

REBECCA DEAN PLLC

2212 QUEEN ANNE AVE. NORTH • BOX 158 • SEATTLE, WA • 98109-2312
PHONE: (206) 465-3594 • FAX: (206) 420-8900
rebeccadean@comcast.net

DATE: JULY 5, 2016
TO: FRANCINE REIS
FROM: REBECCA DEAN
RE: INVESTIGATION REPORT – CLARK COUNTY 2016 COMPREHENSIVE GROWTH
MANAGEMENT PLAN ISSUES (COUNCILOR DAVID MADORE, PLANNING DIRECTOR
OLIVER ORJIAKO, WASHINGTON STATE COUNCIL OF COUNTY & CITY EMPLOYEES
(AFSCME AFL-CIO))

I. INTRODUCTION

A. THE COMPLAINTS

Clark County engaged me to investigate three complaints arising in the context of development of the County's 2016 Comprehensive Growth Management Plan ("the 2016 Comp Plan"): (1) a whistleblower and EEO complaint filed by Planning Director Oliver Orjiako dated March 15, 2016 (Exh. 1); (2) a retaliation complaint filed by AFSCME on behalf of represented staff dated March 2, 2016 (Exh. 2); and (3) allegations made by Councilor David Madore that staff in the Department of Community Planning and the Prosecuting Attorney's Office intentionally provided false information, manipulated data, improperly influenced the outcome of the Thorpe Review, reported rural VBLM results/assumptions that were inappropriately manipulated to advance their own agenda, and were insubordinate to the Council.¹

B. CONCLUSIONS

1. Madore's Allegations of Staff Misfeasance are False (Section III(A))

Generally, (1) Orjiako and AFSCME complained that Madore has repeatedly made false accusations of fraud, deceit, data manipulation and other wrongdoing in violation of County standards; and (2) Madore complains that Orjiako and, more generally, the Planning Department staff, and/or Deputy Prosecuting Attorneys Cook and Horne engaged in such behavior with the intent to mislead the Board because of an "anti-rural growth" agenda.

In all material respects, Madore's allegations regarding staff misfeasance are false. Orjiako, the Planning staff, Cook, and Horne did not engage in any behavior intended to mislead or deceive the BOCC (either in connection with the development of the 2016 Comp Plan or in post-January statements to the BOCC) manipulate data or manipulate the outcome of the Thorpe Review.

¹ Madore's allegations were made after January 1, 2016 in public meetings, on Facebook postings, in emails, an op-ed article and an April 5, 2016 CVTV Clark County Focus interview.

2. Madore Attempted to Directly Micro-Manage the Planning staff's Work (Section III(B))

Orjiako and AFSCME complained that Madore interfered with Planning Department functions; Orjiako asserts that Madore's behavior created a hostile work environment for him and others; Madore has from time to time asserted that the Planning Department employees were insubordinate in not complying with his direction.

Particularly in the period between July and November 24, 2015, Madore attempted to directly micro-manage the Planning staff's work on the 2016 Comp Plan and attempted to pressure Orjiako and Planning staff not to exercise independent professional judgment and criticize Alternative 4B and Madore's methods.

3. The Evidence is that Madore's Conduct was Motivated by Public Discrediting of Alternative 4B by the Thorpe Report and by BOCC Reversal of his Plan, Not by the Motives Alleged by Orjiako or AFSCME (Section III(C)).

Orjiako asserts that Madore's treatment of him has occurred (1) because Madore saw him as a whistleblower because Orjiako often told Madore that his solitary efforts to develop Alternative 4 and 4B without full public participation and transparency were inconsistent with the letter of, and public policies underlying, the GMA, the County Charter and the Board's GMA public participation resolution No. 2014-01-10 and other statutory requirements (collectively, "the transparency requirements"); and (2) because of Orjiako's race and national origin.

With regard to AFSCME's complaint, AFSCME has asserted that Madore's attacks on Planning staff were in retaliation for staff's protest to Francine Reis that Madore was performing bargaining unit work and Reis's explanation to Madore of their concerns.

As a general matter, with regard to all of the alleged motives, the supporting evidence that Madore acted based on any of these motives is overwhelmed by the plethora of evidence that Madore was motivated by the very public discrediting of Alternative 4B by his handpicked analyst and the post-January 1 reversal of his plan. Madore reacted to both events with *ad hominem* attacks in multiple public forums on the credibility and motives of Orjiako, the Planning staff, Cook and Horne. The direct relationship, in both subject matter and time, of these events to Madore's attacks cannot be ignored.

Nevertheless, there is some limited evidence of racial animus by Madore, as the "race card" graphic Madore posted on his website is an effort to demean or discredit Orjiako's sincere and deeply felt belief that Madore was motivated by Orjiako's race and national origin.

II. WITNESSES & DOCUMENTS

I interviewed, in alphabetical order, Gary Albrecht (Planner), Jose Alvarez (Planner), Christine Cook (Deputy Prosecuting Attorney, Civil Division), Gordon Euler (Deputy Director, Planning Department), Barbara Hatman (GIS Technician), Chris Horne (Chief

Civil Deputy), Oliver Orjiako (Director, Planning Department), David Madore (County Councilor, District 3), Mark McCauley (County Manager), Ken Pearrow (GIS Coordinator), Bob Pool (Manager, GIS), Peter Silliman (Research Analyst), and Robert W. Thorpe (Principal, R.W. Thorpe & Associates, Inc.).

In addition to the written complaints, I reviewed (1) documents on the County's Community Planning Department website; (2) documents pertaining to the 2016 Comprehensive Growth Plan on the Councilors' Grid; (3) documents on the Planning Commission Hearings and Meeting Notes website; (4) verbatim minutes or transcripts of relevant portions of Board of County Councilors ("BOCC" or "Board") work sessions or hearings on October 13, 2015, October 20, 2015, October 27, 2015, November 24, 2015, December 1, 2015, December 8, 2015, January 13, 2016, January 19, 2016, February 16, 2016, February 23, 2016, March 1, 2016, March 16, 2016, April 19, 2016, and April 20, 2016; (5) a transcript of a recorded meeting on December 2, 2015 with McCauley, Orjiako, Euler, Alvarez, Horne, Cook, Madore, Thorpe and his associate, Lee Michaelis; (6) a transcript of the April 5, 2016 CVTV Clark County Focus interview with Madore; (7) results of a search of email records pertaining to the Thorpe engagement conducted at my request by Daniel Harrigan of the County's Human Resources Department (over 4000 pages); (8) cited sections of the Washington Department of Commerce website; and (9) cited articles posted on www.oregonlive.com. Additionally, Clark County employees I interviewed provided me with documents for my consideration. They are listed in Appendix A. I have retained all documents provided for my consideration.

III. BACKGROUND & ANALYSIS

A. ALLEGATIONS OF FRAUD, DECEIT, DATA MANIPULATION AND RELATED WRONGDOING

Generally, (1) Orjiako and AFSCME complained that Madore has repeatedly made false accusations of fraud, deceit, data manipulation and other wrongdoing in violation of County standards; and (2) Madore complains that Orjiako and, more generally, the Planning Department staff, and/or Deputy Prosecuting Attorneys Cook and Horne engaged in such behavior with the intent to mislead the Board.

The allegations regarding fraud, deceit or data manipulation concern three general topics:

- The methodology used to calculate the number of potential new lots allowable under each of the four 2016 Comp Plan Alternatives under consideration prior to release of the August 2015 Draft Supplemental Environmental Impact Statement ("the August 2015 DSEIS"), specifically Table 1-2 on Page 1-3 (Exh. 3).
- The engagement with R. W. Thorpe & Associates ("the Thorpe Review") and the process by which the Thorpe firm reached its conclusions ("the Thorpe Report") (Exh. 4 p.4-28) regarding the validity or invalidity of the "planning assumptions" developed by Madore to support the Preferred Alternative the BOCC adopted on November 24, 2015 (Exh. 5) and rejected on February 23,

2016 (Exh. 4 p.1-3), and specifically the methodology Madore developed and used to support his contention that the number of potential new lots was much lower than stated in the August 2015 DSEIS.

- Madore asserts that Planning staff misled the BOCC by persuading the Board to adopt the Office of Financial Management (“OFM”) medium growth rate by understating Clark County’s projected growth.

To summarize, in all material respects, Madore’s allegations regarding misfeasance are false. Whether during the development of the 2016 Comp Plan or after January 1, 2016, Orjiako, the Planning staff, Cook, and Horne did not engage in any behavior intended to mislead or deceive the BOCC, manipulate data, suborn the Thorpe Review or influence its outcome.

1. Contextual Overview – Development of the 2016 Comp Plan

This section of this Report is a general chronological overview for the purpose of providing context for analysis of the specific issues.

The County Planning Department introduced the BOCC to the 2016 Comp Plan development process in July 2013. The Planning Department and BOCC website show that, during 2014, the Planning Department made a series of presentations on various Comp Plan issues. The Board, among other actions: (1) formally adopted certain planning assumptions, including, but not limited to, the Office of Financial Management medium population forecast, a rural/urban split predicting future growth, a public participation plan and an employment forecast; (2) reviewed a detailed presentation on the Vacant and Buildable Land Model (“VBLM”) that had been developed, refined and used in the County for estimating capacity within the Urban Growth Boundaries; and (3) launched the environmental impact review process.

In August 2014, the County engaged ESA, an environmental science and planning firm, to prepare a Supplemental Environmental Impact Statement (“SEIS”). According to Planning Department documents, because Clark County growth had lagged since the Comp Plan had last been updated in 2007, the Planning Department proposed relying upon the final Environmental Impact Statement prepared for the 2007 update, and to supplement it with new analysis of the environmental impact associated with proposed Alternatives developed during the 2016 Comp Plan planning process.

By October 22, 2014, the Planning staff had proposed and explained three alternatives to the Board for consideration in the environmental impact analysis process. Alternative 2 changed some forest lots from 40- to 20-acre minimums, some agricultural lots from 20- to 10-acre minimums and some rural lots from 20-acre minimums to 10-acre minimums (Exh. 6). As I understand it, the impact of Alternative 2 is to allow more subdivision of property outside Urban Growth Boundaries.

As I understand it from Euler and my review of the Planning Department website, by January 2015, ESA had prepared a DSEIS and the Planning Department was preparing for a February 4, 2015 release date.

Peter Silliman, a research analyst who supports Madore and Councilor Tom Mielke by performing special projects and analysis, stated in my interview with him that Clark County Citizens United (“CCCU”) (which I understand to be a special interest group) did not feel that Alternative 2 would do enough to allow development in the rural areas, and they pressed Madore to do more. Madore asked Silliman to look into it.

In a January 21, 2015 work session, the BOCC directed the Planning staff to pause the DSEIS process while the Board proposed an additional 2016 Comp Plan Alternative. Silliman, at Madore’s direction and in consultation with CCCU, made a presentation on what ultimately developed into “Alternative 4.” Silliman stated that he focused on one of CCCU’s desires, which was to correct perceived discrepancies between the actual predominant lot sizes and the existing zoning map.

Silliman stated that CCCU was not satisfied with his proposal because it was not extensive enough. Silliman adds that Madore stated that they needed to come up with something more extensive. Then, according to Silliman, Madore took over the whole process and “proposed something completely different that was all-encompassing and proposed re-zoning almost all rural lands.”

In the March 11, 2015 work session the BOCC reviewed Alternatives 1, 2 and 3 and approved the creation of a new Alternative 4.

In an April 14, 2015 Board hearing the BOCC approved Alternatives 1, 2, 3 and 4 for consideration in the environmental impact analysis.

The County released the Draft SEIS (“DSEIS”) on August 5, 2015. In general, ESA concluded that the impacts of Alternative 4 would be similar to Alternative 2, but with “cumulatively greater impacts due to potentially more development” on all resources (Exh. 3 Table S-2). The DSEIS relied upon rural capacity estimates calculated by GIS according to the methodology developed by GIS in collaboration with the Planning Department, primarily Jose Alvarez (*see* Table 1-2, Exh. 3 p.1-3). As I understand it, if the County had adopted Alternative 4, the greater environmental impact ESA identified could potentially affect the Growth Hearing Board’s willingness to approve the 2016 Comp Plan and render it vulnerable to legal challenges.

Witnesses agree that Madore was unhappy with ESA’s conclusions.

On September 17, 2015, the Planning Commission voted on its recommendation to the BOCC for a Preferred Alternative. Essentially, the Planning Commission rejected Alternative 4 (*see* Exh. 7).

Madore asked McCauley for permission to work directly with GIS. Pool states that in September, Madore installed GIS mapping software on his private computer system and began developing his own model for calculating rural capacity and doing his own analysis. Madore worked extensively with CCCU in connection with this effort.

On October 20, 2015, the Board held a hearing to take public testimony on the Planning Commission’s recommended Preferred Alternative.

At the start of the hearing, Madore introduced a document, never previously disclosed, and titled, “The need to plan for realistic rural population growth.” At the head of the document, Madore asserted that, “*The DSEIS has overstated the rural capacity of Alternatives 1, 2 and 4 to accommodate potential population growth by making the following unrealistic assumptions: . . .*” (Exh. 8). This document contains (1) Madore’s description of what he asserted was GIS’s methodology used in estimating rural capacity for the DSEIS (*Id.* p.1); and (2) Madore’s “*rural VBLM updated to include*” assumptions Madore contended were more reasonable (*Id.* p.3).

Madore also introduced a paper contending that the 20-year population growth rate chosen by the board in December 2013 was incorrect because it was focused on the 2007 recession, and arguing that the actual population growth rate was higher (Exh. 9).

The net effect of applying all of Madore’s assumptions was to reduce the estimate of the potential rural population increase and the number of new home sites and by slightly more than half. Madore asserted that he was, “*ask[ing] the staff to analyze and consider these new assumptions and the path forward to ensure that whatever plan we act on is something that is appropriate.*” (Board of County Councilors [Verbatim] Minutes of October 20, 2015, p.22.)

At the October 20 hearing, Horne pointed out that it would be inappropriate for the Board to discuss additional new, previously undisclosed materials, and that the Board should set a date forward to take action to consider Madore’s proposal, talk about it or evaluate it (*Id.* p.21). Cook also pointed out that Madore’s new assumptions were not available to staff, the Prosecuting Attorney’s office, and probably not available to the public; therefore, if the Board desired to consider them, a public hearing must be duly noticed with 15 days’ advance publication (*Id.* p.24).

At that point in the hearing, Madore turned to the staff to present the Planning Commission recommendation for a Preferred Alternative. In response to Councilor Jeanne Stewart’s question about the impact of substantial change to the existing alternatives upon the process and the need to send the Alternatives back to the Planning Commission, Cook advised that a change based upon different planning assumptions might well have to go back to the Planning Commission for review. Moreover, she advised that a change in basic planning assumptions might have to be restudied for its environmental impacts (*Id.* p.35-36).

The Board then took public testimony. At the conclusion of the meeting, the Board moved consideration of the Planning Commission’s recommendation to November 24, 2015.

Between November 1 and 5, 2015, Orjiako and Alvarez prepared a memorandum to the Planning Commission critiquing Madore’s proposal. Attached to the memorandum are, among other items, a draft document titled “*Estimating Potential Rural Housing and Employment*”; and the staff’s redline mark-up of another iteration of Madore’s October 20, 2015 rural capacity analysis, explaining, among other matters, (1) the staff’s points of disagreement with the accuracy of Madore’s description of the rural capacity methodology that supported the DSEIS; and (2) the staff’s assessment of Madore’s “*Column B*” assumptions (Exh. 10 p.10-13).

On November 5, 2016, Madore's proposal to change the planning assumptions and his new methodology for estimating rural lots was presented to the Planning Commission. Madore attended that meeting.

On November 9, 2015, there was a Joint BOCC and Planning Commission work session. Two more iterations of Madore's proposal, now titled "An Evidence Based Proposal by Councilor David Madore" (dated November 4, 2015 and November 9, 2015) are on the Planning Department website for that date, as are his supporting arguments, a letter regarding septic systems and some revised maps. The Board gave direction to seek public comment on the new materials at two public meetings and a public Planning Commission hearing on November 19.

On November 16 and 17, 2015, the County held open houses at Hockinson and Ridgefield High Schools.

On November 19, 2015, the Planning Commission met to consider the proposed changes to the planning assumptions, Madore's methodology for estimating rural capacity and a revised Alternative 4. Most of the witnesses called Madore's proposal "Alternative 4B," and for consistency's sake, I will use that term in the remainder of this report.

At the meeting, the Staff presented its November 19 staff report, which included its explanation for the methodology for calculating rural capacity used in the DSEIS. The staff also explained its critique of Madore's proposed changes to the planning assumptions. Generally, the staff was critical of the factual basis for Madore's proposed changes (Exh. 11). The Planning Commission also considered another iteration (Version 1.08) of Madore's proposal.

The Planning Commission voted to re-adopt its September 17, 2015 Preferred Alternative recommendation to the BOCC (*see* Exh. 12).

On November 24, 2015, after hearing a staff presentation and public testimony, the BOCC adopted Madore's proposal (presented in yet another iteration (Version 1.09) dated November 18) as the Preferred Alternative (Exh. 5) ("November 24 Preferred Alternative").

The Planning staff and Prosecuting Attorneys concluded that the new Preferred Alternative required environmental impact review. In the December 1, 2015 BOCC hearing, the staff asked for a contingent one-time budget increase of \$300,000 to cover the costs associated with study of the new Alternative. The Board approved \$65,000.

Also on December 1, Madore announced that he had in hand a professional service agreement for \$5000 for R. W. Thorpe & Associates ("the Thorpe firm") to meet with the staff on December 2 to "brainstorm with staff" and to "provide a path forward" so that they "have the available help . . . to ensure that they can accomplish what needs to be done in a timely manner, with competent experienced expertise." (*see* Exh. 13.)

Madore unilaterally selected the Thorpe firm. He contacted Robert Thorpe on November 24 (Exh. 14). It appears from the email record that it was not until after the end of the business day on November 30, the day before the hearing, that Madore directed

McCauley, by email, to prepare a contract for the Thorpe firm's meeting with the staff on December 2 (Exh. 15). Cook prepared the contract the next day, but Orjiako and Euler did not have an opportunity to review it until December 1 (Exh. 16).

On December 2, 2015, Thorpe and his associate, Lee Michaelis, met with McCauley, Orjiako, Euler, Alvarez, Cook, Horne and Madore in the morning. During the morning meeting, Thorpe reviewed his background and experience and the group had a general discussion about the contributions the Thorpe firm could make. Without reaching any final conclusions, the group discussed (1) vetting the assumptions supporting Alternative 4B; and (2) preparing an addendum to the Supplemental Environmental Impact Statement to cover the environmental impact of the revised Alternative that could be folded into the final SEIS.

In the afternoon, Thorpe and Michaelis met with McCauley and Orjiako, and they collectively agreed that performing those two tasks would be an appropriate path forward.

On December 4, Thorpe sent a Memorandum of Understanding for the County's review (Exh. 17). The County reviewed it and presented it for consideration on the consent agenda at the December 8 BOCC Hearing. The staff proposed several revisions to the Memorandum of Understanding, and Board asked for a few additional changes. The final contract (Exh. 18) incorporated all of the requested revisions, with one exception, changing the date of Step 1 of the Thorpe Review from "November 4" to "November 24." The proposed and final revisions are discussed in detail in Section A(2)(b).

Effective January 1, 2016, the Council changed from a three-person body to a five-person body pursuant to the new County Charter.

The Thorpe firm presented its report at the January 13, 2016 BOCC work session. The Thorpe Report concluded that two of Madore's "Column B" assumptions were valid, two partially valid and four invalid (*see* Exh. 4 p.4-28).

On February 16, 2016, the BOCC held a hearing to take public testimony on reconsidering the November 24 Preferred Alternative. That hearing continued for deliberations on February 23. On that date, the BOCC rescinded the November 24 Preferred Alternative, including Madore's notes and policies, and voted to adopt the Planning Commission's recommendations for the Preferred Alternative.

During those hearings, Madore made numerous allegations of misfeasance by Planning staff and Prosecuting Attorneys. On March 1, 2016, the Board engaged in further discussion of those allegations in response to questions from Horne. Madore also made allegations of wrongdoing in this hearing.

In addition to his statements in public hearings, Madore has made – and continues to make – virtually the same or very similar allegations in public forums, including his Facebook page(s), an editorial, publicly distributed emails, and an April 5, 2016 CVTV Clark County Focus interview.

2. Analysis

a) The DSEIS Rural Capacity Analysis

Madore has made numerous statements in numerous forums about the rural capacity analysis performed to support the August 2015 DSEIS and has asserted that Orjiako (and, generally, the Planning Department), Cook and Horne have made false statements to the BOCC about that subject.

Orjiako complains that Madore's allegations are false and abuse his authority; AFSCME asserts that his allegations are "unfounded and defamatory."²

In all material respects, Madore's allegations are false.

(1) Background Detail

By way of further detailed background, as Pool, Horne, Cook and members of the Planning staff consistently explain, a primary purpose of the GMA is to manage growth inside Urban Growth Boundaries. As the Washington Department of Commerce explains, the GMA was amended in 1997 to require a review and evaluation program by which Clark County (among others) is required to collect data for a certain period and use it to evaluate the level of development in order to determine if the County and its cities are achieving urban densities within urban growth areas ("Buildable Lands"; www.commerce.wa.gov). On its website, the Planning Department cites to a March 16, 2007 letter from the Washington State Department of Community Trade and Economic Development, which asserts that GMA counties (those required to develop a Comp Plan) should acknowledge the Buildable Lands Report through adoption of a resolution or ordinance by the appropriate legislative body.

There is no requirement in the GMA or the Washington Administrative Code that the County conduct a similar vacant and buildable lands analysis for rural areas. In 1997, Clark County Superior Court held that it was erroneous for the Growth Management Hearings Board to require a vacant and buildable lands analysis for the rural area.³ (Findings of Fact, Conclusions of Law & Order at 6; *Clark County Citizens United, et al. v. Western Washington Growth Management Hearings Board* (Case No. 96-2-00080-2, Clark Co. Sup. Ct.) (Apr. 4, 1997); Order on Reconsideration at 3, *Clark County Citizens United, et al. v. Western Washington Growth Management Hearings Board* (Case No. 96-2-00080-2, Clark Co. Sup. Ct.) (Jun. 11, 1997).)

Pool states that the County originally hired him when the County was developing its first Comprehensive Growth Plan and needed additional GIS staff to support that effort. Pool explains that he wrote the original VBLM and has continued to be involved in that

² I have not reached any conclusions and offer no opinion about whether Madore's statements are an "abuse of authority" under County policies and standards or "defamatory." The scope of my engagement does not include reaching legal conclusions.

³ Cook and Horne assert that these two factors render it improper to conduct a rural and vacant buildable lands analysis for the rural area. Again, the scope of my engagement does not include reaching legal conclusions and I have no opinion about their legal analysis.

process since that time. The VBLM, Pool states, focuses on the area inside the Urban Growth Boundaries, and all of the review by the Board has been about the urban areas. The County has refined the model over time. The development community has weighed in on the model, and every criterion has been vetted and agreed upon in front of the BOCC.

In contrast, Pool states that for the rural area, GIS has performed a much simpler calculation of buildable capacity, which was historically based upon zoning for minimum lot sizes. Pool states that GIS and Planning staff (more recently, primarily Alvarez, with Orjiako's oversight) would discuss and agree on the criteria for calculating vacant land. Pool states that Pearrow would write the programming script, generate the estimate and give the estimate to the Planning staff. Pool points out that the numbers were just estimates based upon the best available data. He also states that the rural area estimate has not been through rigorous review by the Board similar to that afforded to the VBLM.

As I understand it from my interviews with Pool, Pearrow and Alvarez and my review of documents, the County's Growth Management Plan and annual updates have historically contained an estimate of rural capacity. In my interview with him, Pool stated that the original calculations in 1992 had a timber exclusion based on owner name.

Additionally, for example, The November 1999 Clark County Plan Monitoring Report (1995-1999) (November 1999) (Public Comment Draft) p.49 states:

The vacant and buildable lands identification model, developed in a geographic information system by Clark County Assessment and GIS staff for plan monitoring, does not include rural areas (outside of UGAs [Urban Growth Areas]). In order to assess development potential in the rural areas, a separate but parallel model process was developed.

Information on the number of available vacant and underutilized acres, existing, and potential lots by comprehensive plan designations is also included. It is important to note that the above data excludes lots of less than 1 acre as well as exempt parcels such as school sites, parks and public lands.

(Exh. 19 p. 3). The identical language appears in the July 2000 version of the report (*Id.* p.6) and the 2000-2004 Clark County Plan Monitoring Report (June 2005) (*Id.* p.19).

Pearrow stated in my interview with him that he maintained a Word document that described the methodology that he revised and refined over the years. He stated that he revised this document as needed as the methodology for calculating the estimate changed. Pearrow gave me what he stated was the most recent draft of that document, which is titled "Process for Estimating Rural Land Capacity" dated March 2012. The classification excludes "Western Forest Protected Lands" (Exh. 20). Pearrow explained in my interview with him that this exclusion includes big timber companies or properties in long-term forest production.

Pool and Pearrow explained that when the 2016 Comp Plan process began in 2014, the rural capacity analysis needed to be rewritten to the current state of the software and the current availability and quality of the data.

In that regard, Pool states that the computer scripting language in which prior estimates were written was out of date. Therefore, GIS had to migrate to a new scripting language that runs in the current GIS environment. Additionally, with regard to the data, GIS had access to more accurate data sources.

Pool states that, notably, in trying to identify forestlands that should be excluded from the estimate as “not buildable,” GIS changed to data showing forestlands in “Current Use” maintained by the County Assessor from trying to determine industrial timberlands from a database containing owners’ names. Pool states that when they ran the numbers using the updated criteria and the new software, the final number was reasonably close to the calculations run in prior years.

Between April 2015, when ESA was directed to revise the DSEIS to incorporate Alternative 4, and July 2015, when the rural calculations were sent to ESA for the revised DSEIS, Alvarez and Pearrow worked on a draft paper defining the calculation method. The April 2015 draft (Exh. 21) is an unfinished effort; the July 21, 2015 draft (Exh. 22) is more complete. The document (no longer designated as a draft) appended to the November 19, 2015 Staff Report adds some explication, but the methodology appears to remain the same (*see* Exh. 11 p.4-5). Regardless, both the July 21, 2015 draft and Exhibit 1 to the November 19, 2015 Staff Report designate forestland use parcels participating in Current Use programs as “not buildable” and state that forestlands are excluded from the calculations.

(2) Madore’s Allegations

This section of this report (1) restates each of Madore’s allegations in summary form⁴; (2) states my conclusion regarding the accuracy of his allegation; and (3) explains the basis for my conclusion.

- **Madore stated that the rural capacity calculations provided to ESA for the DSEIS were prepared using “secret” or “covert” software.**

In my interview with him, Madore stated that the software was “secret” or “covert” because (1) Orjiako directed GIS to use that software; Madore asserts that Pearrow and Pool confirmed that Orjiako did so; and (2) no one knew that the software was being used.

Madore’s statement and his underlying assumptions are partially false:

- The software tools (the program and scripting language) were GIS tools, not Planning Department tools, and Pearrow wrote the scripting language that ran the calculations.
- To the extent that Madore meant that Orjiako or the Planning Department dictated the criteria used to calculate the rural capacity – as opposed to the software itself – his statement is also false. As both Pearrow and Pool explained, development of the criteria was a collaborative effort, with GIS developing the

⁴ Madore has repeated the same allegation in slightly different words in many different forums; my restatement captures the gist of his allegations.

classification, providing information on the available data, the sources of data and the accuracy of data and then obtaining Planning department buy-off. Pool states that no one in the Planning Department dictated the outcome; rather they discussed the data and its sources and the criteria that made sense with the goal of accurately reflecting the data.

- It is not true that “no one knew the software was being used.” As to the software itself, it is simply a GIS tool. It is possible that no one outside GIS was familiar with the specific mapping tools, scripting languages or programs, but it is difficult to see why that would constitute some kind of deception – or why it would matter. In my initial interviews and follow-up interviews with Pool and Pearrow, they showed no sensitivity with regard to the names or function of the GIS tools.
- To the extent that Madore’s statement could be interpreted to mean that no one knew that there was a methodology for calculating rural capacity, his statement is false. As can be seen from monitoring reports going back at least until 1995 (20 years), the County had repeatedly publicly stated that it prepared a relatively simple analysis to calculate rural capacity.
- To the extent that Madore means that, prior to development of the 2016 Comp Plan, the Board did not focus on, and were not presented with, the specific criteria used in estimating rural capacity, his statement is true. Witnesses agreed that the Board did not examine criteria for rural capacity at a granular level.
- **Madore stated that the Planning Department intentionally inflated the rural capacity in the DSEIS. In my interview with him, Madore asserted that the Planning Department had instructed the GIS to “maximize” the number of rural lots.**

Madore’s statement is false:

- Pool is emphatic that no one in Planning ever tried (1) to tell GIS to maximize the number of rural lots; or (2) dictated the selection of criteria to reach a specific outcome. Rather, they discussed the criteria and data that made sense.

When I asked Madore about his allegation that Orjiako directed GIS to maximize the number of rural lots, Madore evaded the question with a self-serving statement inconsistent with other statements in the interview. In the interview I asked him (1) if he had seen any documents supporting his allegation; and (2) if anyone in GIS told him that they had been directed by Orjiako to maximize the number of lots. Madore he stated he was unwilling to reveal the names of people who made such comments to avoid implicating GIS or dragging them into this investigation. At the end of my interview, however, Madore suggested that I interview Pool and Pearrow. Madore has no qualms about involving GIS in this investigation.

- Madore’s reasoning is flawed. He argues that because the criteria used to calculate rural capacity for the DSEIS reaches a larger number of rural lots than the calculations using Madore’s preferred criteria, the criteria must have been selected by the Planning Department for that purpose. But Madore’s argument is an *ad hominem* fallacy that ignores other, more plausible possible purposes for the choice of criteria. Pool ably explained those purposes – to make a reasonable estimate based upon the best available data – without a particular goal in mind.
- **Madore asserts that the calculations used to calculate rural capacity in the DSEIS grossly inflate rural capacity.**

Madore’s statement is false:

- I am not a planning expert, and I do not purport to be qualified to independently assess the quality of the rural capacity analysis provided to ESA for the DSEIS. Nevertheless, when I interviewed Robert Thorpe, he stated that the Thorpe firm reviewed the work underlying the DSEIS and it met professional standards.
- Nevertheless, Madore’s assertion is based on a false premise. More specifically, in making his assertion, Madore relies upon his analysis of the criteria supposedly used by GIS in reaching the rural capacity for the DSEIS.

It is not true, however, that as Madore has stated in multiple forums, his Table 1 “Column A” criteria in the November 24 Preferred Alternative are the criteria used to calculate rural capacity for the DSEIS.

In my interviews with them, Pool and Pearrow reviewed each of Madore’s “Column A” criteria and explained why some of the criteria were inaccurate, identified the criteria that originated in the VBLM for the urban area, or did not make sense. Pool’s and Pearrow’s explanations are essentially consistent with Exhibit 1, Staff Report, “*Public Hearing: Reconsideration of a “preferred alternative” and of planning assumptions . . .*” (February 16, 2016) (Exh. 23). Specifically:

Criteria 1: “*Every possible rural parcel shall be counted as a parcel that will develop . . .*” (Exh. 4 p.4.)

Pool stated in my interview with him: “*That’s not true, right? We exclude a whole list of things that we say are not buildable. So that’s a false statement. . . . No, it’s not—well, it’s not even what we did. That’s not what we did, right? That’s a statement of what the analysis is trying to do, and it’s not. It’s trying to find...it’s an analysis to look at what we reasonably think will develop, and it excludes lots of stuff. He says it doesn’t exclude anything. That’s just not true.*”

Criteria 2: “*Rural parcels located in areas far from basic infrastructure with continuous long-term commercial forestry operations should be counted as parcel that will develop.*” (*Id.*)

Pool explained in my interview with him that the model used in 2015, like the model used since 1992, excluded timberlands. Pool added that the GIS

calculations have always excluded timber. Currently the number of lots is based on Current Use data, which was obtained from the County Assessor. (See Exh. 23 *passim*.)

Criteria 3: *“Rural parcels including 100% of environmentally constrained areas that lack sufficient area for septic systems and well clearances shall be counted as rural parcels that will develop.”* (Exh. 4 p.4.)

Pool states that this is true, and GIS did not consider environmental constraints in its rural capacity analysis for the DSEIS. (See Exh. 23 p.5.)

Criteria 4: *“History shows that 30% of dividable properties with homes and 10% of vacant dividable properties will not further develop.”* (Exh. 4 p.4.)

Pool states that this is a statement based on the urban model, not the rural areas. It is correct, however, that this assumption has not been applied to the rural area. (See Exh. 23 p.5.)

Criteria 5: *“As long as County code allows, lots that are up to 10% smaller than the minimum lot size should be considered as conforming lots and counted as property that is likely to develop.”* (Exh. 4 p.4.)

Pearrow states that this is an accurate statement of GIS methodology. (See Exh. 23 p.5.)

Criteria 6: *“Although county code prohibits most nonconforming parcels from developing, all nonconforming parcels with 1 acre shall be counted as rural parcels that will develop.”* (Exh. 4 p.4.)

Neither Pool nor Pearrow could remember if this was an accurate statement of GIS methodology.

Criteria 7: *“A 0% Market Factor shall be used for rural areas.”* (Exh. 4 p.4.)

Pool states that there has never been a market factor for the rural analysis. Pearrow agrees.

Criteria 8: *“A 0% infrastructure analysis shall be used for rural areas.”* (Exh. 4 p.4.)

Pool states that there has never been an infrastructure deduction (which originated in the urban model) in the rural model. Pearrow states that an infrastructure deduction does not make sense; because of the way development is done in the rural area, you can exclude the right-of-way in the parcel size so it does not take away land from the parcel.

- Generally, Madore’s “Column A” criticizes the DSEIS rural capacity analysis because it does not apply factors to reduce the number of buildable lots that Madore, in performing his calculations, imported from the urban VBLM. With regard to the validity of Madore’s “Column B” assertions, I am not a planning expert, and do not purport to be able to independently assess the soundness of Madore’s methods.

Nevertheless, the Thorpe Report speaks for itself with regard to that point. The Thorpe firm concluded that such criteria were invalid.

- In support of his analysis, Madore has asserted that he worked closely with GIS and ultimately GIS's calculations matched his. His clear implication is that GIS agreed with his methodology. It is true that GIS tried to understand Madore's methodology and how he reached his results. But this does not mean that GIS agreed with his methodology.

Pool states that GIS was trying to understand Madore's methodology so that they could reproduce it if they had to do so in the future. As Pool described GIS's effort to understand and reproduce Madore's calculations in my interview with him, it seemed, in my judgment, to be chaotic and disorganized. GIS was unable to elicit clear responses from Madore about his reasons for excluding certain properties. Pool states that Madore would just tell GIS to exclude individual properties; Pool states that GIS asked several times, but never received a reason for overriding the codes identifying property status on the override table they were given. At the end of the process, Pool states, *"We kind of, sort of understood why he was doing things."*

Pool explains that the way it should be done is to look at the property, look at the criteria, then GIS would produce a map, the appropriate person would approve the map and GIS would approve the criteria. But Pool states that GIS needed to be able to write a script so they could reproduce the methodology, because GIS just cannot do the analysis the way Madore did – looking at property individually. GIS wanted to be able to identify and apply criteria that replicated what Madore did. GIS was able to do so with only partial success.

Pool stated in my interview with him, *"It was a bad process."* Pool stated that, if the Board wanted to get into the nitty-gritty of how GIS did the rural analysis, the matter should have been brought before the Board where they could talk about the criteria. Then the Board could tell GIS what it wanted, GIS could make changes and bring a map back. Instead, Madore just did it himself and said, *"That's what I want,"* and, *"I'm going to do it my way. This is what I want."*

- **In a related allegation, Madore has stated specifically that the DSEIS has inflated the number of buildable lots on forestlands by "a factor of 10," a factor of "1000 percent," or in later public statements, by "500 percent."**

Madore's statement is false.

- Pool explains that he believes that Madore's assertions, both with regard to the existence of a forestlands exclusion from the DSEIS rural capacity calculations and its impact on the results of the calculation is based on a GIS error. Pool states that GIS had been running alternative scenarios and turned the forest exclusion "off" in the code – and then forgot about it. So, as best as Pool can determine, when GIS gave the software and data to Madore, the forest exclusion was still turned off. Therefore, when Madore "reverse engineered" (to use Madore's characterization) the GIS software, it appeared that GIS had not excluded timberlands. GIS staff did not realize the error had been made until they tried (with limited success) to reproduce Madore's methods.

- Pearrow explained in my interview with him that the GIS methodology probably excluded more forestlands or timber operations than Madore’s methodology, because the data they used included more “mom and pop” operations than would be classified as long-term commercial operations (the basis for Madore’s criteria).
- Planning staff repeatedly explained that the DSEIS methodology excluded forest lands before Madore made his public accusations (*See, e.g.,* Exh. 10, 11.). Pool stated in my interview with him that the night before the February 23 hearing, he talked to Madore about the timber issue and explained what had happened.

b) Thorpe Contract

Madore has alleged that Orjiako, the Planning Department and Prosecuting Attorneys subverted the Board’s direction with regard to the scope of the Thorpe Review, improperly influenced the outcome of the review and were insubordinate to the Board. Again, in all material respects, Madore’s allegations are false.

- **Madore asserts that the staff failed to amend the Thorpe contract to comply with the Board decisions in the December 8, 2015 BOCC meeting. Therefore the Thorpe contract was “unlawfully executed.”**

Madore’s statement is accurate to the extent that one approved revision to the contract was not incorporated in the final document. Nevertheless, as a practical matter, it is immaterial to the results of the Thorpe Review as the Thorpe firm was provided with, and reviewed, the November 24 Preferred Alternative.

- On December 4, 2015, Thorpe sent a draft Memorandum of Understanding to McCauley, with a copy to Madore and Orjiako for review. Thorpe’s proposed scope included three steps. Step 1 stated: *“Review the Planning Assumptions introduced on **November 4, 2015** and provide professional opinion on the validity of these assumptions and whether they should be applied to the Vacant Buildable Lands Model for the rural lands.”* (Exj\h. 17 p.2, emphasis added.) Subsequently, the staff reviewed and commented upon the draft, but none of the redline revisions changed the November 4 date.
- During the December 8, 2015 BOCC hearing, the staff proposed several revisions to the draft. Madore proposed two revisions: (1) revise the date in Step 1 to “November 24”; and (2) revise language in Step 2 to read: *“Assuming that the Planning Assumptions have a factual basis for incorporation into the buildable lands model, we will work with County Staff to review and revise Alternatives 1, 2, 3, 4 and the Preferred Alternative by incorporating the Planning Assumptions found to be fact based.”* With regard to the second proposal, Cook confirmed in the hearing that “Preferred Alternative” referred to the November 24 Preferred Alternative. The Board approved all of these revisions.

Madore's first proposal – changing the date to November 24 – was not incorporated into the final contract. All of the other revisions were incorporated. (*see* Exh. 18.)

- In my interview with him, Madore asserted that the failure to change the date was significant because the Thorpe firm was not to analyze a draft, but to analyze the adopted planning assumptions, the November 24 Preferred Alternative.
- Subsequent to the hearing, however, Madore pointed out to Orjiako that the contract had not been revised to correct the date. In response, on December 16, Orjiako assured Madore that he had provided Thorpe with the November 24 Preferred Alternative (Exh. 24 p.3). Euler again reassured Madore that the Thorpe firm was reviewing the November 24 Preferred Alternative on December 22, and Thorpe confirmed Euler's assurance (*Id.* p.1).
- **Madore asserted that the Planning Department “trespassed and usurped the authority of the legislative branch” because, in an act of “active insubordination,” the staff directed Thorpe to consider only the validity of Madore’s “Column B” assumptions, or, in other words, the assumptions that Madore relied upon to calculate rural capacity, rather than assessing the validity of the “Column A” assumptions (Madore’s characterization of the methodology used to estimate rural capacity in the DSEIS).**

Madore's statement is false.

- In the December 2 meeting, which Madore attended, the staff and Prosecuting Attorneys (1) raised the question of whether the revised Alternative 4 planning assumptions in the Preferred Alternative must be applied to Alternatives 1, 2 and 3; (2) whether the Alternative 4 assumptions had been properly vetted; and (3) whether it would be sufficient to prepare an addendum to the SEIS rather than revising the SEIS. Neither Madore nor any of the other participants raised the possibility of Thorpe reviewing the basis for the DSEIS rural capacity analysis.
- Madore did not state in the December 8 hearing that Thorpe should evaluate the basis for the rural capacity estimate contained in the DSEIS.
- The final contract language for Step 1 refers to the “planning assumptions introduced on November 4.” Changing the date to November 24 does not alter the meaning of that language. The assumptions adopted on November 24 were the “Column B” assumptions (*see* Exh. 5 p.1 l.26).
- In my interview with him, Madore stated that the intent of the Thorpe agreement was to review the entire November 24 Preferred Alternative, and that meant that Thorpe should have reviewed the “Column A” assumptions because they were included in that document.

That argument does not withstand scrutiny, however. Even if Madore's Column A assumptions were actually the basis for the DSEIS rural capacity analysis

(which they are not, *see* Section A(2)(a)), those assumptions were not “adopted” on November 24. Rather, the DSEIS methodology was implicitly rejected when the BOCC adopted Alternative 4B.

- An act of insubordination requires a clear and specific direction, followed by a failure to comply with that direction. Nothing that occurred in the December 2 meeting, the December 8 hearing, or the language of the Thorpe contract constituted a clear direction to Planning Department staff that Thorpe should vet the basis for the DSEIS rural capacity analysis.
 - Moreover, Thorpe stated in my interview with him that, in order for his firm to conduct its analysis, they reviewed the staff and ESA’s work on the DSEIS and concluded that it met professional standards.
- **Madore has asserted that the Planning Department did not provide the Thorpe firm with the documentation needed to support “Column B.”**

Madore’s statement is false.

- Madore stated in my interview with him that he provided all of the documentation and the staff posted them in a drop box, but the Thorpe report does not refer to his documentation and therefore it appears that they did not consider “any of the evidence.”
 - The email record establishes that the Planning Department provided the Thorpe firm with all of the documents Madore wished the Thorpe firm to consider (*e.g.* Exh. 25).
- **Madore asserts that the Planning staff prohibited Thorpe from communicating with any member of the Board.**

Madore’s statement is accurate, although “prohibited” overstates what the evidence shows. It is, however, probable that either ESA or Planning staff told Thorpe that if the Thorpe firm had questions their channel of communication should be with Euler.

- The email record shows that ESA had concerns about efforts by Madore and CCCU to obtain information directly from ESA (Exh. 26). When Thorpe was engaged, ESA suggested to Euler that Thorpe operate under the same guidelines and that ESA advise Thorpe about this issue (Exh. 27).
- According to Madore, he called the Thorpe firm and Thorpe stated, *“I’ve been ordered not to talk to you. I can talk only to staff.”*
- Thorpe does not remember if anyone told him about how to respond to contact from Madore. Thorpe remembers only a few calls from Madore asking when the draft report would be released; Thorpe states that he told Madore that he would receive the draft when it was released to the Board.

- Euler states that, to the best of his memory, he told Thorpe that he would be Thorpe's contact if the Thorpe firm needed information, but it would not be his style to be more direct than that.
 - McCauley and Cook stated in my interviews with them that, even if someone had told Thorpe not to talk to Madore or other Board members, it would have been entirely appropriate, as the County expects consultants to perform their work independently, and it would be inappropriate for Councilors attempt to influence their work.⁵
- **Madore has stated that Planning Department staff improperly influenced the outcome of the Thorpe Review.**

Madore's statement is false.

- Thorpe stated in my interview with him that members of the Planning Department did not attempt to influence the outcome or Thorpe's conclusions. Rather, Planning staff responded to questions and defended their work in response to those questions. This, Thorpe states, is what he would expect from planning professionals. Additionally, ESA was open and cooperative and provided all the data and information Thorpe had requested.
- The Planning Department, as previously noted, provided Thorpe with all the documentation that Madore wanted Thorpe to review.
- On January 11, 2016, Thorpe sent the Planning Department a draft report. The revisions proposed by the Planning staff were minor and did not affect the conclusions (*see* Exh. 28).

c) Growth Rate

- **Madore asserts that Planning staff intentionally misled the Board by projecting a 1.12 percent growth rate, when the typical growth rate for Clark County has been two percent; thereby causing the BOCC to adopt the OFM medium population projection.**

Madore's statement is false as to his assertion that Planning staff intentionally misled the BOCC; I have no opinion on the historic growth rate or the proper sample that should be used for growth rate calculations.

It is difficult to see how recommending a middle-of-the-road projection that OFM, by statute, considers to be the most likely outcome, constitutes misleading the Board. Moreover, it appears from the documents that Planning increased its projected growth rate as the population data changed. I am persuaded by my interviews, moreover, that Planning staff's only interest was in adhering to professional standards and assisting the County in developing a defensible 2016 Comp Plan.

⁵ It appears that Madore understood these guidelines, or, at minimum, acknowledged them (*see* Exh. 45)

By way of background, in a December 18, 2013 work session, the BOCC considered selection of a population projection for the 20-year plan horizon of the 2016 Comp Plan. Staff provided the Board with a memorandum (1) explaining the population allocation considerations, including, among other matters, the requirement that counties use the official population projections issued by the Washington State Office of Financial Management (“OFM”), and select between low, medium and high projections, and pointing out that the medium range is, by statute, OFM’s most likely estimate of a county’s population; (2) explaining the importance of selecting an appropriate population projection in light of the risks of underestimating or overestimating the rate of population growth; and (3) recognizing Clark County’s historically healthy population increases and providing data on the county’s census population (Exh. 29). The staff also made a presentation comparing the OFM medium growth rate with other alternatives (Exh. 30). The staff recommended selection of the medium series and requested that the BOCC hold a hearing to consider adoption of the medium population projection (*Id.* p. 7).

According to Madore, in the staff presentation Orjiako intentionally distorted the growth rate to show an artificially low rate by focusing the projection on a seven-year period around the dip in growth caused by the 2008-2010 recession. Madore asserts that Planning staff should have considered the previous 20 years.

The BOCC held a hearing on January 21, 2014. Madore moved to approve adopting Resolution 2014-01-09, which included the OFM medium population growth projection; the motion carried unanimously (Exh. 31 p.2).

In April 2015, the BOCC, by Resolution No. 2015-04-05, increased the Planned Population Growth to 129,546; the Assumed Annual Population Growth Rate remained at 1.12% (Exh. 32).

In connection with the July 2015 draft of the DSEIS, Madore argued that the population growth numbers should be updated *“to better align with the latest OFM report Clark County now being the fastest growing county in the state,”* and asserted, *“the OFM latest report shows a 2% growth for Clark County. We ought to say so. Otherwise, we leave the reader with the false impression that we are still stagnated.”* (See Exh. 33.)

The DSEIS, however, projected an annual population growth rate of 1.26% (*see* Table 1-1, Exh. 3 p.1.2).

In the October 20, 2015 hearing, Madore contended that the County ought to revisit the population growth forecast and adopt the high OFM choice (Board of County Councilors Minutes of October 20, 2015 p.9).

In the staff markup of Madore’s Alternative 4B (November 3, 2105 Version), Planning staff explains the arithmetic basis for their calculations of the growth rate and explains the difference between Planning and GIS’s methods and Madore’s method. Based on a corrected 2015 base population, Planning estimated a 1.29% growth rate (Exh. 10 p.18).

In the November 24, 2015 Preferred Alternative, the BOCC approved a 1.31% annual growth rate (Exh. 5 p.5).

Upon repeal of the November 24, 2015 Preferred Alternative, the BOCC adopted a 1.26% Assumed Annual Population Growth Rate (Exh. 4 p.2).

d) Allegations Regarding Misrepresentations to the BOCC

- **Madore asserts that in the January 13, 2016 work session that Orjiako and Cook intentionally misled the Board by insisting that “the RVBLM (Rural Vacant Buildable Lands Model) including the RVBLM as published on October 20, 2015, were revealed to and approved by the county commissioners in previous years and by the county councils of 2015 and 2016.” Madore adds that they “further misled the councilors by asserting that table 2 (general planning assumptions) were the RVBLM assumptions.”**

Madore’s statement is false; Madore has over-simplified and mischaracterized what occurred and has taken statements out of context.

- There are many flaws in Madore’s characterization of what occurred on January 13, 2016. In the first instance, Madore’s allegation is founded on his often-repeated assumption that his description of the GIS methodology used to calculate rural capacity for the DSEIS (as repeatedly published in his analyses from October 20 on) is accurate. As discussed in Section A(2)(a), this is not true.
- Nevertheless, recasting Madore’s allegation to omit its inaccurate premise, Madore is, in effect, contending that Orjiako and Cook intentionally misled the Board by stating that the BOCC and its predecessor body reviewed and approved the methodology used to determine rural capacity in prior years and in 2015 and 2016.
- Madore is, however, over-simplifying what occurred and has taken Orjiako and Cook’s statements out of context. Specifically, the statements Madore challenges occurred in the context of discussing the Thorpe Review and its conclusions. In this context, most significantly, the Thorpe Review concluded that criteria that applied urban growth criteria to the rural area were invalid.

In the work session, Madore challenged the scope of the Thorpe firm’s analysis, arguing that the Thorpe firm should have analyzed Column A. (The accuracy of his assertions with regard to the intended scope of the Thorpe contract was previously analyzed in Section A(2)(b).)

Orjiako, in response, conflated the VBLM for the urban areas with Madore’s “Column A” assumptions regarding rural capacity. When he made the statement about which Madore complains, Orjiako was explaining why it did not make sense for the Thorpe firm to review the VBLM. Orjiako stated, in what is clearly a reference to the VBLM for the urban areas, that:

If you recall my comment earlier, I said that the Vacant Buildable Lands Model and the assumptions that went into it and the write-up of that was done by a task force that

included the cities, included a representative of the Building Committee, and that has been vetted, tried, appealed, reviewed by the Growth Board.

Orjiako adds, “I don’t recall asking [the Thorpe firm] to go back and vet the current planning assumptions that have been used for over 20 years now.”

Horne followed upon Orjiako’s comment by observing, with regard to past Comp Plans:

What was in existence previously was the result of litigation, and so the assumption was made—whether it’s correct or not—the assumption was made that because it has passed challenges and has ultimately been approved, it was what the only thing we’re left with that was legally allowed by the Growth Management Hearings Board.

Cook adds, after Horne finishes: “And I had one further item to add, that the Choice A assumptions were adopted by the Board in 2014. So those are not all from 20 years ago, but they are assumptions that were adopted for this planned update.”

Madore then proceeds to argue that the “Column A” assumptions inflate rural capacity. It is clear that Orjiako, Euler and others are confused by his argument. At this point in the hearing, they are focused on pointing out the error in Madore’s contention that urban VBLM assumptions should have been applied to the rural capacity analysis so as to reduce the number of buildable rural lots.

Cook then goes on to reiterate and build upon Horne’s point about the legal effect of challenges to prior Comp Plans upon the validity of past assumptions:

Uh, one more point, that it is not correct to say that these assumptions have not been vetted, to the extent that they are assumptions that have underlying prior plans. Uh, the ’94 plan was appealed by...I forget how many parties. It took many years to resolve. And the 2007 plan was appealed and took many years to resolve, and the current ruling from the Growth Board is Clark County’s plan complies. So to the extent that any of those assumptions underlie the plan now, then they can be said to comply.

Considered in context, it is apparent that (1) Orjiako misunderstood Madore and conflated the extensive vetting of the VBLM with vetting of Madore’s characterization of the DSEIS rural capacity methodology; this is easily understood given Madore’s focus on importing urban criteria into rural capacity analysis; moreover, Orjiako’s statements about extensive vetting of the VBLM are true; (2) Cook and Horne described their opinion regarding the legal effect of Growth Management Hearing Board reviews and the outcome of litigation on the validity of criteria in past years; to put it more directly, they contended that if any aspect of past plans survived extensive legal review, it is valid;⁶ and (3) Cook misspoke when she stated specifically that Column A assumptions were adopted by the Board in 2014.

⁶ I have not formed, and do not express, any opinion about the correctness of this reasoning; legal analysis is outside the scope of my engagement.

But none of this amounts to any intentional falsehood or effort to mislead the BOCC. Orjiako made correct statements based upon his misunderstanding of Madore's contentions. Cook made what was obviously an error and confused the planning assumptions (such as population growth rate, rural/urban split and the like) formally adopted by the Board with rural capacity analysis.

In this regard, much confusion has arisen from the loose use of the term "planning assumptions" to refer to (1) the assumptions first formally adopted by the Board because the BOCC is required to do so by the GMA regulatory scheme in 2014 (as amended with regard to estimated population growth in April 2015); and (2) the criteria used to develop the rural capacity analyses supporting the DSEIS and Madore's Alternative 4B, where there is no regulatory requirement that the County conduct such an analysis.

- **Madore asserts that on February 16, 2016, Orjiako and Cook intentionally misled the Board by stating that the Column A RVBLM planning assumptions were not the RVBLM assumptions, but were instead the urban VBLM assumptions. Madore asserts that when pressed, they could not specifically identify which of the "Column A" assumptions were not the actual RVBLM assumptions.**

Madore's statement is false.

- Madore misrepresents Cook's statement. More specifically, Cook states:

I would like to point out, if I could, that choice, the Planning Assumptions that have been labeled as choice A are not necessarily the Planning Assumptions that the Board was working under prior to adoption of choice B. Those were, in fact, written the same time that choice B was written, and they are not necessarily what the County was using up 'till that point. So saying that reconsidering or rescinding choice B takes things back to choice A is, I would say, an inaccurate way to couch the process here.

(Verbatim Planning Committee Minutes, February 16, 2016 p.11.) As previously discussed in Section A(2)(a), Madore's "Column A" assumptions are not a correct statement of the GIS methodology used in the DSEIS.

Moreover, when Madore presses Cook to identify which assumptions were in error, Cook correctly points out that Column A incorrectly asserts that forest lots were counted, when they were not (*Id.*) (*see* Section A(2)(a)).

When Madore challenges Cook about her previous statement regarding approval by the Board, Cook corrects her misstatement in the January 13, 2016 work session and refers Madore to the resolution adopting the planning assumptions (*Id.* p.12). (Cook cited to 2015-04-05; my review of the documents suggests that she meant 2015-04-06).

- Madore also mischaracterizes Orjiako's statements. Madore points out that he was not referring to the formally adopted planning assumptions, but to the GIS rural capacity analysis. In response, Orjiako correctly points out that (1) Madore

took urban criteria and applied them to rural capacity; (2) the VBLM for the urban area was created over years with extensive input from stakeholders and the Board, and was extensively challenged before the Growth Board and the courts and successfully defended; (3) the Planning Department has not extended the urban methodology to the rural area; and (4) Madore made a “big mistake” by doing so, which was made clear by the Thorpe review. (*Id.* p.____.)

- **Madore asserts that on February 23, Orjiako and Horne misled the Board (1) by insisting that the RVBLM did not exist and was not used; and (2) Horne stated that the Planning Department did not “technically” use the RVBLM.**

Madore’s statement is false.

- In the first instance, Madore misrepresents Horne’s role during the February 23 hearing by asserting that Horne made any statement concerning rural capacity analysis. The only statements Horne made during the February 23 hearings concerned (1) the golf course and the Ridgefield urban growth boundary (Verbatim Minutes, February 23, 2016 p.29-32); (2) whether disallowing Washougal’s 41 acres designated R-5 because they did not follow sufficient public process was on the agenda (*id.* p.42-43); (3) a statement clarifying Clark County’s consistent pattern since 1973 recognizing the grandfathering of existing lots, in that “nonconforming” lots are treated as “legal lots” (*id.* p.49-50).

It is worth noting that in my interview with Madore, I advised him that I had repeatedly reviewed the February 23 verbatim minutes and it appeared that Horne had made something similar to the statements Madore attributed to Horne in the March 1 hearing rather than the February 23 hearing. I told Madore that I was not trying to catch him out and asked Madore whether it was possible that he had made a mistake in his citation to the date. Madore insisted that he did not believe that he had erred. He was wrong.

The substance of Madore’s allegation regarding Horne’s statement is discussed in the context of the March 1 hearing.

- With regard to Orjiako’s statement on February 23, Madore has taken Orjiako’s statement out of context. What Orjiako said in response to a question from Councilor Julie Olson about the staff report and documentation of how rural lots have been counted in the past was:

Councilors, what I will say is that there appear to be some misunderstanding and confusion, if I may use that term. What this represent is when ESA asked staff to help them determine the potential new lots available under each alternatives. This is staff documentation of what was presented to ESA.

So, for example, if you go to Page 1-3, it's not in your staff report, I'm referring to the published -- August 5th published DEIS, you can see that on Page 1-3, Table 1-2 list all the potential new lots allowable or available under each alternative. So this is staff's effort to document what we did in consultation with our GIS staff and presented that to ESA.

There is no written rural VBLM model. What we do is just a simple analysis of what are the available potential lot in the rural area based on the current zoning, so we don't have -- this Council and the previous Board that we have worked with have never approved a rural vacant lands model.

(Id. p.5-6.) It is clear from the context that Orjiako is merely pointing out that the rural analysis capacity that appears in the DSEIS is the result of a simple analysis based on current zoning. Orjiako is not denying the existence of a rural analysis. He is distinguishing between that analysis and the complex VBLM for urban areas.

Orjiako's wording was inartful. The rural analysis has been called a "model" for many years, and was referred to in several documents authored by GIS and Planning staff as the "rural VBLM." Pool points out that, from his perspective, the word "model" originated from his office, and in his view, anything that uses data, applies assumptions and comes up with an answer is a "model."

Nevertheless, in context, Orjiako was explaining and clarifying the differences between the VBLM and the rural capacity analysis, not misleading the BOCC.

- **Madore asserts that on March 1, 2016, Horne "misconstrued the allegations against Prosecuting Attorneys Cook and Horne and the Planning Director to be instead, [sic] against GIS staff."**

Madore's statement is false.

- In the first instance, as previously discussed, Madore's assertion regarding Horne's statement regarding the "technical" existence of a rural and vacant buildable lands model occurred on March 1, not on February 23. Horne, however, did not make any misrepresentation. Horne, like Orjiako on February 23, was trying to explain (yet again) the difference between the VBLM and the rural capacity analysis:

One of the key issues of course you're familiar with, related to numbers or data resulting from the analysis of rural development capacity. Um, and just to familiarize the Board, the...Clark County does not technically—and I use that word carefully—does not technically use, um, a Vacant Buildable Lands Model in the rural area, because Judge Poyfair found that a prior Growth Management Hearings Board required Clark County to do a VBLM for the rural area, and Judge Poyfair ruled, and I'll quote, "The Board's requirement," referring to the Growth Management Hearings Board, "The Board's requirement to, in essence, require a Vacant Buildable Lands analysis for the rural area was erroneous." So the County does do a capacity analysis of the rural area.

(March 1, 2016 BOCC Hearing, Partial Transcript p.2.) Repeatedly throughout the hearing, Horne acknowledges the existence of the rural capacity analysis. Whether it is called a model is mere semantics.

- Second, with regard to GIS, Horne merely attempted to understand the basis of Madore's assertion that the staff did anything illegal or unethical. As is clear throughout the hearing, Horne is seeking to find out whether Madore's assertions regarding the alleged inflation of rural capacity in the DSEIS were based on Madore's belief that the DSEIS capacity analysis counted forestlands as buildable and did not exclude them. As Madore's mistaken belief was, in all likelihood, at least partially based upon the error in the GIS software GIS gave him, Horne cited to Pool's explanation of how the error occurred.

An objective review of Horne's statements in the hearing confirms that he was not trying to shift blame to GIS for Orjiako's or Cook's supposed misrepresentations.

- **After this investigation commenced, Peter Silliman asserted that Madore's allegations were supported by an additional instance of alleged misfeasance. More specifically, Silliman asserted that in an October 13, 2015 hearing concerning proposed amendments to the Shoreline Management Program, Orjiako and Cook intentionally misled the BOCC. Silliman asked that this incident be considered in this investigation (Exh. 34).**

With regard to the background, according to Cook, amendments to the Shoreline Master Program ("SMP") had been under consideration for several weeks prior to the October 13 hearing. On August 6, 2015, the Planning Commission met to consider limited amendments to the SMP. Among the revisions was a proposal to add language to County Code 40.460.630(K)(13) to provide, in relevant part:

Legally established existing residential structures and appurtenances located landward of the OHWM and outside the floodway that do not meet the standards of this Program are considered to be conforming, except that existing residential structures either demolished or damaged by more than sixty percent (60%) of the replacement cost by fire, flood, explosion, or natural disaster are no longer considered conforming.

The Planning Commission met again on August 20, 2015. The amendment to §(K)13 again appeared. The Planning Commission approved the recommendations.

On September 2, 2015, the Board held a work session to consider the Planning Commission Recommendations. The proposed amendment to §(K)13 appears again on the Councilors Grid for that work session. (Planning Commission Recommendations to the Board of County Councilors, Exh. 1 p.4-5, September 29, 2015.)

According to Cook, Kevin Tyler, Department of Environmental Services Division Manager, attended the Planning Commission meetings and the BOCC work session.

At the October 13 BOCC hearing, Orjiako asked Planner Gary Albrecht to present the highlights of the proposed changes. In the dialogue that followed (Exh. 35): (1) Madore asked Albrecht to confirm that the amendments were to comply with Department of Ecology mandates and did not go beyond state law, and Albrecht confirmed his statement; (2) Madore asked Don Benton to comment on behalf of the Department of Environmental Services; (3) Benton stated that he was not personally familiar with all of the changes, but his

Permitting Manager was familiar and was supportive; that he was “relieved to hear that it doesn’t make our code any more stringent than the State code”; but he was concerned about the ability to rebuild a home on property that was completely demolished; (4) Madore asked whether that provision came from the State; (5) Madore asserted that it would be helpful to refer back to the Washington Administrative Code and asked Cook to read the specific portion of the WAC containing the 60 percent standard; (6) Madore reiterated that he wanted to ensure that the requirement was “exactly what the State law says”; (7) Cook asserted that she did not know the answer to the WAC, but the purpose of the revisions was to conform the SMP amendments to parallel provisions in the County Code; (8) Orjiako suggested that they set the issue aside for two weeks to allow the staff to do some research, because a revision to this amendment might put the SMP out of alignment with other Code provisions; and (9) Madore reiterated that state law ought to be the standalone driver; and, going forward, he wanted to see specific references to state law.

Orjiako protested about Benton’s behavior to McCauley. McCauley told Benton that he was disappointed in Benton’s behavior, as Benton could have talked to Orjiako about Benton’s concern before the hearing. Benton protested that he did not know he would be called upon to comment in the hearing (Exh. 36).

Silliman subsequently communicated via email with Albrecht, pointing out that the WAC threshold was 75 percent, not 60 percent, and therefore imposed a less restrictive barrier to rebuilding non-conforming structures within the shoreline area. Cook stepped in and corrected Albrecht after Albrecht argued that 60 percent was less restrictive.

Thereafter, Albrecht, Cook and Silliman began working on revisions to the SMP amendments; Albrecht developed a detailed list of WAC references, but refused to add additional information Silliman requested. Ultimately, the SMP amendments were approved and §(K)13 was amended to include a 75 percent threshold; the inconsistent parallel code provisions were not amended.

Silliman asserts that (1) Planning Department staff answered falsely in the hearing by stating that the amendments did not exceed the requirements of state law, as the 60 percent threshold in the proposed amendment to §(K)13 was more restrictive than state law required; (2) Planning Department staff “feigned” ignorance by remaining silent in the hearing; (3) Cook “feigned ignorance” in the hearing when she asserted that she did not know the answer to the question about the WAC requirement; and (5) Albrecht was uncooperative when he refused to provide additional information beyond the WAC citations.

Silliman’s assertion that Planning staff and Cook lied to and misled the BOCC is false.

- Cook credibly states that she was the person who proposed the amendment to §(K)13; she did so in order to bring the SMP into line with other parallel provisions, and she had not considered whether there was a WAC standard.
- The evidence strongly suggests that this entire incident was staged. Madore stated in my interview with him that (1) he called Benton the day before the

hearing; Benton told him that he had been excluded from the development of the SMP amendments; (2) Madore invited Benton to attend the October 13 hearing so if Madore had questions Benton could answer them.

- The dialogue in the hearing strongly suggests that Madore was fully aware before he questioned Albrecht that there was an inconsistency between the proposed amendment and the WAC standard. He asked Albrecht a leading question, and Albrecht, who also had not focused on whether there was a WAC standard, did what witnesses often do, which is confirm the premise of the leading question. I note that in my experience the purpose of a leading question is to elicit the answer the questioner seeks. It is not uncommon for witnesses asked leading questions to assent to propositions with which they would not agree, had they been given the opportunity for reflection or been asked an open-ended rather than leading question.
- The ensuing colloquy between Madore and Benton was focused closely on §(K)13, with Benton articulating a detailed knowledge of WAC provisions and the impact of the proposed amendment. But if Benton, as he later professed, was unfamiliar with the details before the meeting, his knowledge of the comparative impact strains credulity.
- It is clear from the hearing transcript that Cook, Albrecht and Orjiako were caught off guard by what happened, rather than feigning ignorance. When I interviewed him, Silliman had no real evidence that Cook's professed lack of knowledge was a façade; rather, he stated only that Cook was a lawyer with specific expertise, often has a laptop and she could have looked it up. But experience tells me that lawyers rarely have memorized every applicable statute or regulation.
- After the hearing, Benton told McCauley in response to McCauley's admonition that he should have discussed the issue with Orjiako prior to the hearing that Benton "*had no concerns prior to the meeting*" and his sole purpose was to be there for a proclamation; he "*was not prepared to talk on their subject*"; and "The Chair [Madore] caught me off guard when he called me up." Benton did not, however, tell McCauley that Madore had called him to discuss the amendments and that Madore had specifically invited him to be there to respond to questions.

e) Orjiako & Cook's Alleged Political Agenda

- **Madore asserts that Planning staff acted wrongfully in order to achieve a political agenda or an "anti-rural growth agenda."**

Madore's statement is false:

- Madore's assertion is another fallacious *ad hominem* argument. More specifically, the word "agenda" (as used by Madore) is commonly defined as "an underlying often ideological plan or program" (www.merriam-webster.com). As such, the clear implication to a reasonable reader of, or listener to, Madore's statements is

that opposition to rural growth (“anti-rural growth”) and a desire to “strip rural citizens of their property rights” motivated Orjiako.

In my interview with him, however, Madore disclaimed any attempt to attribute motive to Orjiako or other members of the Planning Department. Madore’s disclaimer is unconvincing. Given his inflammatory tone and word choice, his disclaimer indicates that Madore simply has no facts to support his allegation.

Instead, Madore contends that the “agenda” can be derived from a Comp Plan that allegedly increases urban density, favors light rail and public transit, while at the same time restricts rural citizens “from doing anything reasonable with their land.”

The difficulty with Madore’s *ad hominem* attack is that, as I understand it, the existence of a Comp Plan that, *inter alia*, increases urban density is the result of many factors independent of Orjiako and out of his control. These include, at minimum, the statutory purpose and scheme of the GMA, the outcomes of years of litigation, and the County political process in the 20 years between 1994 and the development of the 2016 Comp Plan.

Moreover, in my interviews with Orjiako, Euler and Alvarez, I found no evidence of any desire to pursue any “agenda” with regard to the 2016 Comp Plan Development other than: (1) adhering to their understanding of GMA requirements; (2) minimizing County legal risks from challenges to the 2016 Comp Plan; and (3) adhering to their professional performance and ethical standards.

Using equally fallacious reasoning, Madore asserts that the existence of an “agenda” is a conclusion that can be derived from the alleged misrepresentations allegedly made by Orjiako and Cook to the BOCC. This is circular reasoning, however: they allegedly made representations because they possessed an agenda; the existence of an agenda can be deduced from the alleged misrepresentations. The accuracy of Madore’s assertions regarding alleged misrepresentations has already been analyzed in detail in Section A(2)(c).

In short, Madore has cast his personal political view of the GMA and how it has been implemented in Clark County in the form of an unwarranted and highly personal attack on Orjiako and Cook.

B. ORJIAKO’S COMPLAINTS THAT MADORE COMMANDEERED THE USUAL FUNCTIONS OF THE PLANNING DEPARTMENT & MADORE’S ASSERTIONS REGARDING STAFF INSUBORDINATION

Between January 2015, when Silliman and Madore began developing Alternative 4 and November 24, 2015, when the Board adopted Madore’s Preferred Alternative, Madore, Euler and Orjiako often interacted in the context of key milestones in the 2016 Comp Plan process. The events upon which they focus overlap: (1)(a) Orjiako asserts that Madore commandeered the functions of the Planning Department; the gist of Orjiako’s complaints is

that Madore tried to coerce Orjiako to comply with Madore's directions; this had the effect of interfering with Orjiako's professional judgment and professional standards and created a hostile work environment for Orjiako and the Planning staff; and (b) AFSCME complained to Human Resources that Madore was performing bargaining unit work in violation of the collective bargaining agreement; in contrast, (2) Madore perceived Orjiako and Planning staff's resistance to his directives as insubordinate advocacy against what he labeled Board policy.

McCauley states that under the Charter the County Manager is no longer subordinate to the Councilors, and Orjiako and the Planning staff report to McCauley. The evidence shows that Madore was given legal advice that direction to staff must flow through McCauley, and then only after a Board vote following public notice. McCauley explains that when he authorized Madore to work directly with Planning, it was to obtain information, not to direct Planning staff.

Nevertheless, Madore attempted to micro-manage the Planning staff and repeatedly directed staff not to, in effect, exercise their professional judgment or criticize Alternative 4B or its premises. McCauley coached Orjiako to continue to be professional and not to "fold" or "kowtow."

1. Points of Conflict - Detail

▪ **General Behavior & Alternative 4 Development**

On a general level, Orjiako complains that Madore would frequently drop by his office without notice. Orjiako perceived this as Madore's attempt to catch him unprepared. Madore, however, asserts that he believed that this was more effective because he was working on a "front-burner" project and this would get the job done faster. Madore asserts that Orjiako was almost always gracious and invited him in. Madore states that Orjiako did not ask him to make an appointment.

Orjiako also states that Madore would not accept his meeting invitations to brief Madore on the Comp Plan as he did other Councilors. Madore asserts that if he declined any meetings, it was because there was a conflict, and his emails show that he invited Planning staff to communicate.

Orjiako and Planning staff assert that Madore developed Alternative 4 on his own without input from Planning staff, as should be expected, given Planning staff's role and expertise. Madore asserts that Planning staff had not developed a rural Alternative despite multiple requests that they do so, and so he therefore took that effort on himself. I have reviewed all of the Board resolutions between 2013 and January 2015. There is no direction from the Board to develop a rural Alternative.

▪ **The August 2015 DSEIS**

Orjiako and Euler assert that Madore attempted to interfere with and influence the outcome of ESA's DSEIS; Madore complains that Euler was insubordinate in releasing the DSEIS without Board knowledge. The evidence supports Orjiako and Euler.

According to Orjiako and Euler, in July 2015, ESA complained to Euler and Orjiako that Madore had bypassed Euler and contacted them to discuss the work in progress. Additionally, CCCU representatives also attempted to contact ESA. Orjiako and Euler made it clear to ESA that ESA should work through Euler, who was the designated Program Manager. ESA and the Planning staff agreed that ESA would communicate in accord with those guidelines (*see* Exh. 26).

Orjiako was out of the country on leave during July and August. Euler was in charge of the Planning Department and overseeing completion of the DSEIS while Orjiako was out.

In mid-July 2015, ESA provided Planning with the first four chapters of the DSEIS. Madore asked for, and Euler provided him with, the partial draft for his review, and on July 21, 2015, Madore provided some comments. On July 27, 2015, Madore provided additional comments (Exh. 33).

Euler explained in my interview with him that some of Madore's comments were on point, and aligned with issues with the draft that Euler and others had identified. Others, Euler states, would have changed ESA's conclusions or involved language that Euler and Cook did not believe was appropriate in a SEIS. (Madore's July 21 and 27, 2015 comments are consistent with Euler's description.) Euler explains that in commenting upon ESA's draft, he might ask for more explanation and to correct errors, but would not ask for changes that affect the consultant's conclusions, because reaching those conclusions is ESA's responsibility.

Euler incorporated some, but not all, of Madore's comments in the proposed revisions that he passed along to ESA. Euler, on behalf of the Planning Department, released the DSEIS on August 5, 2015.

According to Orjiako and McCauley, Madore was angry that the DSEIS had been released without Board approval. Madore explained in my interview with him that he wanted to talk to them before the document was released to make sure that it did not include "junk" or "nonsense." It is apparent from his comments on the draft and my interview with him that Madore wanted to control ESA's conclusions.

Euler explains that the Board had never previously reviewed a DSEIS, and it would not have been normal for it to do so, because the purpose for having an independent consultant prepare the DSEIS was to take it out of the political process. He released the document in accord with normal procedures. McCauley states that it was not up to the Council to dictate to the consultant what the final product would say. McCauley adds that he would have punished Euler if he had made the changes because it would have been inappropriate to do so at the behest of one Councilor.

Subsequently, Orjiako and McCauley state, Madore told them that he believed that Euler had been insubordinate. According to Orjiako, Madore wanted him to fire Euler. But McCauley, Orjiako and Madore agree that Madore did not make a specific demand that McCauley or Orjiako take an adverse employment action. McCauley and Orjiako inferred,

however, that Madore wished them to do so. Orjiako and McCauley did not believe that Euler had acted improperly, however, and did not counsel or discipline Euler.

▪ **September 2015 – the Growing Healthier and Aging Readiness Plans**

Madore and Orjiako clashed over whether certain plans adopted by prior Boards should appear on the County website.

In September 2015, a CCCU representative complained that the Growing Healthier and Aging Readiness Plans should be removed from the Planning Department website. After an email exchange with the CCCU representative; Orjiako confirmed that, in a recent work session, the Councilors had directed that these two plans should not be included in the planning policies. Nevertheless, Orjiako asserted, the Councilors had not directed that the plans be omitted from the 2016 Comp Plan. Orjiako pointed out that that decision would be made in a public hearing when the plan was presented (Exh. 37 p.4).

Madore asserted that in the most recent Comp Plan work session (which occurred on July 15, 2015 and concerned a proposed procedure for amending the County-wide planning policies), the BOCC consensus was to exclude “*extracurricular documents*,” “*non-essential policies and information*” and “*all ingredients that are not essential in the Comp Plan.*” Madore went on to state, “*I believe that is the direction already communicated. If this matter needs a formal vote of the BOCC to clearly establish that direction, please let us know. Otherwise, I will assume that staff is fully onboard and working toward that end.*” (Id. p.3.)

Orjiako responded by stating his disagreement with Madore’s view, explaining his rationale and suggesting that a formal hearing may need needed (Id. p.2).

Madore responded with a critique of policies published on the website that “*may have been those of previous boards*” but “*were not in agreement with the current board.*” Madore responded that they would “*follow and [sic] appropriate process to eliminate these unhealthy choices from our adopted policies and from the Comp Plan. These are policy decisions that we as a Board are responsible to determine. Please support our endeavor as a Board to make these corrections.*” (Id. p.1)

Orjiako responded that the Councilors would act when the Comp Plan text was presented (Id.).

▪ **October through November, 2015 – Development of the November 24 Preferred Alternative**

Madore’s efforts to directly manage Planning staff intensified in the weeks leading up to the November 24 BOCC hearing.

On October 1, 2015, as Madore was working on Alternative 4B, Madore told Orjiako that he was “*working to provide a concise definition of our Comp Plan Update Locally preferred [sic] Alternative*” and asserted that “*that creation is appropriately the responsibility of the policy makers which are the County Councilors.*” Madore asserted that he “*welcomed*” input from the Planning staff to help him propose documents for publication and consideration at the October 20

hearing. But, he added, “If you would like to propose any documents, please work with me to ensure that we are on the same wavelength first.” (Exh. ____.)

Cook advised McCauley, Orjiako and Madore that Planning could only assist with creating any variation on Alternative 4 or the DSEIS for presentation at the October 20, 2015 hearing upon McCauley’s direction. Additionally, that direction must come following the vote of a majority of the BOCC in an open public meeting. Madore acknowledged her advice as “perfect.” (Exh. 38).

At the October 20, 2015 hearing regarding the Planning Commission’s Recommended Preferred Alternative, Madore opened the hearing by describing at length the first iteration of what ultimately became the November 24 Preferred Alternative. Orjiako has asserted that Madore did not let him speak or present. Orjiako asserts that it is usual to allow the staff to present the context for the hearing. As far as I can ascertain, while this may be the traditional approach, it is not mandated by Board rules or policy. Madore did eventually let Orjiako and Planning staff present the Planning Commission recommendation. Consideration of that recommendation was postponed until November 24, 2015.

Between the October 20, 2015 hearing and the November 5, 2015 Planning Commission work session, the staff reviewed and analyzed early drafts of Madore’s Alternative 4B proposal. Madore asserts that on November 3, 2015, Madore saw them working, interrupted the meeting and offered to assist. Horne declined his assistance and said that the Prosecuting Attorney’s Office would review the comments and get back to him.

Orjiako asserts that on November 4, 2015, Madore came to his office during a Board Time break and angrily demanded a hard copy of the mark-up. Orjiako supplied it to him. Orjiako tried to explain that Horne was supposed to have supplied the document to Madore, but this did not seem to appease Madore.

On November 5, Planning staff sent their critique to the Planning Commission (*see* Exh. 10) with a cover page explaining that there were numbers and calculations that had not been reviewed; Orjiako believed that disclaimer had been reviewed with Madore prior to the Planning Commission work session. The Planning Commission met at 5:30 PM on November 5; there is a one-hour item for a “Comp Plan Update” on the agenda .

According to Euler, Planning added the Comp Plan update to the November 5 Planning Commission agenda because Madore had asked that the Planning Commission review Madore’s new assumptions, hold a joint work session and comment upon Madore’s new document. Euler told Madore that he saw the November 5 session as an opportunity to advise the Planning Commission of what was coming.

According to Madore, he talked to Euler at around 5 PM and somehow learned that “I’m on the agenda,” but had not been informed. He asserts that Planning had not followed protocol and “my planning assumptions” were on the agenda with “Gordy Euler speaking on my behalf.” Madore stated in my interview with him that he invited himself to accompany Euler, sat in the meeting and listened to Euler’s presentation. Then, he states, he spent the next hour and a half to an hour and forty-five minutes discussing his perspective with the Planning Commission.

Euler states that it was unusual for a Councilor to address the Planning Commission while it is in the position of advising the Board.

Orjiako states that Madore was furious with him, and later chastised Orjiako for “blind-siding” him because he only “stumbled” into the Planning Session work session because he was attending a Regional Transportation Council meeting next door. Orjiako believes that Madore was untruthful about his knowledge of the meeting because Orjiako understood that Horne or Cook had talked to Madore about the disclaimer on the Planning Commission materials.

After the November 9 joint Planning Commission and BOCC work session, Madore sent another email, titled “Action items going forward.” In the email, Madore stated: (1) *“Now that the Board has given direction to propose column B to the community, we need to equip you with the concise documents to present to our community at the two open houses scheduled next week”*; (2) *“It is very important that we focus on only on . . . column B and not confuse citizens with other versions or previous plans”*; (3) *“I will provide you will [sic] the content this week to present that aligns with our Board’s direction”*; and (4) that Orjiako should send Word versions of documents, copy Madore on any staff emails and discuss any changes to the schedule with him in advance. (Exh. 39 p.2.)

In response, Orjiako sent Madore the staff and Prosecuting Attorneys’ mark-up of Madore’s document, and the materials provided to the Planning Commission. He also asked for information on Madore’s methodology and the source of Madore’s data. (*Id.* p.1.)

Although Madore thanked Orjiako for his input, Madore added, (1) *“In the end, I trust that Planning will support the Board’s policy and that staff reports will reflect that policy”*; (2) *“These internal draft documents are not intended to be published to other bodies as they will obviously be considered as advocacy by staff to oppose proposed Board policies”*; and (3) *“I trust that as the Board chooses particular proposals, as we have by advancing column B in our work session, that staff will not continue to advocate against those policies, but instead provide support [sic] the proposed or adopted policies.”* (Exh. 40.)

Orjiako objects to Madore’s making his own presentations at the Hockinson and Ridgefield open houses, because Orjiako asserts Madore would not let him, as Orjiako states was traditional, make an opening remark. Even if Orjiako were allowed to make an opening remark, he asserts, Madore would contradict him. McCauley also states that Madore took over what was normally the Planning Director’s role at the open houses.

Madore asserts that “three different individuals” complained to him after the open houses that Euler made negative comments about Alternative 4 to persons asking questions of staff who were stationed around the room to answer questions. McCauley states that the individuals who complained were CCCU representatives.

On November 19, 2015, at the Planning Commission meeting, the staff presented its analysis of the flaws in Madore’s methodology despite Madore’s admonitions.

It appears from the email record that sometime in this period Orjiako and Cook met with Madore to share their concerns. It appears that in the meeting Orjiako told Madore

that the staff was concerned with Madore's assumptions because there was no development to support them (Exh. 41 p.3.)

On November 23 and 24, Orjiako and Madore's email exchange continued, with Madore complaining that documents had been presented to the Planning Commission without his knowledge (*Id.* p.2-3).

2. Efforts to Address Concerns

McCauley states that Orjiako and Euler talked to him about Madore's behavior and Madore's efforts to control their work product. McCauley states that he told them to be professional. McCauley adds that he did not tell them to "stand down." McCauley states that Orjiako also talked to him about Madore's unannounced visits. It appears that McCauley listened to Orjiako, who was under tremendous pressure, told Orjiako that he was "safe" and McCauley and "everyone else" were behind Orjiako. McCauley states that he did not tell Orjiako or Euler "to fold or to kowtow." He told Orjiako that he should "hold it together, and persevere," and Orjiako did so.

McCauley states that Madore talked to him about his concern that the Planning staff was not responding to his directives. McCauley states that Madore's comments were not specific, but general comments about Planning staff being difficult to work with and uncooperative, and he wanted that behavior to change. McCauley states that he told Madore that they were planning professionals and their job was to do what was right and make data-driven decisions. He did not agree to take any action to alter Orjiako or Euler's behavior.

McCauley states that he did not talk to Madore about his behavior because McCauley has "tried to change [Madore's] behavior on a number of occasions, and it just doesn't work."

C. THE ALLEGED MOTIVES FOR MADORE'S ACTIONS⁷

Orjiako asserts that Madore's treatment of him has occurred (1) because Madore saw him as a whistleblower because Orjiako often told Madore that his solitary efforts to develop Alternative 4 and 4B without full public participation and transparency were inconsistent with the letter of, and public policies underlying, the GMA, the County Charter and the Board's GMA public participation resolution No. 2014-01-10 and other statutory requirements (collectively, "the transparency requirements"); and (2) because of Orjiako's race and national origin.

With regard to AFSCME's complaint, AFSCME has asserted that Madore's attacks on Planning staff were in retaliation for staff's protest to Francine Reis that Madore's

⁷ In my interviews with Orjiako and Madore, each cast aspersions on the motives of the other. Orjiako asserted that Madore may have been motivated to pursue Alternative 4 and 4B because he used to be a property developer and might have a financial gain if additional development occurred in the rural area. Madore asserted that Orjiako may have conspired with Councilors Boldt, Olson and Stewart and made his discrimination allegations in order to affect Madore's chances for reelection. Neither Orjiako nor Madore had any facts to support their speculations. I did not investigate, and have no opinion about, either of their allegations.

activities constituted performing bargaining unit work and Reis's subsequent assertion that Madore had been advised of their concerns.

As a general matter, with regard to all of the alleged motives, the supporting evidence that Madore acted based on any of these motives is overwhelmed by the plethora of evidence that Madore was motivated by the very public discrediting of Alternative 4B by his handpicked analyst and the post-January 1 reversal of his plan. Specifically:

- Prior to November 24, 2015, Madore was attempting to push through Alternative 4B in the face of the Planning staff's skepticism of the validity of the underlying assumptions and staff resistance to his efforts to directly manage and control their assessment of the quality of his methodology; his attacks on the DSEIS rural capacity methodology were made in support of his arguments for his "Column B" methodology; and
- After January 1, 2016, Madore was (1) responding to the public invalidation on January 13 of his "Column B" planning assumptions by the Thorpe firm (which he had personally selected); and (2) to the five-member BOCC's rejection on February 16 and 23 of his Preferred Alternative.

As discussed at length, Madore reacted to both events with *ad hominem* attacks on the credibility and motives of Orjiako, the Planning staff, Cook and Horne in multiple public forums. The direct relationship, in both subject matter and time, of these events to Madore's attacks cannot be ignored.

With regard to the specific allegations:

- Although I do not doubt that Orjiako complained to Madore about Madore's failure to comply with transparency requirements, the evidence does not support his contention that Madore's conduct was motivated by Orjiako's complaints about this issue.
- There is some limited evidence regarding racial animus on Madore's part, specifically the "race card" graphic that Madore posted on his website; the "race card" comment is often used to demean and discredit the motives of persons with genuine and deeply held concerns about discrimination and injustice. The rest of the facts Orjiako cites, however, do not constitute evidence that Madore was motivated by Orjiako's race or national origin.
- The evidence does not support AFSCME's retaliation allegation. The close proximity in time between AFSCME's November contract violation complaint is the only supporting evidence.

1. Complaints Regarding Compliance with Transparency Requirements

Although I do not doubt that Orjiako complained to Madore about Madore's failure to comply with transparency requirements, the evidence does not support his contention that Madore's conduct was motivated by Orjiako's complaints.

Orjiako asserts that there were many times, in private meetings with Madore, when he told Madore that his private work on developing Alternative 4 and 4B was not consistent with the transparency requirements.

I do not doubt that such conversations occurred. Nevertheless, in my interview with him, Orjiako could not provide much information about the specific instances or context for such discussions. Moreover, he did not provide email directly to Madore containing any such admonitions or notes of meetings that documented such discussion.

McCauley confirms that the issue arose in his discussions with Orjiako. In particular, McCauley was concerned about what appeared to be CCCUs unusual level of access to Madore and the irregular way in which Madore created his own planning assumptions. McCauley, however, did not discuss Orjiako's concerns about the lack of transparency with Madore; again, he did not do so because he believed that Madore's behavior would not change.

Madore states that he does not remember if Orjiako had such conversations with him.

In the absence of more concrete evidence (1) that such conversations occurred and information concerning the specific context or content of such discussions; or (2) that Madore remembered and reacted to them, I conclude that the evidence does not support Orjiako's assertion.

2. Alleged Discriminatory Motives - Race and National Origin

There is some limited evidence regarding racial animus on Madore's part, specifically the "race card" graphic that Madore posted on his website. The rest of the facts Orjiako cites, however, do not constitute evidence that Madore was motivated by Orjiako's race or national origin.

In support of his contention that Madore was motivated by his race and/or his national origin, Orjiako has asserted that (1) Madore was visibly frustrated with his accent and formal communication style; (2) Madore has not treated other County executives or Planning Directors in the same manner that he treated Orjiako; (3) Madore reacted by publicly criticizing the quality of the work, the competence and integrity of a black man who stood up to him when he tried to push through Alternative 4, which Orjiako asserts was based upon manipulated numbers; (4) he was the lone black person talking to a white audience at public open houses in nearly all-white rural areas, and Madore humiliated him by giving a counter-presentation and reacting non-verbally to his presentation; (5) Madore called Orjiako a promoter of "high-density development," which Orjiako interpreted as a concern that high density development would bring diversity; (6) shortly after he was elected, Madore made a statement to the effect that he did not want to "turn Clark County into Detroit"; (6) Madore made statements such as "the wrong agents are driving the process" in the context of a post-January 1 exchange about cluster developments; (7) the October 13 SMP amendment issue, which Orjiako believes was an attempt to undermine his work; (8) the "race card" graphic Madore posted on his Facebook page is evidence of racial animus; and (9) Madore has a documented history of treating protected-class members less

favorably than white males; in particular, forcing the County to hire Don Benton instead of Anita Largent.

Orjiako's assertions regarding potential factors that might suggest that Madore was motivated by his race confuses Madore's allegedly improper behavior with evidence that Madore's conduct was motivated by Orjiako's national origin. In that regard, Orjiako's reasoning is circular: (1) Madore treated Orjiako poorly because of Orjiako's race and national origin; and (2) the poor treatment is evidence of an invidious motive. In that regard, Orjiako's assertions regarding Madore's public criticism of his work, competence and integrity and Madore's pursuit of his Alternative 4B in lieu of relying upon the Planning staff (items 3, 4, 6, and 7 listed above) are the alleged outcomes of an illicit motive – they cannot logically be both the outcome of the motive and evidence of the motive for that outcome.

With regard to potential evidence for an invidious motive:

- I am troubled by the “race card”⁸ graphic on Madore's Facebook page (Exh. 42), which first appeared after Orjiako lodged his complaint.⁹ In my interview with him, Madore defended his posting of the graphic as an entirely appropriate action done in Madore's capacity as a “citizen reporter” commenting on events from outside the County circle, because Orjiako's response to making allegedly false statements was to attack Madore by “*fabricating completely unsubstantiated nonsense*” and “*retaliating against the fellow [Madore] that called him out for illegal activity.*” Madore also defended his use of a picture of President Barack Obama because he did not at first notice that graphic contained Obama's picture. Nevertheless, Madore decided, “that is okay” because Obama has “done more to cause racial divide in this country than anyone else.”

In my experience, however, the “race card” accusation is often made when the speaker (like Madore) is trying to discredit and demean the motives of someone who has made a deeply felt complaint of injustice and poor treatment. After interviewing Orjiako, I am persuaded that Orjiako is genuinely outraged by Madore's public assertions that Orjiako is dishonest and has misled the BOCC. Orjiako, in my judgment, sincerely believes that his race and national origin has played a role in Madore's behavior.

- Some evidence supports Orjiako's contention that Madore was visibly frustrated with Orjiako's formal communication style. McCauley commented that Madore stated several times that he thought Orjiako took too long to get to the point. Cook also observed that, while Madore did not do anything (other than the race card post) that she could see was motivated by Orjiako's race, Cook observed that Madore interrupted Orjiako and failed to understand what he was saying; Madore “just did not get” what Orjiako was communicating. In Cook's observation, Madore evinced hostility to Orjiako in response to Orjiako's disagreement with Madore. McCauley stated that he did not know whether Madore was frustrated with Orjiako's Nigerian accent. Frustration with Orjiako's

⁸ In my interview with him, Madore referred to the card as the “king of spades.”

⁹ After this investigation commenced, Orjiako asserted that Madore was retaliating against him because of his complaint. Those allegations are not within the scope of this investigation; I have considered the “race card” graphic only for its potential value as evidence of Orjiako's race and national origin discrimination allegations.

deliberative approach, however, does not equate to irritation with his accent absent more concrete evidence that it was the accent to which Madore objected.

- Orjiako asserts that Madore did not treat any prior Planning Director or County official with the same level of public contempt and criticism that Orjiako experienced. Orjiako notes that in public comments praising County staff from 2013 (Exh. 43), Madore did not include him. Orjiako also contrasts Madore's treatment of him and Madore's allegations that Orjiako lied with Madore's fulsome public praise of GIS staff and their honesty.

Ultimately, however, Madore's treatment of Orjiako cannot be distinguished with any degree of certainty from Madore's treatment of others who disagreed with or opposed him: the list includes, among others, Cook, Horne, McCauley and even the County Auditor (*see* Exh. 44), all of whom are white. The intensity of Madore's criticism of Orjiako can be measured by the intensity with which Madore pursued Alternative 4B and his outsize reaction when his plan was derailed.

- Madore's alleged assertion criticizing Orjiako as a proponent of high-density development is, in my judgment, susceptible to too many other explanations to warrant Orjiako's speculation that Madore was motivated by opposition to diversity; Madore's opposition to high density development appears to be closely linked to his alliance with CCCU, as well as opposition to the GMA statutory scheme and its historic impact on Clark County.
- Madore's statement regarding turning Clark County into Detroit appeared, as Orjiako advised, in an Oregonian article not long after Madore was elected. His comment, however, was in response to a question about Madore's opposition to the Columbia River Crossing project. Specifically:

Question - Reporter: You emerged from relative obscurity as a private businessman when you began vocally opposing the Columbia River Crossing project. What is it about that issue that made you politically active?

Answer - Madore: It's a classic boondoggle. It has the threat to turn our Clark County, a community, into Detroit.

Let me give you three very specific examples. There are three businesses in Clark County -- Greenberry (a full-service mechanical industrial contractor and fabrication provider), Thompson Metal Fab and Oregon Iron Works -- that employ hundreds of high-paid, blue-collar jobs. (Restricting) the (bridge) clearance to 116 feet will kill those three businesses. All three will either shut down or be forced to move.

The question is, how important is light rail to Clark County? The proponents are saying light rail at any cost. That is way out of balance.

(www.oregonlive.com (January 16, 2013); *see also* *Id.* January 26, 2013 ("It will kill our county. . . . It will force industries to leave. . . . Clark County will become Detroit.")) In short, Madore's reference to Detroit was a comparison to Detroit's loss of heavy industry, not a reference to Detroit's large non-white population.

- My factual conclusions are not based, to any degree, upon Orjiako's reference in his complaint to Madore's allegedly adverse treatment of protected class members as demonstrated by the Don Benton/Anita Largent incident (*see* Exh. A). In my interview with Madore, he proffered a convoluted theory that he was the victim of a mistaken interpretation of the hearing record that attributed Mielke's comment to Madore, linked to a mistaken trust in staff's recommendation to settle the Largent lawsuit, tied to the fact that Orjiako is represented by Gregory Ferguson, who also represented Largent. As a practical matter, revisiting the Largent matter several years after its closure is outside the scope of this investigation.

3. AFSCME's Complaint

The evidence does not support AFSCME's retaliation allegation. The close proximity in time between AFSCME's November contract violation complaint is the only supporting evidence.

By way of background, in November 2015, AFSCME complained to Francine Reis that Madore's activities in developing and advocating for Alternative 4 violated the labor agreement and potentially constituted an unfair labor practice. As a remedy, AFSCME asked that the County attempt to resolve this matter by sharing employee concerns with Madore and asking that he discontinue doing this type of work. In response, on December 18, 2015, Reis advised AFSCME that their concerns were addressed with Madore and that the County would monitor future work and try to avoid further concerns.

According to Madore, Reis discussed this matter with him only in passing. According to McCauley, Madore had no discernable reaction to AFSCME's complaint other than asserting that he believed it to be baseless.

When I met with Jose Alvarez in his capacity as a shop steward and spokesman, he stated that, other than the timing, in that Madore's public criticism of staff commenced very shortly after Reis's letter, he had no other documents or information that would suggest that Madore was motivated to retaliate by AFSCME's complaint. Alvarez acknowledged that it was difficult to sort out Madore's motive in light of the change in his political fortunes after January 1, 2016.

While timing under certain circumstances may be suggestive of retaliation, timing is the only link between AFSCME's complaint and Madore's behavior. Given the overwhelming evidence of Madore's other motives, proximity in time considered alone is unpersuasive.

RD