

RESOLUTION NO. 21--__

A RESOLUTION SETTING FORTH THE FINDINGS OF FACT AND CONCLUSIONS OF THE BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS PERTAINING TO THE DENIAL OF REQUEST FOR REZONING FROM RESIDENTIAL, RU-1-13 TO AGRICULTURAL LOW INTENSITY, AU(L) ZONING ON PROPERTY OWNED BY LAZY RIVER, INVESTMENTS, LLC.

BE IT RESOLVED by the Board of County Commissioners of Brevard County, Florida as follows:

STATEMENT OF THE CASE AND FACTS

This item came before the Brevard County Planning and Zoning Board (P&Z) on November 9, 2020. The Planning and Zoning Board recommended approval. The item came before the Brevard County Board of County Commissioners on December 3, 2020 and was tabled until February 4, 2021. On February 4, 2021, the request was denied after a public hearing.

The record is attached as Exhibit "A." It consists of the documents maintained by the Planning and Development Department, and provided to the Planning and Zoning Board and Board of County Commissioners, relevant code sections, Comprehensive Plan provisions and minutes. The pages will be referred to as R-_____.

Description	Page Numbers
Agenda Report	R-0002
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Chapter 01 Conservation Element, Brevard County Comprehensive Plan	R-0097
Chapter 02 Surface Water Management, Brevard County Comprehensive Plan	R-0145
Chapter 10 Coastal Management Element, Brevard County Comprehensive Plan	R-0159
Section 62-1334, Code of Ordinances of Brevard County, Florida, Agricultural Residential-Low Intensity (AU(L)); Section 62-1340, Code of Ordinances of Brevard County, Florida RU-1-13	R-0209
Section 62-1335, Code of Ordinances of Brevard County, Florida Rural Estate Use (REU)	R-0215
Section 62-1255 – Code of Ordinances of Brevard County, Florida – Establishment of zoning classifications and consistency with comprehensive plans	R-0217
Minutes Brevard County Commission Meeting February 4, 2021 Item H.1 Lazy River Investments	R-0222
Minutes of the Brevard County Commission Meeting December 3, 2020 Item H.6., Lazy River Investments	R-0237
Section 62-1188 – Code of Ordinances of Brevard County, Florida	R-0238

The applicant, Lazy River Investments, LLC (Lazy River), purchased the subject 20.13 acre property on May 9, 2019 (R-0045). In 2019, the Brevard County Comprehensive Plan Future Land Use Map (FLUM) designation for the property was Residential 1 unit per 2.5 acres (RES 1:2.5) and has not been changed (R-0022, R-0011, R-0012). Under the density restriction of the Future Land Use Map the maximum allowable density on the subject property is 8 dwelling units. The subject property's existing zoning of RU-1-13 allows a density of greater than 1 unit per 2.5 acres and, therefore, it is inconsistent with the Future Land Use Map. The applicant requested rezoning to Agricultural Residential Low Intensity Zoning AU(L), which allows 1 unit per 2.5 acres, to be consistent with the Future Land Use Map (R-0011).

The property consists of two vacant platted lots, one of 10.25 acres and one of 9.88 acres based on a plat recorded in 1894 (R-0055, R-0090). The two lots have water frontage along the Sebastian River and road frontage on Fleming Grant Road (R-0021). At the time of the application for rezoning, the property development potential was 2 lots or 2 dwelling units. The proposed rezoning request for AU(L) would allow 8 units, an increase in a density of 6 units (R-0011). AU(L) zoning has a minimum lot size of 150 feet (R-0209). Although RU-1-13 would allow a density greater than two units and in excess of 8 units, the Comprehensive Plan's Future Land Use Map limits density to 8 units [based on the cap on density of 1 unit per 2.5 acres on 20.13 acres.] Accordingly, the property's zoning classification is inconsistent with the Future Land Use Map of the Comprehensive Plan (R-0011). However, the text of the Comprehensive

Plan, in Objective 15, specifically allows the development of nonconforming lots without the necessity of rezoning to be consistent with the Comprehensive Plan. The two lots are nonconforming lots of record because they were in the current two lot configuration when the County's Comprehensive Plan was adopted in 1988 (R-0090). Accordingly, the two lots have had the potential for development as two lots since 1988. (R-0090)

According to the staff report, the southern portion of the property is in the Coastal High Hazard Area (CHHA) (See Map R-0028, R-0012). The Comprehensive Plan's Coastal Element indicates the CHHA is an area which is subject to storm surges and flooding in a Category 1 hurricane (R-0018). Objective 7 of the Coastal Element of the Brevard County Comprehensive Plan seeks to "limit densities within the coastal high hazard zone and direct development outside of this area." (R-0185) The southern portion of the property is also in the Special Flood Hazard Area (SFHA) (See Map R-0027). Development in the SFHA must be elevated to or above the 100-year base flood elevation (BFE) (R-0012). In other words, the property would have to be filled to 6.3 feet to be above the 100-year floodplain in order to accommodate development. The SFHA and the CHHA overlap significantly (See Maps R-0027 and R-0028).

In the staff report, concurrency issues involving transportation and school capacity were addressed and found to be adequate as no deficiency levels were reported (R-0013). The staff report further stated:

The subject property is not served by potable water. The subject property would be served by well and septic. Brevard County Division 46, Article II, Division 4 establishes a nitrogen reduction overlay area (Overlay) that requires advanced OSTDS that reduces total nitrogen by at least 65%. A portion of the property lies within this Overlay and septic systems within this Overlay are subject to said regulations.

(R-0013)

Other significant environmental issues were addressed in the staff report by the County's Office of Natural Resources which provided a summary of issues followed by extended discussion. The summary is provided below along with portions of the extended discussion (beginning at R-0016).

Summary of Mapped Resources and Noteworthy Land Use Issues:

- *National Wetland Inventory (NWI) Wetlands*
- *Aquifer Recharge Soils*
- *Coastal High Hazard Area*
- *Floodplain*
- *Surface Water Classification*

- *Indian River Lagoon Nitrogen Reduction Septic Overlay*
- *Protected and Specimen Trees*
- *Protected Species*

The southern portion of the subject parcel is located within the Special Flood Hazard Area (SFHA) as identified by Federal Emergency Management Agency (FEMA) in yellow on the FEMA Flood Zone Map. A comparison of the SFHA and the CHHA on the corresponding maps, reveals a similar overlay. Per Section 62-3723(2)(a) and (b), development within an estuarine floodplain shall not negatively impact adjacent properties or receiving water body quality.

Development shall provide a contiguous area that includes the primary structure and perimeter buffer, accessory structures, onsite sewage disposal system and buffer, and access to the primary and accessory structure. This contiguous, developed area shall be elevated to or above the 100-year base flood elevation (BFE) as described below.

Wetlands

The subject parcel contains an area of mapped NWI wetlands on the southwest portion of the site as shown on the NWI Wetlands Map; an indicator that wetlands may be present on the property. A wetland delineation will be required prior to any site plan design, land clearing activities, or building permit submittal. Per Section 62-3694(c)(1), residential land uses within wetlands shall be limited to not more than one (1) dwelling unit per five (5) acres unless strict application of this policy renders a legally established parcel as of September 9, 1988, which is less than five (5) acres, as unbuildable. For subdivisions greater than five acres in area, the preceding limitation of one dwelling unit per five (5) acres within wetlands may be applied as a maximum percentage limiting wetland impacts to not more than 1.8% of the total non-commercial and non-industrial acreage on a cumulative basis as set forth in Section 65-3694(c)(6).

Coastal High Hazard Area

The southern portion of the property is in the CHHA. The Coastal Management Element of the Comprehensive Plan, Objective 7.0, seeks to limit densities within the coastal high hazard zone and direct development outside of this area. Policy 7.6 states that existence of sewer, water, roadways or other public infrastructure shall not be considered adequate rationale for an increase in zoning density or intensity within the CHHA. Policy 6.1 designates CHHAs to be those areas below

the elevation of the Category 1 storm surge elevation as defined in Chapter 163, Florida Statute.

Floodplain

The southern portion of the subject parcel is located within the SFHA as identified by FEMA in yellow on the FEMA Flood Zone Map. A comparison of the SFHA and the CHHA on the corresponding maps, reveals a similar overlay. Per Section 62-3723(2)(a) and (b), development within an estuarine floodplain shall not negatively impact adjacent properties or receiving water body quality, and development shall provide a contiguous area that includes the primary structure and perimeter buffer, accessory structures, onsite sewage disposal system and buffer, and access to the primary and accessory structure. This contiguous, developed area shall be elevated to or above the 100-year BFE as described below.

The FEMA determined BFE within the SFHA for the parcel is anticipated to increase from 4.5 feet NAVD to 5.3 feet NAVD, becoming effective January 29, 2021. Both the Florida Building Code and County Code require that for any structure proposed within the SFHA, the lowest floor elevation (FFE) of structures must be a minimum of 1 foot above the BFE, or 6.3 feet NAVD upon effective date. The LiDAR map provided in this package shows the 6.3 feet NAVD contour line. Elevations below 6.3 feet NAVD will either require fill, or an alternative option to slab-on-grade construction (i.e. stem wall construction), to bring the FFE up to 6.3 feet NAVD.

Construction in the SFHA of onsite septic tank and drain field with buffers, access to the primary and accessory structures, and all accessory structures such as pools, decks, detached garages, sheds, require a constructed elevation at or above the BFE (5.3 feet as of January 2021); which may likely result in fill used in conjunction with a stem wall/retaining wall.

Surface Water Classification

The property is located on surface waters designated by the State as an Aquatic Preserve. A 50-foot surface water protection buffer (Buffer) is required. Except as allowable under Section 62-3668 (7), primary structures shall be located outside of the Buffer. Accessory structures such as pools, decks, sheds, cabanas, etc., are permissible within the Buffer provided that stormwater management is provided. Impervious areas shall not exceed 30% of Buffer area.

Avoidance/minimization of Buffer impacts is required so that surface water quality and natural habitat is not adversely affected.

Indian River Lagoon Nitrogen Reduction Septic Overlay

Portions of the site are mapped within the Indian River Lagoon septic overlay per Chapter 46, Article II, Division IV - Nitrogen Reduction Overlay. The project is not located within the Brevard County's sanitary sewer service area. Thus, use of an alternative septic system designed to provide at least 65% total nitrogen reduction through multi-stage treatment processes shall be required. Septic tanks and drain fields in the SFHA are be (sic) subject to flooding, and per Section 62-3723(b) will require fill to be elevated to or above the BFE.

Heritage Specimen Trees

The entire subject property is overlaid in a mapped polygon of SJRWMD FLUCCS code 4340-Upland Mixed Coniferous/Hardwood trees. Protected Trees (greater than or equal to 10 inches in diameter) and Specimen Trees (greater than or equal to 24 inches in diameter) are included in this FLUCCS code and are found on the project area. Per Brevard County Landscaping, Land Clearing and Tree Protection ordinance, Section 62-4331(3), the purpose and intent of the ordinance is to encourage the protection of Heritage Specimen trees. In addition, per Section 62-4341(18), Specimen Trees shall be preserved or relocated on site to the Greatest Extent Feasible. Per Section 62-4332, Definitions, Greatest Extent Feasible shall include, but not be limited to, relocation of roads, buildings, ponds, increasing building height to reduce building footprint or reducing Vehicular Use Areas.

While developing to a higher elevation provides more protection from flooding, the additional fill is detrimental to the preservation of Protected and Specimen Trees, especially those located at the lower elevations within the SFHA floodplain and the CHHA. If units are developed in the lower elevations of the property, closer to the shoreline, more fill will be required to satisfy Land Development Regulations relating to the FFE.

(R-0016, R-0017)

The staff provided a general description of surrounding properties as follows:

The surrounding area is characterized as low density with some residential lots developed at less than 1 acre prior to the adoption of the Comprehensive Plan in 1988.

The surrounding properties are zoned RR-1 to the east, RU-1-13 to the west, AU across Fleming Grant Road to the north and General Use (GU) on the islands in the Sebastian River to the south.

There have been no approved zoning actions approved in the last three (3) years within half-mile of the subject property.

Directly to the east of the subject property lies a 30-foot unimproved right-of-way, and to the east of that lies the private drive Seabird Lane, which per AA-1581 and AA-1583, provides access to two three-acre riverfront parcels.

(R-0015)

The staff comments also addressed Administrative Land Use Policies of the Brevard County Comprehensive Plan.

Analysis of Administrative Policy #3 - Compatibility between this site and the existing or proposed land uses in the area. (R-0013 – R-0014)

All of the properties between Fleming Grant Road and the Sebastian River have the RES 1:2.5 Future Land Use designation. This segment of Fleming Grant Road is considered to be low density residential and rural in character. The area contains a mixture of lot sizes and zoning classifications. Lots within ½ mile of the property range in size from 0.17 acres up to 4.5 acres with the majority being an acre or larger, and are zoned AG (Agricultural), GU (General Use), RR-1 (Rural Residential) and RU-1-13 (Single-Family Residential). The AG and GU classifications may be considered consistent with RES 1:2.5; however, the RR-1 and RU-1-13 classifications are not considered to be consistent with the RES 1:2.5. The majority of these parcels were created prior to the adoption of the Comprehensive Plan in 1988.

The proposed AU(L) zoning may be considered to be consistent with RES 1:2.5 as it has a minimum required lot size of 2.5 acres. The AU (Agricultural Residential) zoning classification is generally intended to encompass lands devoted to agricultural pursuits and single-family residential development of spacious character. The classification is divided into two types, AU and AU(L). AU is the standard agricultural residential classification, while AU(L) is a low intensity sub-

classification more suited to smaller lots where the neighborhood has a more residential than agricultural character. The AU(L) classification also permits the raising/grazing of animals, fowl and beekeeping for personal use and prohibits commercial agricultural activities. The AU(L) zoning classification requires a minimum lot size of 2 ½ acre lots, with a minimum lot width and depth of 150 feet, and a minimum house size of 750 square feet. There are parcels in the area that have the AU zoning classification; however, the Board's approval of the request would introduce AU(L) to the area.

The properties along the eastern boundary of the subject property and most of the north side of Fleming Grant Road from the subject property are zoned RR-1. The RR-1 zoning classification is generally intended to encompass lands devoted to single-family residential development of spacious character, together with such accessory uses as may be necessary or are normally compatible with residential surroundings, and at the same time permits uses which are conducted in such a way as to minimize possible incompatibility with residential development. The RR-1 classification permits horses, barns, and horticulture as accessory uses to a single-family residence subject to the standards in Section 62-2100.5(2). The minimum lot size for RR-1 is one acre, with a minimum lot width and depth of 125 feet, and a minimum house size of 1,200 square feet.

The subject property and the properties along the western property line are zoned RU-1-13. The RU-1-13 classification is generally intended to encompass lands devoted to single-family residential development of spacious character, together with such accessory uses as may be necessary or are normally compatible with residential surroundings. RU-1-13 does not permit horses, barns, or horticulture. The minimum lot size is 7,500 square feet, with a minimum width and depth of 75 feet, and a minimum house size of 1,300 square feet.

Analysis of Administrative Policy #4 - Character of a neighborhood or area.

The area is characterized primarily by low-density single-family zoning and rural development. As mentioned above, the area contains a mixture of lot sizes and zoning classifications (i.e., AG, GU, RR-1 and RU-1-13). The majority of the AU-zoned land is approximately 360 feet west of the subject property and has a mixture of residential and residential/agricultural. The more intense uses allowed within the AU zoning classification do not appear to be occurring in the area. The parcels to the east and north of the subject property are zoned RR-1 and are primarily developed as single family residences.

Should the Board be concerned with agriculture activity between the RU-1-13 and RR-1 zoning classifications, an alternative residential zoning classification, REU (Rural Estate Use), could be considered in lieu of the applicant's AU(L) request. The REU zoning classification is similar to AU(L) and requires a minimum lot size of 2.5 acres and may be considered consistent with the RES 1:2.5 Future Land Use, but limits agricultural uses as a conditional use. The keeping of horses or other farm animals would require a separate zoning action in order to identify and limit their usage upon the property. Additionally, REU, with minimum lot width and depth of 200 feet, would limit the number of new lots fronting Fleming Grant Road or the river, plus a small left-over area for possible flag stems accessing Fleming Grant Road, or providing access to the water. The minimum living area is 1,200 square feet, which is 450 square feet larger than the 750 square feet required in AU(L). Although REU zoning is not currently located in the surrounding area, this zoning classification could offer additional protections the AU(L) does not.*

(R-0013, R-0014) (*Examination of the maps in the record indicates the two lots together have water frontage in excess of 600 feet)

At the Planning and Zoning Board hearing on November 9, 2020, Ms. Laura Young, attorney for the applicant, presented the item. She stated the property zoning on the property is inconsistent with the current Future Land Use and it would be a downzoning of the property to rezone from RU-1-13 to AU(L). She stated the property had been before the Board on two separate occasions. The first request was to amend the Comprehensive Plan to allow a greater density RES 1 (which allows 1 unit per acre) instead of RES 2.5 (which allows 1 unit per 2.5 acres) and to allow 20 units. That item was denied by the Board. The second request was for the approval of a Binding Development Plan to reduce density to 8 units with the zoning classification remaining RU-1-13. That request was also denied. She stated her clients chose a zoning classification that is consistent with the Comprehensive Plan, AU(L) and requires a minimum of 2.5 acres. She noted AU(L) affords some flexibility for lot configurations. Bruce Moia, P.E. of MBV Engineering spoke and stated there were ways to make the property buildable; one is to change the zoning and one is to change the land use. He said AU(L) will make the zoning consistent with the Comprehensive Plan and "this is the last way the property can be brought into conformance and it's the simplest." The Planning and Zoning Board voted to recommended approval of the item. (R-0060)

After the Planning and Zoning meeting but before the zoning hearing scheduled for December 3, 2020 before the Board of County Commissioners, the Micco Homeowners Association filed a comment letter. The letter requested that all homes be located outside the Coastal High

Hazard Area, all stormwater be captured outside the Coastal High Hazard Area, that advanced septic be required for all homes near the Coastal High Hazard area and that no fill dirt be allowed in the AE flood zone. In the letter, the Association questioned what would happen to flood waters and cited the continuing need to protect the Indian River Lagoon by limiting the flow of contaminants into the Sebastian River. (R-0062)

At the County Commission meeting on December 3, 2020, the Board tabled the item to February 4, 2021 after a limited discussion (R-0237).

At the County Commission meeting on February 4, 2021, the Board first heard comments from the public, with the applicant's permission, and then heard comments from the applicant's new attorney, Anna Long.

Mary Sphar spoke and stated a huge amount of fill would be required - up to 6.3 feet for development to occur in the CCHA and SFHA. She asked that no structures be permitted in the CHHA. She noted the area in the CHHA is approximately 5 acres and that area is subject to storm surge in a category one hurricane. She also requested that the applicant provide a Binding Development Plan and stated her concern for the existing specimen trees in that "putting several feet of fill on the roots of trees would kill them, losing their service of absorbing stormwater and runoff. So, the fact is, there is no good way to develop as usual, clear cut and fill in the Coastal High Hazard Area and protect the Indian River Lagoon at the same time. Sierra Club's recommendation for a BDP guarantees no homes in the Coastal High Hazard Area and matches the request from Micco Homeowners Association...We are spending millions of tax dollars on public safety related to storms and we're also investing nearly \$500 million on Lagoon cleanup over a 10-year period. Sierra Club urges you to make a responsible decision that is not counterproductive to the County's huge investments. Please ask the applicant to provide an adequate BDP to protect the health of our precious Indian River Lagoon, and please choose to defer your decision on the zoning until you see such a BDP." (R-0224)

David Monty Montgomery spoke to object to the rezoning without a Binding Development Plan to protect the CHHA. He stated, "The property was purchased, here's a survey by William Suter, Bill Suter, a guy down in Malabar, and it was known that there were, was ability to build two homes on this property and now there's a request to build eight homes on this property." He went on to say, "its very sandy soil, to go to eight homes would have issues even with improved septic, you'd still have the pollution of three to four septic tanks even with advanced septic but, my main issue is not to approve this without some sort of commitment or Binding Development Plan that protects from structures being built in the Coastal High Hazard Area...here's one NOAA map that shows, basically most of that area being flooded by four foot storm surge, and here's a NOAA that shows basically, a third of the property being covered by

water.. fill dirt is not going to solve that problem, it's a, a pollutant that'll get washed away with severe, severe weather events." (R-0225)

Terry LaPlante spoke and read the letter from the Micco Homeowners Association into the record, presenting concerns regarding CHHA, floodplains, and contaminants in the river as previously stated. (R-0226)

Lorraine DeMontigny spoke in support of the project and said: "I'm here to support the applicant's request. I think that it's very important that we do protect the environment and I know that one of the applicants resides very close to this property, and I'm sure has the same concerns of protecting the environment. All these items, I think are going to be addressed by the restrictions that are already in place for development in our area...We're all potentially subject to flooding, that's just part of living in Florida and it could really happen anywhere in the United States. I think the constitutional protection of our God-given rights is being a little trampled on, so we have to keep that in mind and we, we shouldn't allow one person to be punished for the mistakes or crimes of another person and we can't predict what's going to happen in the future. So, I think that this, this is going to be a great project." (R-0226, R-0027)

Nine emails in opposition to the proposed rezoning were sent to the Board of County Commissioners. The emails repeatedly stated that there should be no development in the Coastal High Hazard Area. Concerns were raised regarding contaminants from septic tanks, fertilizers and pesticides flowing into the Sebastian River if homes are constructed in the CHHA. Other emails also addressed the problems presented by filling the area due to increased runoff into the river and the need to protect trees and species on the property. The emails also noted the 5 acres in the CHHA overlaps the FEMA maps and is vulnerable to storm surge and flooding. (R-0066 – R-0086)

Ms. Long, the applicant's attorney from the law firm of Dean Mead, requested approval of the Planning and Zoning Board's recommended action to approve the AU(L) rezoning request. She stated she reviewed the information and there was an addendum to staff comments at 8:50 am the day before the meeting which indicated there was no need for rezoning, but she disagreed. She stated two lots would be a de minimis use of the 20 acres at issue and investment backed expectations would not be met. She stated, "This is not an example of down-zoning, it's an example of a taking. The property owner in this matter, they are not asking for special treatment, they are moving forward and have been working with staff over 17 months to obtain compatible zoning for their property, compatible zoning that, per State law, should have been addressed by the County within a year of adopting its Comprehensive Plan in 1988. Nonetheless, the owners are ready to do what they must do, what they are being required to do. They have submitted the rezoning application, the application was reviewed by staff, it was deemed complete, transmitted to the County's Planning and Zoning Board. The Planning and

Zoning Board, after reviewing the application as submitted, along with staff's comments, recommended approval for the rezoning. Per the County Code, nothing additional is required, nothing additional should be expected. Future development or future permitting issues are just that, future issues... we've reviewed all of the written public comments submitted to the County last November and December... There were nine letters or emails, of the nine, one writer did not provide an address, five were written by folks that reside a minimum of 17.2 miles away, and one lived as far as 47.3 miles. The remaining letters, one was, was a person who lived about a mile away, another one, point mile, one mile, and the other across the street... One of the writers and speakers this evening referenced previous comments submitted to the County regarding the property from several agencies including the water management district, DEP, and DO... DEO. All of those agency comments had to do with the previous owner's request for a Comp Plan Amendment, the issue before you, in May 2019. None of those comments had anything to do, nor do they have anything to do, with the requested rezoning here this evening. We asked, there have been no negative comments, or positive, or indifferent, or asked, or received from any of the other environmental agencies, none... While the agencies may have comments during the actual permitting process, the development process, the approval process, those comments right now would be premature, there's nothing to give them, there's nothing for them to comment on... It's simply a straight request for a rezoning...Commissioner Tobia asked us to look into the SLOSH model as was mentioned this evening. Thank you, I had not heard of the SLOSH model. We did do our due diligence. I spoke directly to the National Hurricane Center, and the SLOSH model is updated every three to six years. It was just updated in January of 2020."

Ms. Long provided an extended description of permitting procedures that would be followed after the property is rezoned. She then addressed the BDP as follows: "Let's get to the BDP, a BDP per the County's Code is something that an applicant may voluntarily submit when requesting a rezoning for its property, a BDP is not something that the applicant must request. To reiterate, the rezoning is being required by the County, not truly requested by the applicant. The owner as acquiescent to the process because without it, as noted above, the property value is nearly worthless, certainly falling well short of the investment-backed expectations. In addition, while the current property owners are seeking the requested rezoning, they may not be the ones to develop the property, that's part of the problem they may want to sell it just as vacant lot, and it's very difficult to do right now because when somebody does their due diligence they recognize that the zoning doesn't match the underlying, excuse me, land use provisions. The new owners would be best suited to explore development options and constraints, not the current owners unless they become the developers...The requested AU zoning will allow for eight homes. This is a decrease of 97 percent of the development density permitted under the current noncompatible zoning district. If forced to settle for the nonconforming option, provided in the addendum, then it's a decrease of 99.5 percent...Eight

homes being developed if you approve, down to two would be 75 percent removal of their development rights. The owners have spent thousands of dollars to fix a problem they didn't create. They've listened to staff, they've listened to the property owners around them, and they've submitted everything necessary to support the AU zoning. They've completed everything required of them and the zoning is compatible. We respectfully request that the Board confirm the recommendation of the Planning and Zoning board and re, approve the AU zoning, anything less would result in a taking, punishing the current owners for a situation resulted through no fault of their own."

R-0227 – R-0230

A discussion about allowing additional time occurred. The applicant did not request additional time. Thereafter, the discussion moved to the Board members. (R-0230)

Commissioner Tobia mentioned the Coastal High Hazard Area and indicated he spoke with Laura Young, attorney for the applicant, on or around November 25th and discussed his four primary concerns with the development. (R-0231)

Mr. John Denninghoff, Professional Engineer was asked about impact on neighbors in the event there was an elevation change in the CHHA. He indicated that there would be an impact to neighbors if the area was filled in the future. (R-0231 – R0232) Commissioner Tobia asked Ms. Long for her client's response to the concern regarding fill displacing water during storms and impacting neighbors in a storm event the storm surge would have to go elsewhere, perhaps on neighboring property. (R-0232)

Commissioner Tobia then stated, "the Coastal Management Element of the Comp Plan, and specifically states the County should and I quote here, "Limit densities within the Coastal High Hazard Zone and direct development outside of this area." Uh, Ms. Long, uh, what would you have to say about the Comp Plan, clearly and specifically directing, uh, the Board to, uh, make sure that this type of development doesn't happen in that area?" (R-0232)

Ms. Long responded, "The Comp Plan requires that zoning be compatible with the underlying land use. AU(L) zoning is compatible with the underlying land use, to deal with the other provisions of the Comp Plan, you deal with it as you're moving along in the development process, and apply it accordingly." (R-0232)

Ms. Long also indicated that the client's engineer would work with the County and St. Johns Water Management District. She stated, "I can't really answer the question in the manner in which, I think you might want me to because it's premature." (R-0232)

Commissioner Tobia then stated, "Madam Chair. Can I. Can I read that quote again? 'Limit densities within the Coastal High hazard Zone.' If we were to grant this, we would in effect not be following Coastal High Hazard Zone because your client or whoever they decided to sell it, could directly, uh, develop it outside/inside this area, and it would not come back to the Board." (R-0232)

Ms. Long then stated, "And they could easily develop outside of it, you're giving a compatible zoning to allow for up to eight units... Whether or not those units are located with or outside of the Coastal High Hazard area, is not the point of the discussion this evening." (R-0232 – R-0233)

Commissioner Tobia then stated, "A SLOSH model was mentioned, um, by uh, Ms. Long... Ms. Long because it's a conversation I had with Ms. Young. While these are traditionally done on larger scales, they can be done on smaller scales. Uh, Ms. Young, or sorry, Ms. Long, I apologize, um, and my conversation was via the phone." (R-0233)

Ms. Long stated, "That's fine." (R-0233)

Commissioner Tobia then stated, "So, I didn't see either one of you, uh, um, did you, uh, did you do a SLOSH study?" (R-0233)

Ms. Long stated, "No, sir... And when I asked the National Hurricane Center how it, you know, or, how many SLOSH models are performed by the private sector or by private individuals, I got transferred. I can't even tell you how many times, because they really didn't understand why I was asking. So, I would more than be happy after the rezoning to discuss how that might occur, but as it was explained to me, by the people that currently produce the model that it's a model done by the National Hurricane Center in cooperation with FEMA, NOAA, and the Army Corps of Engineers." (R-0233)

Commissioner Tobia then stated, "Okay. Finally, um, and this would go back to Mr. Denninghoff, and your expert opinion. Will the health of the Indian River Lagoon be adversely impacted should homes be built in the Coastal High Hazard Zone?" (R-0233)

Mr. Denninghoff stated, "Given that we're talking about new development while the development standards are in some cases high, they do not reach the level that's necessary to preclude a negative impact to the Lagoon. So, the answer is that there would be an impact to Lagoon." (R-0233)

Commissioner Tobia stated, "Thank you. Uh, one final question. Ms. Long, would you agree it would be legally appropriate for this Board to consider adverse impacts on the Indian River Lagoon when making decisions, such as this?" (R-0233)

Ms. Long stated, "I think it would be appropriate for this Board to determine whether or not the request before you meets the current criteria of your Code and if what I heard your Assistant Manager say was, that your current Code is inadequate to allow new development, and that's an entirely different issue and again, you would be punishing this applicant for something that the County should be addressing on a consistent basis." (R-0234)

Commissioner Tobia commented on due diligence and zoning in effect at the time of purchase along with potential BDP opportunities and then said, "I think there were many opportunities, but certainly right now, the blatant disregard, uh, of actions of, of the Board, and disregard of, of, I, I would say that the neighbors and it appears as though that is as the, the case. Um, right now, I, I don't see how I could, vote in favor of this. Um, I'm actually on the fence right now of whether or not this should, uh, be denied, or tabled again? If it's tabled again, it would give the applicant, you know, 30 or 60 days to, uh, come back to us. Uh, if it was denied the applicant... My understanding is, could come back to us, however, there would a six-month, uh, moratorium on it, but given the fact that there was no communication with my office up until yesterday. I'm probably leaning to the former, uh, than the latter, but I would like to hear from, uh, the rest of the this Board, Madam Chair..." (R-0234)

Commissioner Smith stated, "...Thank you, Madam Chair. I'm very concerned, being a water guy myself, and, and an environmentalist to some degree. I don't want to see anything built in that High hazard Zone either, so if we can do something that is legally, uh, available to us to prevent that. But, while at the same time giving the, the owner the opportunity to build the number of houses that can, can adequate adequately be provided on the rest of that property, I think that's the way we should go. So, I will be supporting you, as well." (R-0235)

Ms. Long stated, "You know, I really need to understand what, why it's being denied. I really do. Um... Before I can answer that question. So, again, if you're denying it because there was not a BDP submitted. Is that what I'm hearing? Excuse me, you're offering to table it, so that a BDP could be prepared and submitted, because without a BDP your motion will be to deny." (R-0235)

Commissioner Pritchett stated, "I think on my part that unless you can address the concern of the High Coastal Hazard Area that is in line with the Comp Plan Agreement and, I think a BDP would do that. I don't think that would be that, that hard for you guys to come back with. Am I right Commissioner Lo, uh Commissioner Tobia on that?" (R-0235)

Commissioner Tobia stated, "The impact on neighbors. Uh... The issues with the Comp Plan, uh, potential alternative paths, uh, that, and, and the health of the Indian, uh, River Lagoon. I think, what Commissioner Lober said, uh, produce findings. Um... But, you know, past what I've

said here, I don't know that that puts us in a position. The more we speak, I think this is... I'm surprised. In all honesty, um, you don't have a court reporter here." (R-0236)

Ms. Long, "We do have a court reporter here..." (R-0236)

Commissioner Tobia, "...I would, uh, make a motion to deny and ask that there, uh, we produce findings, Madam Chair." (R-0236)

Commissioner Lober, "I'll second that." (R-0236)

Commissioner Pritchett, "Thank you. I have a motion by Commissioner Tobia, second by Commissioner Lober. All in favor say aye." (R-0236)

Commissioner Lober, "Aye." (R-0236)

Commissioner Tobia, "Aye." (R-0236)

Commissioner Smith, "Aye." (R-0236)

Commissioner Zonka, "Aye." (R-0236)

Commissioner Pritchett, "Aye. Opposed? Denied 5:0." (R-0236)

Commissioner Lober, "Madam Chair, if I may just have a brief moment?" (R-0236)

Commissioner Pritchett, "Yes, sir." (R-0236)

Commissioner Lober, "I just want to put out there, in case there's any question. My issue is not one with respect to the BDP. I think a BDP would cover some of the concerns that were raised, but from my perspective as, as one out of five, a BDP isn't necessarily the, the, um, the only issue. I think, with or without a BDP, there are other ways to make this go forward, but the concerns simply weren't addressed to my satisfaction." (R-0236)

FINDINGS OF FACT

The Board of County Commissioners finds:

1. The subject property was purchased by the current owner on May 9, 2019 per the Special Warranty Deed recorded in Brevard County Official Records at Book 8435, Page 416.
2. The subject property is currently vacant and consists of two platted lots totaling 20.13 acres running from Fleming Grant Road to the Sebastian River.

3. The property has a development potential of two units based on two existing lots. The two lots are currently zoned RU-1-13. The lots were platted in 1894, per Plat Book 1, Page 77. The property is considered to contain two nonconforming lots of record, however, per the text of the Comprehensive Plan Objective 15, the lots are not required to be rezoned to be considered consistent with the Brevard County Comprehensive Plan.
4. In this case, each lot is eligible for a building permit. As there are two lots, a total of two single-family residential units are allowed, provided that all other Brevard County Code regulations, state and federal regulations are met.
5. The surrounding area is characterized as low density residential.
6. Brevard County Comprehensive Plan Administrative Policy 6 requires that the “use(s) proposed under the rezoning, conditional use or other application for development approval must be consistent with (a) all written land development policies set forth in these administrative policies; and (b) the future land use element, coastal management element, conservation element, potable water element, sanitary sewer element, solid waste management element, capital improvements element, recreation and open space element, surface water element and transportation elements of the comprehensive plan.”
7. Brevard County Comprehensive Plan Administrative Policy 7 of the Future Land Use Element provides that proposed uses “shall not cause or substantially aggravate any (a) substantial drainage problem on surrounding properties; or (b) significant, adverse and unmitigable impact on significant natural wetlands, water bodies or habitat for listed species.” The Brevard County Comprehensive plan has elements required by Chapter 163, Florida Statutes, addressing conservation, flood plains, wetlands and coastal high hazard areas.
8. The staff comments indicate the lots proposed for rezoning are in the coastal high hazard area, the estuarine flood plan, and contain wetlands and protected species of trees.
9. One quarter to one third of the subject property or the southern portion of the subject property is in the Coastal High Hazard Area (CHHA), which, according to the SLOSH map model will be flooded by storm surge in a Category 1 hurricane.
10. Objective 7 of the Coastal Management Element of the Comprehensive Plan, seeks to limit densities within the coastal high hazard zone and direct development outside of this area.

11. The southern portion of the subject property is also located with the Special Flood Hazard Area (SFHA) as identified by the Federal Management Agency (FEMA) in yellow on the FEMA Flood Zone Map. The SFHA overlaps the CHHA to a significant degree.
12. The subject property abuts the Sebastian River which is part of Indian River Lagoon.
13. The subject property is not located with the Brevard County's sanitary sewer service area. Accordingly, septic tanks will be used if the property is developed.
14. Increasing density could increase the potential number of septic tanks in the Coastal High Hazard Area, which is, as stated previously, the location of the anticipated surge of water from a Category 1 hurricane.
15. Objective 3 of the Conservation Element of the Brevard County Comprehensive Plan provides the objective to "Improve the quality of surface waters within Brevard County and protect and enhance the natural function of these waters."
16. Objective 4 of the Conservation Element of the Brevard County Comprehensive Plan is entitled "Floodplains" and provides the objective to "Reduce loss of flood storage capacity and reduce risk to life and property by continuing to apply regulations which minimize the impact of development within flood hazard areas." Policy 4.5 of the Conservation Element states: "Brevard County shall continue to protect the estuarine floodplains by creating the following minimum criteria: A) Development within the one-hundred-year estuarine flood plain shall not adversely impact the drainage of adjacent properties or the quality of the receiving surface water body." The subject property contains acreage within the estuarine floodplains.
17. The proposed change in zoning increases density by 6 units. A portion of the increased density could increase the density in the Coastal High Hazard area protected under the Brevard County Comprehensive Plan Coastal Element Objective 7. The additional dwelling units could also be placed in the Special Flood Hazard Area if the rezoning is granted.
18. The proposed rezoning to AU(L) could allow additional units and additional fill in the CHHA and the SFHA which could aggravate drainage issues and cause significant unmitigable impacts on water bodies.
19. The proposed rezoning to AU(L) is inconsistent with the Coastal Management Element and the Conservation Element of the Brevard County Comprehensive Plan.

CONCLUSION

Based on the foregoing, the Board of County Commissioners hereby finds the proposed rezoning to AU(L) fails to meet the requirements of the Future Land Use Element, the Conservation Element and the Coastal Element of the Brevard County Comprehensive Plan. Accordingly, the rezoning request to AU(L) is denied.

DONE AND RESOLVED this ____ day of _____, 2021.

ATTEST:

By: _____
Rachel Sadoff, Clerk

By: _____
Rita Pritchett, Chair
As approved by the Board
on: _____