

**CPA2008-18
UPDATE DENSITY CALCULATIONS
BoCC SPONSORED
AMENDMENT
TO THE**

LEE COUNTY COMPREHENSIVE PLAN

THE LEE PLAN

**Lee County Board of County Commissioners
Sponsored Amendment and Staff Analysis**

**BOCC Public Hearing Document
for the
May 24, 2010 Public Hearing**

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May 18, 2010

LEE COUNTY

**DIVISION OF PLANNING
STAFF REPORT FOR
COMPREHENSIVE PLAN AMENDMENT
CPA2008-18**

Text Amendment

Map Amendment

	This Document Contains the Following Reviews:
✓	Staff Review
	Local Planning Agency Review and Recommendation
	Board of County Commissioners Hearing for Transmittal
	Staff Response to the DCA Objections, Recommendations, and Comments (ORC) Report
	Board of County Commissioners Hearing for Adoption

STAFF REPORT PREPARATION DATE: May 18, 2010

PART I - BACKGROUND AND STAFF RECOMMENDATION

A. SUMMARY OF APPLICATION

1. APPLICANT:

LEE COUNTY BOARD OF COUNTY COMMISSIONERS
REPRESENTED BY LEE COUNTY SMART GROWTH & DIVISION OF PLANNING &
DIVISION OF ENVIRONMENTAL SCIENCES

2. REQUEST:

Amend the Lee Plan to clarify upland and wetland density calculations.

B. STAFF RECOMMENDATION AND FINDINGS OF FACT SUMMARY

1. RECOMMENDATION:

Staff recommends that the Board of County Commissioners transmit the proposed amendment to the Lee Plan as shown below. This section of the staff report contains proposed text in strikethrough and underline format as it relates to the existing Lee Plan.

CONSERVATION AND COSTAL MANAGEMENT

Staff recommends that the Board of County Commissioners transmit the following amendments to the Conservation and Coastal Management Element of the Lee Plan:

Objective 114.1: The natural functions of wetlands and wetland systems will be protected and conserved through the enforcement of the county's wetland protection regulations and the goals, objectives, and policies in this plan. "Wetlands" include all of those lands, whether shown on the Future Land Use Map

or not, that are identified as wetlands in accordance with F.S. 373.019(17) through the use of the unified state delineation methodology described in FAC Chapter 17-340, as ratified and amended by F.S. 373.4211. In certain urban categories as an incentive to preserve or restore wetlands, higher density may be obtained through the development process consistent with the adjacent upland density as specified in Table 1(a).

Policy 114.1.2: The county's wetlands protection regulations will be consistent with the following:
No changes are proposed for paragraphs 1 through 5. Proposed new #6:

6. Wetland density will be determined by the jurisdictional wetland line. Impacted wetlands may not be calculated at the underlying upland density rate. Density calculations for impacted wetlands must be at 1 dwelling unit per 20 acres.

TABLES

Staff recommends that the Board of County Commissioners transmit the following amendments to the "Clarifications and Exceptions" of Table 1(a) of the Lee Plan.

No changes are proposed for Table 1(a)

No changes are proposed for clarifications 1 through 7

8. Higher densities may be allowed under the following circumstances where wetlands are preserved on the subject site:

(a): no changes

(b): Dwelling units may be relocated to developable contiguous uplands from preserved wetlands designated Intensive Development, Central Urban, or Urban Community at the same underlying density as is permitted for those uplands, so long as the uplands density does not exceed the maximum standard density plus one-half of the difference between the maximum total density and the maximum standard density; or

(c): Dwelling units may be relocated from preserved freshwater wetlands, to developable contiguous uplands designated Suburban, Outlying Suburban, or Sub-Outlying Suburban at the same underlying density as is permitted for those uplands, so long as the uplands density does not exceed eight (8) dwelling units per acre for lands designated Suburban, four (4) dwelling units per acre for lands designated Outlying Suburban, and three (3) dwelling units per acre for lands designated Sub-Outlying Suburban. (Amended by Ordinance No. 00-22, 07-09)

No changes are proposed for clarifications 9 through 12

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

- This amendment was initiated at the Direction of the Smart Growth Director.

- As part of County coordination with natural resource management and permitting agencies, the Lee County Board of County Commissioners directed staff to review Environmental Resource Permits (ERP). Through the regulatory review staff noted that the Lee Plan unintentionally provides an incentive to developers to calculate an increased density/intensity for wetland impacts.
- Through review of South Florida Water Management District (SFWMD) permits and review of zoning applications a discrepancy was noted in the amount of wetlands and uplands depicted on the SFWMD permits compared to the amount of wetlands and uplands depicted on zoning applications. Impacted wetlands were being presented as “uplands” during the zoning application review and counted in the density/intensity calculations.

C. BACKGROUND INFORMATION

Lee County staff has found that the existing regulatory structure of the Lee Plan unintentionally provides an incentive to fill wetlands by allowing filled areas to be treated as uplands for the purpose of calculating residential density. Lee County accepts the Florida Department of Environmental Protection and the South Florida Water Management District authority to allow wetland impacts through the ERP permitting process, as they are the permitting agencies responsible for the determination of jurisdictional wetlands. However, the Lee Plan inadvertently provides an incentive to applicants by allowing the wetlands lawfully impacted to count as uplands in density calculations. This policy has had the effect of encouraging impacts to jurisdictional wetlands for development if allowed by the state permitting agencies, leading to increased densities and intensities.

This practice of impacting wetlands to enable density calculations based on the underlying upland future land use category has led to an unintended increase in density. The increase in density and intensity resulting from the unintended effects of the Lee Plan wetlands and density policies that provide an incentive to impact wetlands has led to an increased demand on the county infrastructure, facilities and services.

PART II - STAFF ANALYSIS

A. STAFF DISCUSSION

A review of SFWMD permits over the last four years provides a number of examples wherein substantial portions of wetlands were promoted to be filled for urban purposes. The staff review recognized that there is a three-fold test and priorities for wetland filling: (1) can it be avoided, (2) can the need for wetland filling be satisfied on site, (3) can it be mitigated offsite. Under that categorization, staff focused on the offsite and unmitigated projects with significant percentages of wetlands. The preliminary staff review indicates that a substantial number of urban projects, that had a significant quantity of onsite wetlands, proposed extensive wetland impacts. There were also numerous examples of urban projects with significant wetlands that proposed little or no wetland impacts. This indicates that some developments can work within the constraints of avoidance or onsite remediation. Staff has provided 10 examples of projects with significant wetland impacts as Staff Exhibit I.

Staff notes that there are two incentives to filling wetlands. These incentives are density, and use. Under current practice the filled wetland is re-designated with the adjacent upland's designation. This equates to a substantial amount of "unrecorded" small scale plan amendments being proposed through the Environmental Resource Permit process. The staff analysis revealed that the current practice was leading to unplanned for increases in the population accommodation capacity of the Future Land Use Map.

A substantial number of projects with large wetland impacts involved non-residential components. Such uses should be able to meet floor area ratios without filling, through multistory structures, but given that the wetland filling also grants the use, not just density—of the upland piece, there is an additional incentive to fill wetlands.

Wetlands are key to maintaining the health of a watershed. They provide flood control, aquifer recharge, and filtration of pollutants from storm water runoff. Wetland impacts adversely affect native species, disrupt flood control patterns, degrade water quality, increase salt water intrusion and decrease aquifer recharge. Instead of creating an incentive for wetland impacts, the language in the Lee Plan should be revised to provide an incentive to preserve wetlands.

Goal 114 of the Lee Plan is intended of this Goal is to assist the Federal and State Agencies in protection of the wetlands in Lee County, while assuring the agencies that the County would not pursue an independent review or regulate impacts to wetlands. Existing Policy 114.1.2 is reproduced below:

Policy 114.1.2: The county's wetland protection regulations will be consistent with the following:

1. In accordance with F.S. 163.3184(6)(c), the county will not undertake an independent review of the impacts to wetlands resulting from development in wetlands that is specifically authorized by a DEP or SFWMD dredge and fill permit or exemption.
2. No development in wetlands regulated by the State of Florida will be permitted by Lee County without the appropriate state agency permit or authorization.
3. Lee County will incorporate the terms and conditions of state permits into county permits and will prosecute violations of state regulations and permit conditions through its code enforcement procedures.
4. Every reasonable effort will be required to avoid or minimize adverse impacts on wetlands through the clustering of development and other site planning techniques. On- or off-site mitigation will only be permitted in accordance with applicable state standards.
5. Mitigation banks and the issuance and use of mitigation bank credits will be permitted to the extent authorized by applicable state agencies. (Amended by Ordinance No. 94-30, 00-22, 07-12)

[Staff notes that this policy was slightly modified at the March 3rd, 2010 Comprehensive Plan

Amendment Adoption hearing. This modification is not in effect at the time of this writing.]

Reason for the Preservation of Wetlands:

There are a multitude of reasons for the preservation of wetlands including:

- Flood control
- Aquifer recharge
- Demand on County infrastructure
- Reduce Salt Water Intrusion
- Reduction in Total Maximum Daily Loads (TMDL's)
- Filtration of pollutants from storm water runoff
- Preservation of habitat for native wildlife

Flood Control - Wetlands aid in slowing the flow of water during heavy precipitation events allowing time for rivers and streams to process the additional flows without flooding of adjacent uplands. Impacts to wetlands increase water flow during heavy precipitation events decreasing the ability of streams and rivers to process the additional water increasing the opportunity for flooding.

Aquifer Recharge - Wetlands aid in the aquifer recharge, filtering water of sediment and pollutants before percolation into the water table.

Demand on County Infrastructure - Allowing impacts to wetlands that are then calculated as uplands for density and intensity is a future land use change that was not anticipated in the 2030 forecast, placing a strain on County infrastructure.

Reduce Saltwater Intrusion - Wetland impacts reduce aquifer recharge placing additional strain on county aquifers and increasing the opportunity for salt water intrusion.

The Total Maximum Daily Load program is going into effect, requiring basin wide approaches to water quality improvements - The County is liable for the costs of water quality improvements. The most common form of water quality improvement is retention and detention systems, and the natural variety of these are wetlands and natural water bodies, which are "public trust" systems. Preventing filling of jurisdictional wetlands helps preserve the County's ability to meet its responsibility to the public in protecting and restoring the quality of our public waters. Wetlands thus preserved will also help the County meet its water supply needs for the public and for the public resources, including the receiving waters of the estuaries.

Filtration of pollutants from storm water runoff - Wetlands aid in filtration of runoff filtering sediment and pollutants while improving water quality.

Preservation of habitat for native wildlife - Wetlands are habitat for a multitude of listed species including: the Florida panther, black bear, big cypress fox squirrel, wood stork and a multitude of migratory wading birds.

Policy Revision:

A single policy is difficult to interpret correctly, if taken in isolation. In the review of other County Policies in the Lee Plan, the general theme is to NOT support wetland destruction. There is a theme, however, to eliminate unnecessary duplication, AND also that the County will not undertake an independent review of impacts to wetlands from development in wetlands that is authorized by a DEP or SFWMD dredge and fill permit.

The most strategically important point of the review process, and consistent with existing policy, is the determination of the wetland jurisdictional line. This is an early step of the permit review, and determines the jurisdiction the permit agency has to exercise. This step—the determination of the wetland boundary—is quite compatible with the Lee Plan’s intent to identify wetlands for the application of land use categories.

Upon determination of the wetland jurisdiction line, Lee County staff should provide an immediate assessment of allowable densities/intensities of the parcel under review, based upon the wetland and upland densities. This should be a strict interpretation, with the underlying bonus density provided as an option, made clearly dependent upon the existing, predevelopment boundaries of wetlands and degree of protection and restoration afforded the wetlands. This serves the permitting agency notice in regard to the land planning agency of jurisdiction’s determination of public interest density/intensity, and bonuses tied to good environmental management. This would supplement the environmental agency’s review of impacts of development in wetlands not submitted to Lee County for development or zoning approval, and restore the appropriate responsibility for land use management decisions to Lee County.

To clarify the existing Policy language, which provides an incentive for wetland preservation and penalizing wetland impacts, would encourage developers and assist State and Federal agencies in the avoidance of wetland impacts. An example would be to allow developers to gain upland credits for preserving and restoring wetlands and penalizing or maintaining the 1 dwelling unit per 20 acres for wetland impacts. Smart Growth principles can be used to allow for increased height, clustering of uses and greater conservation of natural resources.

In the event that the site is within the “mixed use” overlay, the application of densities and intensities consistent with the mixed use overlay should apply, also. This would provide for transfer of floor area ratios from the wetland component to the upland component.

Agency permit issuance is dependent upon an evaluation of the public interest. Lee County needs to be more explicit on the public interest, as determined by the Lee Plan, at strategically important points of the permit review. By expressing Lee County’s interest to state and federal agencies with regards to the preservation of wetlands the County is assisting these agencies in their review and the prevention of wetland impacts.

Staff is recommending that the modifications shown below be transmitted by the Board of County Commissioners:

Objective 114.1: The natural functions of wetlands and wetland systems will be protected and conserved through the enforcement of the county's wetland protection regulations and the goals, objectives, and policies in this plan. "Wetlands" include all of those lands, whether shown on the Future Land Use Map or not, that are identified as wetlands in accordance with F.S. 373.019(17) through the use of the unified state delineation methodology described in FAC Chapter 17-340, as ratified and amended by F.S. 373.4211. In certain urban categories as an incentive to preserve or restore wetlands, higher density may be obtained through the development process consistent with the adjacent upland density as specified in Table 1(a).

POLICY 114.1.2.

Staff is proposing additional Policy language and changes to Table 1a) expressing Lee County's commitment to wetland preservation to assist state agencies in the prevention of wetland impacts.

Policy 114.1.2: The county's wetlands protection regulations will be consistent with the following:

No changes are proposed for paragraphs 1 through 5.

6. Wetland density will be determined by the jurisdictional wetland line. Impacted wetlands may not be calculated at the underlying upland density rate. Density calculations for impacted wetlands must be at 1 dwelling unit per 20 acres.

TABLES

Staff recommends that the Board of County Commissioners transmit the following amendments to the "Clarifications and Exceptions" of Table 1(a) of the Lee Plan.

No changes are proposed for Table 1(a)

No changes are proposed for clarifications 1 through 7

- 8: Higher densities may be allowed under the following circumstances where wetlands are preserved on the subject site:

(a): **no changes**

(b): Dwelling units may be relocated to developable contiguous uplands from preserved wetlands designated Intensive Development, Central Urban, or Urban Community at the same underlying density as is permitted for those uplands, so long as the uplands density does not exceed the maximum standard density plus one-half of the difference between the maximum total density and the maximum standard density; or

(c): Dwelling units may be relocated from preserved freshwater wetlands, to developable contiguous uplands designated Suburban, Outlying Suburban, or Sub-Outlying Suburban at the same underlying density as is permitted for those uplands, so long as

the uplands density does not exceed eight (8) dwelling units per acre for lands designated Suburban, four (4) dwelling units per acre for lands designated Outlying Suburban, and three (3) dwelling units per acre for lands designated Sub-Outlying Suburban. (Amended by Ordinance No. 00-22, 07-09)

No changes are proposed for clarifications 9 through 12

B. CONCLUSIONS

Staff believes that the proposed amendment to Policy 114.1.2. and Table 1(a) will effectively clarify the existing wetland preservation density incentive within the Lee Plan and better articulate the intent of the Board of County Commissioners concerning wetland preservation within Lee County.

C. STAFF RECOMMENDATION

County staff recommends that the Board of County Commissioners transmit this amendment to clarify the intent of the wetland density incentive within the Lee Plan.

**PART III - LOCAL PLANNING AGENCY
REVIEW AND RECOMMENDATION**

DATE OF PUBLIC HEARING: August 24, 2009

A. LOCAL PLANNING AGENCY REVIEW

Mr. Noble provided a summary of the proposed amendment and staff recommendations. This was followed by questions and answers between the LPA; planning staff; and Wayne Daltry, Smart Growth Director. Through the questions the LPA was seeking additional information and examples of places where developers have used filled wetlands to gain additional density, amounts of wetlands filled, and how many additional units have been allowed. Following the question and answer session, the item was opened for public comment. Three members of the public, who represented developers and large property owners, stated that they were against the proposed amendment. The LPA stated that they did not feel that they had enough information to address this item. Members of the LPA did not agree that impacts to wetlands are happening solely because of the density incentive that is provided. And further the LPA members did not agree that this regulation would have the desired result. One member stated that if the real issue is wetlands and stormwater storage, then provide the same incentive if you don't fill in the wetlands. He also reiterated that the two issues should be separated (density issue and wetland issue). Other members of the LPA stated their agreement with this. Planning staff noted there would not be another LPA meeting before the September 23rd and 24th BOCC Transmittal Hearing. He stated the LPA could make a motion stating they did not feel enough information was provided and that they are recommending non-transmittal. The outcome of this meeting will be presented to the Board of County Commissioners.

**B. LOCAL PLANNING AGENCY RECOMMENDATION AND FINDINGS OF FACT
SUMMARY**

1. RECOMMENDATION:

The LPA recommends that the Lee County Board of County Commissioners does not transmit the proposed amendment. The LPA did not feel that there was adequate data and analysis or knowledge about the extent of the problem to know whether or not the proposal is a solution to the stated problem.

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

The LPA did not agree with the basis and recommended findings of fact. Specifically the LPA did not agree that filling of wetlands and density are directly related.

C. VOTE:

NOEL ANDRESS	<u> AYE </u>
CINDY BUTLER	<u> AYE </u>
CARIE CALL	<u> NAY </u>
JIM GREEN	<u> AYE </u>
MITCH HUTCHCRAFT	<u> AYE </u>
RONALD INGE	<u> AYE </u>
CARLA JOHNSON	<u> AYE </u>

**PART III - LOCAL PLANNING AGENCY
REVIEW AND RECOMMENDATION**

DATE OF PUBLIC HEARING: May 24, 2010

A. LOCAL PLANNING AGENCY REVIEW

**B. LOCAL PLANNING AGENCY RECOMMENDATION AND FINDINGS OF FACT
SUMMARY**

1. RECOMMENDATION:

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

C. VOTE:

NOEL ANDRESS	_____
CINDY BUTLER	_____
CARIE CALL	_____
JIM GREEN	_____
MITCH HUTCHCRAFT	_____
RONALD INGE	_____
CARLA JOHNSON	_____

**PART IV - BOARD OF COUNTY COMMISSIONERS
HEARING FOR TRANSMITTAL OF PROPOSED AMENDMENT**

DATE OF TRANSMITTAL HEARING: June 16, 2010

A. BOARD REVIEW:

B. BOARD ACTION AND FINDINGS OF FACT SUMMARY:

1. BOARD ACTION:

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

C. VOTE:

BRIAN BIGELOW	_____
TAMMARA HALL	_____
VACANT	_____
RAY JUDAH	_____
FRANK MANN	_____

**PART V - DEPARTMENT OF COMMUNITY AFFAIRS OBJECTIONS,
RECOMMENDATIONS, AND COMMENTS (ORC) REPORT**

DATE OF ORC REPORT: _____

A. DCA OBJECTIONS, RECOMMENDATIONS AND COMMENTS:

B. STAFF RESPONSE

**PART VI - BOARD OF COUNTY COMMISSIONERS
HEARING FOR ADOPTION OF PROPOSED AMENDMENT**

DATE OF ADOPTION HEARING: _____

A. BOARD REVIEW:

B. BOARD ACTION AND FINDINGS OF FACT SUMMARY:

1. BOARD ACTION:

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

C. VOTE:

BRIAN BIGELOW

TAMMARA HALL

VACANT

RAY JUDAH

FRANK MANN

DENSITY FROM WETLAND IMPACTS

Name	Permit/ Application #	Total Acres	Upland Acreage	Wetlands Acreage	Impacts Acreage	Land Use Category	Approved Dwelling Unit (du) per acre
Cypress Shadows	DCI2003-00039 ERP 36-05393-P DOS2005-00077	352 acres	98.9 acres	253.1 acres	125.61 acres	Wetlands 1du to 20 du/acre Suburban 1 to 6 du/acre	Max density 6du per acre =607 du. 770 du requested + 40,000 sq ft Commercial
Sunset Falls F.K. A. Waterstone	DCI2005-00078 ERP 36-05751-P	109.63 acres	61.06 acres	48.57 acres	23.98 acres	Wetlands 1du to 20 du/acre Urban Community 1to 6 du/acre	Max density 6du per acre =368 du. 608 du requested.
Waterstone RPD F.K.A. Daniels 32	DCI2004-00040 ERP 36-05943-P	39.91 acres	18.74 acres	21.17 acres	13.81 acres	Wetlands 1du to 20 du/acre Outlying Suburban 1 to 3 du/acre	Max density 3du per acre = 57 du. 93 du requested.
Emerson Square	DCI2003-00061 ERP 36-04869 DOS2003-00208	ERP is for 119 acres. DCI is for 153 acres.	93.8 acres	25.20 acres Same project minus commercial	15.36 acres	Wetlands 1du to 20 du/acre Urban 1to 6 du/acre	Max density 6du per acre = 563 du. 670 du requested + 100,000 sq ft Commercial
Monte Cristo	DCI2005-00071 ERP App # 060825-10	396 acres	55 acres	341 acres	154 acres	Wetlands 1du to 20 du/acre Suburban 1 to 6 du/acre	Max density 6 du per acre = 347 du. 724 du requested.
Park 41 Commons	DOS2007-00201 ERP 36-04782-P	133.1 acres total.	96.9 acres	36.20 acres	33.0 acres	Wetlands 1du to 20 du/acre Central Urban 4du to 10 du/acre	Max density 4 to 10 du per acre = 970 du. 838 requested plus the commercial component.

Winkler 10 Acre	DCI2007-00069 ERP 36-07092-P	9.62 acres	2.01 acres	7.61 acres	5.3 acres	Wetlands 1du to 20 du/acre Outlying Suburban 1 to 3 du/acre	Max density 3 du per acre = 6 du. 27 du requested.
Lucaya F.K.A. Asbury	ERP 36-04200-P DOS2004-00141	98.94 acres	34.47 acres	64.47 acres	21.02 acres	Wetlands 1du to 20 du/acre Urban Community 1 to 6 du/acre	Max density 6 du oer acre = 209. 364 du requested.
Emerson Condominiums	ERP# 36-06431-P DOS2006-00007	26.12 acres	0.92 acres	25.2 acres	15.36 acres	Wetlands 1du to 20 du/acre Urban Community 1 to 6 du/acre	Max density 6 du per acre = 7 du. 268 du requested.