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## MEMORANDUM

**TO:** Village Council, Village of Palmetto Bay

**FROM:** John R. Herin, Jr., Esq. and Ty Harris, Esq.

**DATE:** March 31, 2017

**SUBJECT:** Potential Repeal of Village of Palmetto Bay Ordinance No. 2016-13 and Resolution No. 2016-28.

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### I. QUESTIONS PRESENTED.

1. Does the Village Council of Palmetto Bay (the “Village”) have the legal authority to Repeal Ordinance No. 2016-13 and Resolution No. 2016-28 (the “Ordinance” and “Resolution” respectively)?
2. If the Village repeals the Ordinance and Resolution, does the property owner, 17777 Old Cutler Road, LLC (the “Property Owner”), have “vested development rights” under the Ordinance or Resolution?
3. Does the legal doctrine of Administrative Res Judicata preclude the Village from repealing the Ordinance or Resolution?

### II. SHORT ANSWERS.

1. The Village has the legal authority to repeal the Ordinance and Resolution pursuant to the Fla. Const. art. VIII, §2(b) and Section 166.021, *Florida Statutes*.
2. Neither the Ordinance nor the Resolution confer or grant a vested right to the Property Owner to proceed with the transfer of density from the sender site to the receive site designated in the Resolution.
3. There has been no final administrative action with respect to the Ordinance and Resolution, and therefore, the doctrine of Administrative Res Judicata does not apply (see, discussion on the application of the doctrine of administrative res judicata and vested rights in Section V.B.3. *infra*).

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### III. AUTHORITIES.

The Analysis and Answers set forth herein are based on a review of the following documents and authorities: The Florida Constitution; §§166.021, 66.041, and 166.033, *F.S.*; the Village of Palmetto Bay Code of Ordinances; the Ordinance and Resolution; Black's Law Dictionary (1999); review of the pleadings in the on-going Writ of Certiorari and Declaratory Judgment legal proceedings; communications with Village staff; communications with the Village Attorney's Office; communications with the Village Manager; and the cases cited in this Memorandum.

### IV. FACTS.

In January of 2016, the Property Owner inquired with Village staff regarding the use of transferrable development rights to move putative residential development density from a portion of property it owned – the sender site – to another portion of property it owned – the receiver site. Thereafter, Village staff conducted a “trend analysis” of the sender site and advised the Property Owner the sender site had a putative density of 85 residential dwelling units available for transfer to the receiver site (the “TDRs”). Village staff, however, advised the Property Owner that in the absence of an amendment to the Village's comprehensive plan and land development regulations the transfer of the TDRs to the receiver site was impermissible.

Thereafter, Village staff prepared and placed before the Village the Ordinance and the Property Owner sought approval of the transfer of the TDRs via the Resolution.<sup>1</sup> On March 7, 2016, the Village heard and considered the Ordinance on first reading. The Village heard, considered and adopted both the Ordinance (on second hearing) and Resolution on May 2, 2016. Subsequently, a property owner that lives in proximity to the subject property challenged both the Ordinance and Resolution in separate court proceedings, one a Writ of Certiorari, and the other a Declaratory Judgment. Both court actions are currently pending.

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<sup>1/</sup> Village staff also drafted and put forward an ordinance to amend the Village comprehensive plan, which was a required condition precedent to the adoption of the Ordinance. *See* §163.3202, *F.S.* (“[e]ach county and each municipality [Village] shall adopt or amend and enforce land development regulations [the Ordinance] that are consistent with and implement their [its] adopted comprehensive plan.”). Although outside of the scope of our assignment, repeal of the comprehensive plan ordinance falls within the same analysis set forth herein with respect to the Ordinance and Resolution. Furthermore, the adoption, amendment and/or repeal of any portion of the Village comprehensive plan is a purely legislative function. *See, Martin County v. Yusem*, 690 So.2d 1288 (Fla. 1997) (“[w]e expressly conclude that amendments to comprehensive land use plans are legislative decisions. This conclusion is not affected by the fact that the amendments to comprehensive land use plans are being sought as part of a rezoning application in respect to only one piece of property.”).

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**V. ANALYSIS AND ANSWER.**

**A. Question 1.** The Village Council has the authority to amend or rescind any prior actions it may have taken in general – and specifically with respect to the Ordinance and Resolution - under the broad home rule powers granted to municipalities under the Florida Constitution and Chapter 166, *F.S.*

The Florida Constitution confers upon municipalities “governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and [the Village] may exercise any power for municipal purposes except as otherwise provided by law.” Fla. Const. Art. VIII, §2(b). *See, City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006) (“In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers.”)<sup>2</sup>. This broad constitutional grant of power to municipalities is subject to two limitations. First, the powers must be exercised in furtherance of a municipal purpose; second, the powers may be exercised “except as otherwise provided by law.” To implement Art. VIII, §2(b), the Legislature enacted §166.021(3) and (4), *F.S.*, which state:

(3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:

- (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
- (b) Any subject expressly prohibited by the constitution;
- (c) Any subject expressly preempted to state or county government by the constitution or by general law; and
- (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

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<sup>2/</sup> Repeal of an ordinance is accomplished by adoption of an ordinance repealing the initial ordinance.

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(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. However, nothing in this act shall be construed to permit any changes in a special law or municipal charter which affect the exercise of extraterritorial powers or which affect an area which includes lands within and without a municipality or any changes in a special law or municipal charter which affect the creation or existence of a municipality, the terms of elected officers and the manner of their election except for the selection of election dates and qualifying periods for candidates and for changes in terms of office necessitated by such changes in election dates, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, any change in the form of government, or any rights of municipal employees, without approval by referendum of the electors as provided in §166.031. Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed.

Based on our analysis of plain language of Fla. Const. Art. VIII, §2(b), and §166.021, F.S., the Village is within its rights to rescind the Ordinance and Resolution, because none of the preemptions or prohibitions enunciated in §166.021(3), F.S. are triggered by such repeal. With respect to the repeal of the Ordinance and Resolution, the Village must comply with the public notice and hearing requirements set forth in §166.041, F.S. and the Village Code.

**B. Question 2 & 3<sup>3</sup>.** Based upon the available facts, neither the adoption of the Ordinance or the Resolution gives rise to a vested right by the Property Owner to proceed with

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<sup>3/</sup> Due to the interrelationship between the concepts of vested rights and administrative res judicata we have combined our analysis and answers to these issues.

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the transfer of density from the sender site to the receive site designated in the Resolution<sup>4</sup>, nor does the doctrine of administrative res judicata preclude the Village from repealing the Ordinance and Resolution.

A “vested right” has been defined as “[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent.” Black’s Law Dictionary (7th ed. 1999). As the U.S. Supreme Court has said, “[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379 (11th Cir. 1994). A long line of Florida cases have addressed and answered the question of when a party acquires a vested right to such things as sign permits, building permits (construction), liquor licenses, re-zonings, and other local government entitlements.

The overarching precedent in Florida’s case law is that vested rights are created — thus establishing an enforceable entitlement in the face of subsequent changes in the law — in only **two circumstances**. The first and more common way a vested right is created occurs when a party has reasonably and detrimentally relied on existing law, creating the conditions of equitable estoppel. In the second, less common case, a vested right may be created in the absence of a showing of detrimental reliance when a local government has acted in a clear display of bad faith.

### 1. Equitable Estoppel

Florida courts have made it clear that when a property owner incurs a substantial investment of time or money in reasonable reliance on existing laws and with no reason to know that, the laws are likely to change, he may acquire a vested right in a development permit. Thus, under Florida law, the doctrine of equitable estoppel may be invoked against a local government “when a property owner: (1) in good faith; (2) upon some act or omission of the government; (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.” *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So.2d 867, 869 (Fla. 4<sup>th</sup> DCA 1973) (citing *Sakolsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963)), *aff’d in part and rev’d in part on*

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<sup>4/</sup> We cannot and do not make any representations or warranties concerning the likelihood of the Property Owner or third party initiating a claim of vested rights or equitable estoppel against the Village, or the outcome of such claim. We do believe, however, the analysis contained in this Memorandum represents the current state of the law in Florida on the matters set forth herein.

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*other grounds*, 329 So.2d 10 (Fla. 1976). The Second District Court of Appeal described equitable estoppel in these terms:

“Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances or commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds.” *Town of Largo v. Imperial Homes Corp.*, 309 So.2d 571, 573 (Fla. 2<sup>nd</sup> DCA 1975).

The plaintiffs in *Hollywood Beach Hotel Co.*, *supra* sued the city after spending almost \$200,000 and almost a year in preparation for construction of a large project, after the city of Hollywood rezoned the property in question **and** gave the plaintiffs a building permit. Then, however, the city (after political upheaval that resulted in the electoral defeat of every Commission member who had voted for the ordinance) reconsidered and repealed the ordinance granting the rezoning. The Florida Supreme Court concluded that the city’s actions in delaying the plaintiffs’ ability to begin construction (almost a two-year delay) constituted “unfair dealing,” and therefore invoked the principle of equitable estoppel. In doing so, the Court pointed to the fact the rezoning ordinance and building permit granted by the city were **final** and the plaintiffs had already expended funds and commenced development activity in reliance of the city approvals before the city took steps to undo the previously granted rezoning and building permit.

In *Sakolsky*, the plaintiff became interested in constructing a luxury apartment building in Coral Gables. He met with the City’s mayor to discuss his plans, and then entered into a contract to buy a tract of land for the proposed building – the mayor suggested the location of the particular tract of land. The mayor also suggested to the plaintiff that he have an architect draw up preliminary plans for the proposed building, which was to be twelve stories in height (three-story building was maximum allowed without city commission approval). Thereafter, the plaintiff submitted the preliminary building plans to the city for approval and applied to the city commission for approval to build a twelve-story building. Upon notice and a public hearing, the city commission voted to issue a permit for the construction of the twelve-story apartment building on the land in question.

According to the Florida Supreme Court, it was “uncontroverted that petitioner changed his position materially and incurred very substantial expense in reliance upon the permission granted and permit issued by Coral Gables.” *Sakolsky* at 434-435. Although ultimately the

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Florida Supreme Court ruled in favor of the plaintiff, it did so after stating the outcome would be different **if the validity of a permit or zoning ordinance were at issue in pending litigation at the time the city commission changed its mind** and repealed the approval for the twelve-story building (emphasis added). That is the current procedural posture of the Ordinance and Resolution; they are the subject of two separate but related legal proceedings challenging their validity.

Florida courts have found similar conditions of reliance and estoppel in other cases. *See, e.g., Texas Co. v. Town of Miami Springs*, 44 So.2d 808, 809 (Fla. 1950) (oral assurances of Town accompanied by subsequent issuance of building or development permits); *Bregar v. Britton*, 75 So.2d 753, (Fla. 1954) (approval of rezoning and related expenditures to build drive-in movie theater); *Imperial Homes*, 309 So.2d at 572–73 (plaintiff spent over \$379,000 to purchase land in reliance on rezoning); *Equity Resources, Inc. v. County of Leon*, 643 So.2d 1112, 1119 (Fla. 1st DCA 1994) (county continuously issued permits for the unrestricted construction of the project over a period of 18 years).<sup>5</sup>

The converse is equally true, in the absence of equitable estoppel; Florida's courts have consistently denied claims for vested rights. *See, e.g., City of Gainesville v. Cone*, 365 So.2d 737, 739 (Fla. 1<sup>st</sup> DCA 1978) (denying claim for vested rights in existing zoning laws because “[a]n owner of property acquires **no vested rights in the continuation of existing zoning or land use regulations as to such property unless matters creating an estoppel against the zoning authority have arisen**”); *City of Ft. Pierce v. Davis*, 400 So.2d 1242, 1244 (Fla. 4<sup>th</sup> DCA 1981) (holding that **\$4,000 the plaintiff spent**, most of it **after the plaintiff had notice of the city's intent to change its decision**, was not enough to trigger equitable estoppel); *Great Outdoors Trading, Inc. v. City of High Springs*, 550 So.2d 483 (Fla. 1<sup>st</sup> DCA 1989) (holding that appellant was **not entitled to a permanent injunction when city changed zoning ordinance** to permit a restaurant to apply for liquor license and **then repealed ordinance** before liquor license was acquired.); *City of Miami Beach v. 8701 Collins Ave.*, 77 So.2d 428 (Fla. 1954) (**no claim for equitable estoppel when city amended an existing zoning ordinance** so as to eliminate certain permitted uses) (emphasis added).

As stated by the Third District Court of Appeal in *City of Miami Beach v. 8701 Collins Ave.*, *supra*, at 430:

“This Court has never gone so far as to hold that a city will be estopped to enforce an amendment to a zoning ordinance merely

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<sup>5/</sup> This list is not exhaustive of all circumstances giving rise to equitable estoppel; whether an act or omission is sufficient to warrant reliance and give rise to a successful claim of equitable estoppel is usually determined by a fact intensive review of the surrounding circumstances the court engages in on a case-by-case basis.

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because a party detrimentally alters his position upon the chance and in the faith that no change in the zoning regulations will occur. It is our view that such a doctrine would be an unwise restraint upon the police power of the government. All that one who plans to use his property in accordance with existing zoning regulations is entitled to assume is that such regulations will not be altered to his detriment, unless the change bears a substantial relation to the health, morals, welfare or safety of the public.”

As explained by the First District Court of Appeal in the *Great Outdoors Trading* case, because zoning legislation promotes the public welfare someone in the zoned area is always going to be negatively impacted, that does not mean they are automatically entitled to judicial relief or compensation from the local government. Only in rare circumstances will the doctrine of equitable estoppel apply to relieve the harsh consequences of a zoning decision. Those circumstances are when the property owner “(1) has made such a substantial change in his position, (2) in good faith reliance upon some act or omission of the government, that it would be highly inequitable and unjust to destroy (3) the rights he has acquired.” *Great Outdoors Trading, Inc. v. City of High Springs* at 486. Ultimately the Appellate Court determined the property owner could not invoke the doctrine of equitable estoppel just because the city had adopted an ordinance, which it subsequently repealed, because the property owner commenced the new use (sale of alcohol) after he became aware of the city’s intent to repeal the previous ordinance. Similarly, here the legality of the Ordinance and Resolution are the subject of current litigation, and the Property Owner – to date – has not submitted a site plan or any other development application to develop the additional density putatively “recognized” by the Resolution.

## 2. Bad Faith

Florida’s courts also recognize the existence of vested rights in a smaller number of cases, in the absence of estoppel, where the local government acted in obvious bad faith in denying a permit or license. One of the earliest cases in Florida addressing the issue of bad faith dates to the early days of the automobile. In *Aiken v. E.B. Davis, Inc.*, 143 So. 658 (1932), the plaintiff applied for a permit to build a “filling station” in an area where there was no relevant zoning law in effect. After he applied for the building permit the town council of Boca Raton passed an “emergency ordinance” (later made permanent) placing the lot of land into a residential zone that prohibited the construction of a filling station. The plaintiff then obtained a peremptory writ of mandamus to compel the City to issue a permit, with the lower court saying, “the municipality acted unreasonably and arbitrarily.”

The overriding principle of *Aiken* is that a vested right can arise when a local government wrongly singles out a property owner and hastily passes a new ordinance to prevent the

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construction of a project (a filling station in *Aiken*) despite no evident public benefit in this change. The City had no zoning ordinance in place, and it decided, only after receiving the application to build a filling station, to put a new law into effect that would bar its construction. The Florida Supreme Court determined that this post-hoc change in the law could not stand. That is not the situation here; in fact, the exact opposite has occurred. Until the Ordinance and Resolution were adopted, the transfer of the TDRs from the receiver site to the sender site was not allowed. By adopting the Ordinance and Resolution, the Village “created” the putative 85 residential dwelling units and adopted a procedure allowing the Property Owner to take that density and transfer them from the sender site to the receiver site.

The Florida Supreme Court reached a similar result fifteen years later, in *Harris v. State ex rel. Webster*, (citation omitted). Webster applied for and was denied a liquor license. He then petitioned for a writ of mandamus challenging the validity of the city's liquor licensing ordinance under the state liquor law. The trial court agreed and issued the writ, and in response, the city changed the ordinance, replacing it with a valid one that would have disallowed the type of license Webster had initially sought. The Florida Supreme Court ordered the city to grant him a liquor license, citing *Aiken* and stating:

[T]he rights of a relator in a mandamus suit, claim for which was asserted by an alternative writ granted and served prior to action taken by the respondent city and its officials in an effort to avoid having to comply with its commands, would be affected by any such subsequent action, and that a peremptory writ would issue in accordance with the alternative writ though the action taken, had it occurred before the issuance of the alternative writ, would have been a good defense. *Id.* at 266.

The Supreme Court of Florida thus said that **a change in law that took place before a court order compelling the grant of the permit would have constituted a defense against the claim.** See also, *Broach v. Young*, 100 So.2d 411, 414 (Fla. 1958) (“The *Aiken* and *Harris* cases place this Court with those that hold that if the application is unreasonably refused or delayed and the subsequent ordinance enacted in bad faith, the law at the time of the application should be applied.”); *City of Margate v. Amoco Oil Co.*, 546 So.2d 1091, 1092–94 (Fla. 4th DCA 1989) (affirming an order for injunctive relief because the City acted “‘arbitrarily, capriciously, discriminatorily and illegally’ in denying the permit” to build a gas station . . .”) *Dade County v. Jason*, 278 So.2d 311, 311–12 (Fla. 3rd DCA 1973) (ordering the County to grant the plaintiffs a building permit that the County had deliberately withheld until a building moratorium went into effect, because “the County had acted in Bad faith in delaying the issuance of the permit and, therefore, the applicant should have been entitled to a permit”).

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In each of these cases, the defendant local government changed the law in a final effort to avoid granting a permit or license to a plaintiff, after the enabling legislation or ordinance was final. Here, that is not the case; the Ordinance and Resolution are the subject of pending litigation. Accordingly, as stated by the Florida Supreme Court in the *Sakolsky* and *Aiken* cases, there can be no reliance on the Ordinance and Resolution by the Property Owner, and the Village would not be acting in bad faith if it repealed the Ordinance and Resolution.

In the absence of bad faith or reasonable reliance on existing law, Florida's courts have consistently refused to find a vested right. See, e.g., *Davidson v. City of Coral Gables*, 119 So.2d 704, 708 (Fla. 3rd DCA 1960) (citing *Harris* and *Aiken* as having held that a repealed liquor licensing law, rather than a new one, can apply to a plaintiff only “when the officials or governmental body to whom an application for a liquor license has been made, and against whom suit is filed to enforce its issuance, act arbitrarily to avoid their duty,” and that “it is a question for the court as to whether the subsequently enacted limitations or regulations were made arbitrarily or in bad faith”); *City of Miami v. State ex rel. Ergene, Inc.*, 132 So.2d 474, 476 (Fla. 3rd DCA 1961) (plaintiff had no vested rights in a zoning variance allowing it to construct a gas station because “[w]e do not view the circumstances in this case as constituting arbitrary or bad faith acts on behalf of the city as was the circumstance in [*Aiken, Harris, and Broach*]”); *City of Miami Beach v. 8701 Collins Ave., Inc.*, 77 So.2d 428, 429–31 (Fla. 1954) (denying equitable estoppel in previous zoning regulations even though the plaintiff had spent \$250,000 in reliance on them, because the City had no knowledge of these expenditures when it changed the law); *City of Miami Beach v. Jonathon Corp.*, 238 So.2d 516, 519–20 (Fla. 3rd DCA 1970) (rejecting the claim that a vested right in a permit was created at the moment of application regardless of later acts by the City, in the absence of a showing of bad faith or arbitrariness); *City of Boynton Beach v. Carroll*, 272 So.2d 171, 172–73 (Fla. 4th DCA 1973) (when the plaintiff tried to rush through a building permit application before the City's new zoning ordinance took effect, knowing that the ordinance would forbid him from building the desired seven-story retirement home, the court said that “Florida law since 1945 has been clear that possession of a building permit does not create a vested right, and that a permit may be revoked where the zoning law has been amended subsequent to the issuance of the permit in the absence of equitable estoppel”); *Smith v. City of Clearwater*, 383 So.2d 681, 688–89 (Fla. 2d DCA 1980) (noting an interplay between “those situations in which the city is estopped because the property owner has spent large sums in reliance on the city's original position and those in which the city refuses to issue a permit for a use which is permissible under existing zoning,” and denying the plaintiffs a right to their development plans because they previously had notice of the impending changes).

### 3. Doctrine of Administrative Res Judicata Under the Village Code.

Section 30-30.14(b) of the Village Code states: “A development order is **final for purposes of filing an appeal or writ of certiorari** to the appropriate court only upon the order’s execution by the village clerk.” (emphasis added) Therefore, for purposes of any judicial appeal, the Village’s enactment of the Ordinance and Resolution became final on May 2, 2016. On June 1, 2016, a timely Petition for Writ of Certiorari (the “Petition”) was filed naming the Village as the Respondent and challenging the legality of the Ordinance and Resolution. With the filing of the Petition, Section 30-30.14(a) of the Village Code was triggered effectively barring any permits or further zoning approvals during the pendency of the litigation:

Sec. 30-30.14. - Appeals.

(a) Stay pending appeal.

(1) Rezoning actions. In the event an application is made for a change of zoning on property which possesses any variance, conditional use, site plan review, or administrative determination as provided by Division 30-20, **no permits or certificates shall be issued for such variance, use, special permit, or administrative determination as provided by Division 30-20, until the order on the application becomes final and any appeal proceeding is concluded.** If the application for change of zoning is approved, the variance, conditional use, special permit or plan review shall terminate, unless continued by the rezoning resolution; otherwise such prior approval shall terminate with the approval of the rezoning application. **No plans may be submitted to the building department until the application for zoning hearing has been approved, or approved with modifications, and has not been appealed.**

(2) During an appeal of a development order, whether issued administratively or by the village council, and whether the appeal is for the entirety of the order or just a portion thereof, **any zoning approvals relating to that development order being appealed shall not be issued until the appeal becomes final and all appeal proceedings are concluded.** Further, zoning approvals for a development order or permit issue, except those associated with a building permit not related to the development order being appealed and regardless of whether the appeal is for the entirety of the order or just a portion thereof, shall not be

**issued/granted until the appeal becomes final and all appeal proceedings are concluded.** During any appeal, all permits relating to the item(s) appealed shall be, where not prohibited by state statute or county ordinance, revoked or suspended, as applicable. If a portion of an administrative determination, council zoning resolution or development order is appealed, all permits and approvals relating to that determination, resolution or development order shall be stayed pending final resolution by the courts. No permits may issue by any regulating agencies, including but not limited to Miami-Dade County DERM, Fire, or Public Works, if directly related to the matter being appealed. The application for, and issuance of permits to the appealing party shall result in civil fines as provided under subsections (q) and (r) below, and may result in the village seeking an injunction in the applicable court, the cost of which proceeding shall be borne by the violating applicant. An exception to the foregoing shall apply to the issuance of permits due to life safety or material deterioration under the Florida Building Code or prior issued permits unrelated to the specific development order being appealed. (emphasis added)

Thus, under the Village Code's "stay pending appeal" provisions, neither the Ordinance nor Resolution are "final" for the purpose of administrative res judicata and development purposes and the TDRs and any other development entitlements and related approvals are on hold pending the outcome of the pending Writ. This is important because it does more than put the Property Owner on notice that the Ordinance and Resolution has been challenged. It affirmatively prohibits the Property Owner from moving forward with any development plans. With respect to equitable estoppel, it would be a difficult argument to make that the Property Owner has made a substantial change in position in "good faith" reliance on the Ordinance and Resolution when the Village Code prohibits any further approvals once the Writ was filed.

#### **4. Equitable Estoppel/Vested Rights Analysis of the Ordinance and Resolution**

Florida common law provides that vested rights through a theory of equitable estoppel may be established if a property owner has, "(1) in good faith reliance, (2) upon some act or omission of government, (3) made such a substantial change in position or has incurred such extensive obligations and expenses (4) that it would make it highly inequitable to interfere with the acquired right. *Monroe County v. Ambrose*, 866 So. 2d 707, 710 (Fla. 3rd DCA 2003).

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The Ordinance and Resolution authorize the transfer TDRs. An appeal and consistency challenge to the Ordinance and Resolution are pending, which under current case law makes it unlikely that the developer can rely in good faith on the Ordinance and Resolution. Moreover, the “stay pending appeal” provision of the Village Code prohibits the Property Owner from applying for related zoning approvals and permits. The *Sakolsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963) case recognizes that pending litigation is a defense to a vested rights claim. The Supreme Court of Florida citing *City of Miami v. State ex rel. Ergene, Inc.*, stated the following:

“The effect of pending litigation directly attacking the validity of a permit or zoning ordinance, or the effect of an eventual determination that such permit was invalid, may present a very different problem. The decision in the instant case was not rested on any showing that petitioner, at the time he acted in reliance on the permit granted him, was a party defendant in legal action directly attacking its validity, that he had any notice that his permit might have been invalid in its inception, or that its revocation was in fact required in the public interest. *Sakolsky* at 436.

Because the Ordinance and Resolution are under appeal, it is correct to analyze any vested rights claim pertaining to the Ordinance and Resolution under the Third District case of *City of Miami v. State ex rel. Ergene, Inc.*, 132 So.2d 474 (3rd DCA 1961). In *Ergene*, the City of Miami granted a variance through a resolution for the construction of a gas station. Adjacent property owners filed suit challenging the variance. While the suit was pending, the developer moved forward with a building permit and began construction. While the appeal was still pending, the City revoked the building permit and the developer sued. The Court upheld the City’s actions and proffered the following analysis:

“... if the appellant's rights to the variance and the building permit issued in conjunction with the variance become vested, such vesting was subject to the warning evidenced by the pending litigation and, therefore, subject to the ultimately completed exercise of the police power which was signaled by this pending litigation. **We do not view the circumstances in this case as constituting arbitrary or bad faith acts on behalf of the city** as was the circumstance in *Aiken v. E.B. Davis, Inc.*, 106 Fla. 675, 143 So. 658; *Harris v. State ex rel. Wester*, 159 Fla. 195, 31 So.2d 264; *Broach v. Young*, Fla. 1958, 100 So.2d 411. Here also, we have a case that is clearly distinguished from that line of cases that have held illegal and void similar acts under the principle of equitable estoppel. In the present case, the appellee who claimed it

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was injured by relying upon the ordinance granting the variance and the building permit issued pursuant thereto, had good reason to believe, before acting to its detriment that the official mind would soon change, as it subsequently did. As was observed by the Florida Supreme Court in *Miami Shores Village v. Wm. N. Brockway Post*, 156 Fla. 673, 24 So.2d 33, 36: It would appear childish to assert that the permittees were without knowledge of these undisputed facts and for the respondents to wholly disregard them and simultaneously incur financial obligations incidental to the construction of the building under the questioned permit, shows that they acted while red flags were flying and cannot complain of lack of notice.”

In the present case, the pending litigation doctrine is a defense to a vested right claim under the theory of equitable estoppel or bad faith. Furthermore, under the Village Code the doctrine of administrative res judicata does not apply to the Ordinance and Resolution.

#### **V. CONCLUSION.**

Under the Florida Constitution and Chapter 166, *F.S.*, the Village has plenary authority to rescind the Ordinance and Resolution. Furthermore, under Florida case law addressing bad faith and equitable estoppel - as well as the doctrine of administrative res judicata as addressed in the Village Code - it is highly unlikely the Property Owner would prevail in a vested rights claim if the Village repeals the Ordinance and Resolution.

cc: Edward Silva, Village Manager  
Dexter Lehtinen, Village Attorney  
Travis Kendall, Interim Director of Planning & Zoning Dept.