

OFFICE OF THE HEARING EXAMINER, LEE COUNTY, FLORIDA

HEARING EXAMINER DECISION

ADMINISTRATIVE APPEAL: ADM2010-00001  
APPELLANT: PINE TARR, LLC  
HEARING DATE: MARCH 25, 2010

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**I. APPLICATION:**

Filed by PINE TARR, LLC, 3050 Horseshoe Drive North, Suite 105, Naples, Florida 34704 (Appellant / Owner); MATTHEW D. UHLE, ESQUIRE, 1625 Hendry Street, Suite 301, Fort Myers, Florida 33901 (Agent).

This is an Appeal of an Administrative Interpretation to the Hearing Examiner to appeal a decision by the Lee County Department of Environmental Sciences to Approve a Vegetation Removal Permit (VEG2009-00252) subject to a condition requiring a 50-foot buffer abutting the existing SFWMD wetland jurisdictional line (i.e. prohibiting any clearing of wetlands on the site).

The subject property is located at 5100 Pine Island Road NW, Pine Island Planning Community, Lee County, Florida.

The Strap # as furnished by the Appellant is: 28-44-22-00-00012.0000

**II. HEARING EXAMINER DECISION:**

The undersigned Hearing Examiner hereby DENIES Appellant's appeal of the decision by the Lee County Department of Environmental Sciences to Approve a Vegetation Removal Permit (VEG2009-00252), subject to a condition requiring a 50-foot-wide buffer abutting the existing SFWMD wetland jurisdictional line.

**III. HEARING EXAMINER DISCUSSION:**

Background

The 18.33-acre, AG-2 zoned parcel is located on the north side of Pine Island Road, east of its intersection with Stringfellow Road. The eastern portion of the subject property is covered in tidal (mangrove) and non-tidal wetlands associated with the Matlacha Pass Aquatic Preserve. Lee Plan Policy 14.1.5, and LDC Section 33-1031 require that a 50-foot-wide native buffer be installed between any development site, including agricultural uses, and the adjoining state-designated aquatic preserves and associated wetlands, as a means of protecting the water quality and habitat of that Preserve. It is undisputed that the wetlands on this site are "associated" with the Matlacha Pass Aquatic Preserve, and any use of the site would require the "installation" of the 50-foot-wide buffer.

Appellant knew that development of the subject property would be very constrained, given the amount of wetlands on the site and County Staff's position that any impacts are prohibited to wetlands on Pine Island. They stated that Staff has been interpreting the intent

of Lee Plan Policy 14.1.5, LDC Section 33-1031 and a number of other Lee Plan and LDC provisions to prohibit all developers from impacting any wetlands on Pine Island.

In an attempt to challenge Staff's interpretation that prohibits the filling of wetlands on Pine Island, Appellant first applied for a lot split on the subject property. That request was later withdrawn, when it became apparent the lot split would not get them into the necessary forum to challenge that interpretation.

At some point in time, the jurisdictional wetland boundaries on the subject property were determined by both the South Florida Water Management District (SFWMD) and the Army Corps of Engineers (ACOE). Those jurisdictional boundaries meandered all over the east and central portions of the subject property, even doubling back on itself in several locations, and left very little developable area on the subject property.

Their second attempt was in 2008, when they applied to rezone the 18.33-acre subject property and the adjacent 8.44-acre parcel owned by Appellant to CPD for a shopping center project, to be known as Calusa Cay CPD. In conjunction with that rezoning, Appellant obtained Environmental Resource Permits (ERP) from the SFWMD and the ACOE, in the fall of 2009. Those ERPs were based on the CPD plan of development, which would allow them to fill (impact) about 2.5 acres of those wetlands, provided Appellant purchased mitigation credits, covering that loss, at the Little Pine Island Wetlands Mitigation Bank. Those mitigation credits were purchased by Appellant shortly after receiving the two ERPs. With the approval of the ERPs and the CPD, Appellant could then configure and locate the required 50-foot-wide buffer along the easternmost development line for the commercial project, instead of following the very convoluted jurisdictional wetland lines.

After learning that Staff was recommending denial of the zoning request - for a variety of reasons, Appellant withdrew their request for rezoning, submitting instead an application for a Notice of Clearing (vegetation removal permit) for the 18.33-acre subject property. Their purpose was to clear out a large number of the trees on the site so they could institute an agricultural use there. They conceded that the Lee Plan and LDC provisions relating to the 50-foot-wide buffer were applicable to the subject property, even for an agricultural use. They understood that the buffer had to be placed between the agricultural use and any wetlands associated with the Matlacha Pass Aquatic Preserve, and proposed using the 50-foot-wide buffer as depicted in the ERPs - which would allow them to fill over 2.5 acres of those wetlands.

Appellant asserted that the wetlands to be destroyed were disturbed wetlands, seriously infested with exotics; that they would be preserving the more pristine ones. They wanted Staff to approve the proposed buffer location, subject to the same buffer-related conditions contained in the ERPs.

Staff approved the Notice of Clearing, on January 11, 2010, but, among other conditions, required that the 50-foot-wide buffer be located alongside (commence at) the existing SFWMD jurisdictional wetland boundary. This condition meant that Appellant would not be able to locate the buffer as depicted in the ERPs, and could not fill 2.5± acres of the wetlands.

Appeal

Appellant timely filed an administrative appeal of the imposition of the 50-foot-wide buffer condition, asserting Staff's location of the buffer prevented them from filling the wetlands, as they had been authorized to do in the two ERPs. They alleged that Staff's location of the 50-foot-wide buffer was based on an erroneous interpretation of wetland and natural resource protection provisions of the Lee Plan and Land Development Code.

In their back-up documents to the Notice of Appeal (page 2 of Exhibit A-2.B), Appellant asserted that:

The appeal should be granted, for the following reasons:

1. The literal language of LDC Section 33-1031(a) does not preclude any filling of wetlands. It merely requires an upland buffer between agricultural uses and the wetland line.
2. The County's interpretation of Section 33-1031(a) is not supported by any legislative history.
3. Any prohibition against filling wetlands on Pine Island for agricultural purposes would be in conflict with the exemption granted for such uses in F. S. 373.406 and would consequently be invalid.
4. The County's interpretation of Section 33-1031(a) is inconsistent with LDC and Lee Plan provisions permitting the filling of wetlands in accordance with an approved ERP.

Staff responded that Objective 14.1, Policy 14.1.5, and LDC Section 33-1031 must be read together to achieve the purpose of the Greater Pine Island Goal, which is "to manage future growth on and around Greater Pine Island so as to maintain the island's unique natural resources, character, and its viable and productive agricultural community. . . ."

They pointed out that they have applied these provisions and interpretation - in exactly the same manner as being applied to the facts of this case - in several other cases on Pine Island. They argued that their interpretation is based on a clear reading of these provisions that will effectuate the goals and vision of the Greater Pine Island community.

The pertinent provisions of Goal 14 (Greater Pine Island) read as follows:

**OBJECTIVE 14.1: NATURAL RESOURCES.** County regulations, policies and discretionary actions affecting Greater Pine Island will permit no further degradation of estuarine and wetland resources and no unnecessary loss of native upland vegetation and wildlife habitat.

**POLICY 14.1.5 :** New development, including 'planned development' rezoning approvals, new subdivisions, and agriculture, that adjoin state designated aquatic preserves and associated wetlands and natural tributaries must preserve or create a 50-foot-wide native vegetated buffer area between the development and the waterbody or associated wetlands. This

requirement will not apply to existing subdivided lots. For agriculture, this requirement:

- will be implemented through the notice-of-clearing process in chapter 14 of the Land Development Code;
- will include a requirement to use this area as a riparian forest buffer with an adjoining filter strip wherever farmland abuts wetlands; and
- if native vegetation does not currently exist, native tree cover will be established within three years of issuance of the notice of clearing.

The pertinent portions of LDC Section 33-1031 (Agricultural notice of clearing on Greater Pine Island) read as follows:

Notices of clearing for agricultural purposes in Greater Pine Island must comply with the following additional requirements in accordance with Policy 14.1.5 of the Lee Plan:

- (a) Agriculturally zoned land that is pursuing a new agricultural use through the Agricultural Notice of Clearing process that adjoins state-designated aquatic preserve and associated wetlands and natural tributaries (see section 33-1003) must preserve or create a 50-foot-wide native vegetated conservation buffer area between all agricultural lands and the natural waterbody and associated wetlands.  
.....
- (f) No other grading, excavating, or filing (sic) is allowed within the 50-foot buffer.

Hearing Examiner Analysis

Under the provisions of LDC Section 34-145(a), the Hearing Examiner may only grant an appeal after finding that an error was made, by Lee County Staff, in the "order, requirement, decision, interpretation, determination or action of the administrative official charged with the administration and enforcement of the provisions of this Code or other ordinance that provides for similar review."

In reaching her determination of whether an error was made, the Hearing Examiner must consider the following three criteria {Section 34-145(a)(2)}:

- a. 1. Whether appeal is of a nature properly brought to him for decision, .  
.....
  - 2. The intent of the ordinance applied or interpreted.
  - 3. The effect the ruling will have when applied generally to this Code.

She must also consider Staff's recommendations, and the testimony of the Appellant and general public.

During the course of the hearing, it became obvious that Appellant was more concerned about finding an action that would allow them to appeal Staff's interpretation of the wetlands



protection provisions of the Lee Plan and the Land Development Code, than they were of actually obtaining development approval for the subject property. Under the appeal of an administrative action, Appellant has the burden of proving that Staff's interpretation of LDC Section 33-1031 was inconsistent with the intent and provisions of Goal 14 of the Lee Plan. In this instance, the intent and provisions of LDC Section 33-1031 mirror the language adopted in the Greater Pine Island Community Plan, specifically, Policy 14.1.5, and Appellant failed to prove that Staff's interpretation/application were inconsistent with that Goal and Policy.

Appellant argued that the interpretation was inconsistent with other provisions of the Lee Plan, specifically Policy 114.1.2, which prohibited the County from undertaking "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." They asserted that, since they had obtained a "permit" from SFWMD allowing them to fill in over 2.5 acres of the wetlands, County Staff could not interpret other Lee Plan and LDC provisions to prevent them from doing that.

Staff responded that Policy 114.1.2 was not applicable to the facts of this situation, as Appellant's "permit" was not a "dredge and fill permit or exemption," which was the only permit referenced in that Policy. In addition, it is not applicable herein, because the Notice of Clearing (vegetation removal permit) for Pine Island does not allow any impacts to the wetlands being protected by the buffer. The only impacts allowed under the Notice of Clearing are to the uplands being cleared and the 50-foot-wide "upland" buffer separating the agriculturally used lands from the protected wetlands.

Staff further asserted that a Notice of Clearing (vegetative removal permit) only allows the removal of trees and other vegetative material; it does not authorize the filling of a lot or a wetland. Since Appellant's application and proposed buffer location would result in the filling of about 2.5 acres of wetlands, its approval as proposed would be inconsistent with the purpose and provisions of the vegetative removal permit regulations.

Staff also pointed out that they have applied the same interpretation of LDC Section 33-1031 and Policy 14.1.5 to other projects on Pine Island in the past, citing several other development requests on the Island, including one owned by Appellant. They stated that the protection of wetlands is quite different on Pine Island than in other areas of the County, because of the Pine Island Community Plan (Goal 14). The express purpose of Goal 14 is to protect and preserve unique wetlands, natural resources and state-designated aquatic preserves on and around Pine Island from detrimental development impacts. Staff's interpretation that no filling or other development activity can occur in those listed resources clearly furthers that purpose and the intent of the Goal.

Given their understanding of the goals and intents of Goal 14, Staff cannot approve Appellant's proposed buffer location. In Staff's opinion, the only logical location for the buffer - in order to adequately preserve/protect the wetlands and preserves - is directly abutting the jurisdictional lines of those wetlands and preserves. That prevents any intrusion into or direct impact on the wetlands themselves.

After reviewing the Lee Plan and Land Development Code, the hearing record, and Staff Report and Appeal documentation, the Hearing Examiner finds that Staff made no error in their interpretation and application of the provisions of LDC Section 33-1031 to the facts of this case. Having made a finding of no error, the Hearing Examiner must deny the appeal.

**IV. FINDINGS AND CONCLUSIONS:**

Based upon the Staff Report, the testimony and exhibits presented in connection with this matter, the undersigned Hearing Examiner makes the following findings and conclusions:

A. The appeal is properly brought before her for a decision, and that there is no variance or special exception procedure available to Applicant for resolving this matter.

B. The purpose of LDC Section 33-1031 is to achieve the goals and policies set forth in the Lee Plan for the future development, and protection of the natural resources, of Greater Pine Island (specifically, Goal 14).

C. The Hearing Examiner's decision in this case will not have a County-wide application, as the facts, circumstances and land development regulations discussed herein apply only to lands on Pine Island that adjoin, or contain wetlands associated with, the Matlacha Pass Aquatic Preserve or other state designated aquatic preserves surrounding Pine Island..

D. Staff made no error in their interpretation or application of the provisions of LDC Section 33-1031 to the facts and circumstances of this case.

E. As required by the Lee Plan, Staff's interpretation and application of the LDC provisions are consistent with the intent and provisions of the Lee Plan.

F. LDC Section 33-1031 - Agricultural notice of clearing on Greater Pine Island - does not preclude, nor even address the filling of wetlands - except for in the 50-foot-wide buffer. This provision relates only to the issuance of a permit allowing the clearing of the property (i.e., the removal of trees and other vegetation) in anticipate of future development or use of the property. Other activities that constitute development - i.e., the filling of the parcel or moving of earth, must be permitted in accordance with the applicable LDC regulations relating to the specific development activity desired.

G. Review of legislative history for LDC Section 33-1031 was unnecessary, as the intent and requirements of that provision are neither vague nor unclear.

H. The Hearing Examiner has no authority to determine whether the County's land development regulations or Staff's interpretations thereof are in conflict with State Statutes; a local circuit court would be the proper venue for such a determination.

I. The County's interpretation of Section 33-1031 - under the facts and circumstances of this case - are not inconsistent with LDC and Lee Plan provisions allowing the filling of wetlands through a SFWMD permit, because the ERP herein is not a dredge and fill "permit or exemption" as is required in Lee Plan Policy 114.1.2.

**V. LIST OF EXHIBITS:**

**STAFF'S EXHIBITS**

- 1 2008 Aerial Photo, provided by Lee County DCD, created March 25, 2010 (24"x36") [color]

- 2 LDO Plan for Lot Split, prepared by Banks Engineering (11"x17")
- 3 Calusa Cay CPD Master Concept Plan, prepared by Gary F. Muller, AICP, dated September 2009 (11"x17")
- 4 Calusa Cay CPD Wetland Map, prepared by W. Dexter Bender & Associates, Inc. (11"x17")
- 5 Calusa Cay CPD Vegetation Map, prepared by W. Dexter Bender & Associates, Inc. (11"x17")
- 6 Matlacha Pass Aquatic Preserve, map created March, 2005 (11"x17")[color]
- 7 Pine Island Sound Aquatic Preserve, created February, 2005 (11"x17")[color]
- 8 2008 Aerial Photograph showing Wetland Line and 50' Wetland Buffer on parcel, map created January 8, 2010 by Lee County Environmental Sciences (11"x17")[color]
- 9 2008 Aerial Photograph with 50' Native Vegetated Buffer, created March 19, 2010 by Lee County Division of Environmental Sciences (11"x17") [color]
- 10 Calusa Cay Aerial Photography, map created March 19, 2010 by Lee County Division of Environmental Sciences (11"x17")[color]
- 11 Tranquility Bay Master Site/ Striping Plan, prepared by Avalon Engineering, Inc., revised August 13, 2007 (11"x17")
- 12 Demere Preserve RPD Conceptual Site Plan, prepared by James Ink & Associates, LLP, revised March 20, 2005 (11"x17")
- 13 Demere Preserve Site Plan, prepared by James Ink & Associates, LLP and Exceptional Engineering, Inc., revised May 2, 2008 (11"x17")
- 14 Orchid Cove Master Site Plan and Grading and Drainage Plan, prepared by Banks Engineering, revised November 1, 2007 (11"x17") [ 2 pages ]
- 15 Pine Island Land Use Study

Résumés of Lee County Staff are on file with the Hearing Examiner's Office and are incorporated herein.

**APPELLANT/APPLICANT'S EXHIBITS**

- 1 Aerial Photograph, prepared by Banks Engineering, dated March 17, 2010 (24"x36") [color]
- 2 Composite consisting of four (4) cases and The 2009 Florida Statutes, Tittle XXVIII, Chapter 373, section 373.406 Exemptions.
- 3 Lee County Goal 16: Greater Pine Island, Objective 16.1 and Policy 16.1.1 through Policy 16.1.4, revised September 1990

- 4 Lee County Board of County Commissioners, Blue Sheet number 20070688 in reference to conducting a public hearing on May 8, 2007 in regards to an ordinance amending Lee County Land Development Code, includes memorandum from the Department of Community Development, dated April 27, 2007
- 5 Lee County Board of County Commissioners, Blue Sheet number 20070729 in reference to conducting a public hearing on May 22, 2007 to adopt an ordinance pertaining to Greater Pine Island Planning Community and amending Lee County Land Development Code, includes memorandum from the Department of Community Development, dated April 27, 2007
- 6 Lee County Board of County Commissioners, Blue Sheet number 20070729 in reference to public hearing on May 29, 2007 and Regular BOCC Meeting CD, dated May 29, 2007

Résumés of Appellant's consultants/representatives are on file with the Hearing Examiner's office and are incorporated herein.

**VI. PRESENTATION SUMMARY:**

See Official Court Reporter Transcript

**VII. OTHER PARTICIPANTS AND SUBMITTALS:**

**ADDITIONAL APPELLANT/APPLICANT'S REPRESENTATIVES:**

1. John Agnelli, c/o Lake Lincoln, 3050 North Horseshoe, Naples, Florida 34104
2. Tom Lehnert, c/o Banks Engineering, 10511 Six Mile Cypress Parkway, Fort Myers, Florida 33966

**ADDITIONAL COUNTY STAFF:**

1. Brad Browning, Senior Environmental Planner, P.O. Box 398, Fort Myers, Florida 33902-0398
2. Michael Jacob, Assistant County Attorney, P. O. Box 398, Ft. Myers, Florida 33902
3. Matt Noble, Lee County Community Development, P.O. Box 398, Fort Myers, Florida 33902-0398
4. Craig Smith, c/o W. Dexter Bender & Associates, 3640 Camino Real Way, Fort Myers, Florida 33966
5. Becky Sweigert, Principal Environmental Planner, P.O. Box 398, Fort Myers, Florida 33902-0398



**PUBLIC PARTICIPATION:**

**For:**

1. Steve Hartsell, P.O. Drawer 1507, Fort Myers, Florida 33902
2. Raymond Pavelka, c/o Little Pine Island, 13451 McGregor Boulevard, Suite 31, Fort Myers, Florida 33919

**Against:** NONE

**IX. LEGAL DESCRIPTION:**

See Exhibit A (scanned legal description).

**X. UNAUTHORIZED COMMUNICATIONS:**

Unauthorized communications shall include any direct or indirect communication in any form, whether written, verbal or graphic, with the Hearing Examiner, or the Hearing Examiner's staff, any individual County Commissioner or their executive assistant, by any person outside of a public hearing and not on the record concerning substantive issues in any proposed or pending matter relating to appeals, variances, rezonings, special exceptions, or any other matter assigned by statute, or any other matter assigned by statute, ordinance or administrative code to the Hearing Examiner for decision or recommendation. . . . [Administrative Code AC-2-5]

No person shall knowingly have or attempt to initiate an unauthorized communication with the hearing examiner or any county commissioner [or their staff]. . . . [LDC Section 34-52(a)(1), emphasis added]

Any person who knowingly makes or attempts to initiate an unauthorized communication . . . [may] be subject to civil or criminal penalties which may include: [Section 34-52(b)(1), emphasis added]

Revocation, suspension or amendment of any permit, variance, special exception or rezoning granted as a result of the hearing examiner action which is the subject of the unauthorized communication. [LDC Section 34-52(b)(1)b.2.] OR

A fine not exceeding \$500.00 per offense, by imprisonment in the county jail for a term not exceeding 60 days, or by both such fine and imprisonment. [LDC Section 1-59(c)]

**XI. APPEALS:**

This Decision becomes final on the date rendered. A Hearing Examiner Decision may be appealed to the Circuit Court in Lee County. Appeals must be filed within thirty (30) days of the date the Hearing Examiner Decision is rendered. Appeal is by Petition for Writ of Certiorari in accordance with the Lee County Land Development Code Section 34-146.

**XII. COPIES OF TESTIMONY AND TRANSCRIPTS:**

A. A complete verbatim transcript of the testimony presented at the hearing can be purchased from the court reporting service under contract to the Hearing Examiner's Office. The original documents and file in connection with this matter are located at the Lee County Department of Community Development, 1500 Monroe Street, Fort Myers, Florida.

B. The original file and documents used at the hearing will remain in the care and custody of the Department of Community Development. The documents are available for examination and copying by all interested parties during normal business hours.

This decision is rendered this 13 day of May, 2010. Notice or copies of this decision will be delivered to the offices of the Lee County Board of County Commissioners.



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DIANA M. PARKER  
LEE COUNTY HEARING EXAMINER  
1500 Monroe Street, Suite 218  
Post Office Box 398  
Fort Myers, FL 33902-0398  
Telephone: 239/533-8100  
Facsimile: 239/485-8406

## Legal Description

### Exhibit "A"

A TRACT OR PARCEL OF LAND SITUATED IN THE STATE OF FLORIDA, COUNTY OF LEE, BEING A PORTION OF THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 28, TOWNSHIP 44 SOUTH, RANGE 22 EAST, BEING FURTHER BOUND AND DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER; THENCE N 00°53'29" W ALONG THE EAST LINE OF SAID FRACTION FOR 33.00 FEET TO AN INTERSECTION WITH THE NORTH RIGHT-OF-WAY LINE OF PINE ISLAND ROAD NW, STATE ROAD 78 (66.00 FEET WIDE) AND THE POINT OF BEGINNING OF A PARCEL OF LAND HEREIN DESCRIBED; THENCE S 88°54'08" W ALONG SAID NORTH LINE FOR 621.34 FEET TO AN INTERSECTION WITH THE WEST LINE OF THE EAST HALF OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER; THENCE N 00°01'48" W ALONG SAID WEST LINE FOR 1,306.47 FEET TO THE NORTHWEST CORNER OF SAID FRACTION; THENCE N 89°02'04" E ALONG THE NORTH LINE OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER 601.70 FEET TO THE NORTHEAST CORNER OF SAID FRACTION; THENCE S 00°53'29" E ALONG THE EAST LINE OF SAID FRACTION FOR 1,304.87 FEET TO THE POINT OF BEGINNING.

PARCEL CONTAINS 18.33 ACRES MORE OR LESS

BEARINGS AND DISTANCES ARE BASED ON "THE STATE PLANE COORDINATE SYSTEM" FLORIDA ZONE WEST NAD 83 (CORS) WHEREIN THE EAST LINE OF THE NE 1/4 OF SECTION 28, TOWNSHIP 44 SOUTH, RANGE 22 EAST BEARS S 00°53'29" E THE SCALE FACTOR IS 0.99994344.

DESCRIPTION PREPARED 12-10-2009.