bay County officials. This grand jury should be tasked with the responsibility to recommend the appropriate course to be followed in order to return Bay County government to the good people who reside there.