

**CPA2013-02
AG REZONING
IN SUBURBAN AREAS
PLAN AMENDMENT
TO THE**

LEE COUNTY COMPREHENSIVE PLAN

THE LEE PLAN

Privately Initiated Amendment and Staff Analysis

DEO Transmittal Document

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October 24, 2013

**LEE COUNTY
DIVISION OF PLANNING
STAFF REPORT FOR
COMPREHENSIVE PLAN AMENDMENT
CPA2013-02**

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 Review Agencies' Comments
	Board of County Commissioners Hearing for Adoption

STAFF REPORT PREPARATION DATE: September 13, 2013

PART I - BACKGROUND AND STAFF RECOMMENDATION

A. SUMMARY OF APPLICATION

1. APPLICANT/REPRESENTATIVES:

Barry C. Denicola and Toni O. Denicola / Beverly Grady, Roetzel & Andress

2. REQUEST:

Amend Policy 9.2.1 of the Lee Plan to allow for rezoning to an agricultural zoning district on a case by case basis in the Suburban future land use categories.

B. STAFF RECOMMENDATION AND FINDINGS OF FACT SUMMARY

1. RECOMMENDATION:

Staff recommends that the Board of County Commissioners *transmit* the proposed amendment to Policy 9.2.1 of the Lee Plan as modified by staff. The specific language is provided below:

TEXT AMENDMENT

Policy 9.2.1: Rezoning of land to agricultural zoning districts is prohibited in those areas designed by the Lee Plan as Future Urban Areas, with the exception of those areas designated as Sub-Outlying Suburban, Outlying Suburban, or Suburban where parcels

five acres or larger may request rezoning to an agricultural zoning district. These requests will be reviewed on a case by case basis. Approval will be based on:

- a. current and future availability of urban infrastructure;
- b. compatibility of the existing and future land uses;
- c. acreage of rezoning request
- d. cumulative effect on county tax base; and
- e. support of applicable community plans.
- f. evaluation of how environmental features, including but not limited to flowways, protected species, and habitat, will be protected or mitigated.

~~In Outlying Suburban areas, such requests will be reviewed on a case by case basis, and recommendations will be made based on current and future availability of urban infrastructure and compatibility of existing and future land uses.~~

C. BOARD OF COUNTY COMMISSIONERS TRANSMITTED LANGUAGE:

TEXT AMENDMENT

Policy 9.2.1: Rezoning of land to agricultural zoning districts is prohibited in those areas designed by the Lee Plan as Future Urban Areas, with the exception of those areas designated as Sub-Outlying Suburban, Outlying Suburban, or Suburban where parcels five acres or larger may request rezoning to an agricultural zoning district. These requests will be reviewed on a case by case basis. Approval will be based on:

- a. current and future availability of urban infrastructure;
- b. compatibility of the existing and future land uses;
- c. acreage of rezoning request
- d. cumulative effect on county tax base; and
- e. Suburban and Sub-Outlying Suburban lands must be located within the Pine Island and Caloosahatchee Shores Planning Communities.
- f. evaluation of how environmental features, including but not limited to flowways, protected species, and habitat, will be protected or mitigated.

~~In Outlying Suburban areas, such requests will be reviewed on a case by case basis, and recommendations will be made based on current and future availability of urban infrastructure and compatibility of existing and future land uses.~~

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

- CPA2013-02, a privately sponsored amendment was submitted by the applicant on June 25, 2013.
- Policy 9.2.1 currently allows for rezoning an agriculture zoning district in the Outlying Suburban Future Land Use Category on a case by case basis.
- Policy 9.2.1 was added to the Lee Plan on November 1, 2000 by PAT98-18.
- A new category, the Sub-Outlying Suburban future land use category, was created by the 2004 Evaluation and Appraisal Amendments. CPA2005-40 was adopted by

the Board of County Commissioners on May 16, 2007 by Ordinance 07-09. Policy 9.2.1 was not modified to reflect this new category.

- Prior to CPA2005-40, the Sub-Outlying Suburban areas were designated Outlying Suburban with a footnote on Table 1(a) limiting density to 2 dwelling units per acre.
- Several community plans have been adopted expressing a desire to preserve or maintain a rural character.
- The proposed amendment will still preclude the consideration of new agriculture uses in the more urban land use categories (Intensive Development, Central Urban, and Urban Community).
- The proposed plan amendment requires evaluation of the potential loss of tax revenue over time.
- The proposed amendment addresses efficient use of infrastructure and compatibility with neighboring uses.

C. BACKGROUND INFORMATION

The policy subject to this private amendment request, Policy 9.2.1, was incorporated into the Lee Plan as part of a publically sponsored amendment to the plan known as PAT98-18. PAT 98-18 amended Goal 9, Agricultural Lands, by adding a new objective and subsequent policies that address the permitting of new, or extension of existing agricultural uses within lands designated as Future Urban Areas. PAT98-18 provided in part the following background discussion:

This amendment was initiated in response to several rezoning requests in which property owners attempted to down zone property to an agricultural category in a Future Urban Area, as designated by the Lee Plan. In many cases, these requests are made for the sole purpose of gaining an agricultural tax exemption. Prior to 1989, one could obtain the exemption regardless of the zoning of the property. After 1989, however, land had to be zoned agricultural in order to receive the Agricultural Exemption. In these down zoning cases, the County has opposed such requests, with a couple of notable exceptions. The following paragraphs discuss some of the zoning history that is relevant to the plan amendment at hand.

A parcel of land on Fiddlesticks Boulevard, located in the Outlying Suburban land use category was proposed for a rezoning from RM-2 to AG-2 on two separate occasions in the early 1990s (Case #91-05-14-Z-04, Resolution Z-91-057 and Case #93-09-21-Z-01, Resolution Z-93-073). In both cases, the request was denied by the Hearing Examiner and the Board. The first request was denied solely on the basis that the proposed rezoning would allow a range of agricultural activities on the subject property, many of which would have been incompatible with the residential uses on abutting properties. Despite its ultimate denial, this request was found to be compatible with the Outlying Suburban land use category, and was recommended for approval by county staff. The second request, however, received a more thorough analysis by staff, and received a denial recommendation based upon substantial Lee Plan inconsistencies. Staff asserted that the rezoning was not consistent with the Lee Plan because the designation

description for the Outlying Suburban category did not identify “agriculture” as a permitted use, whereas the various Non-Urban classifications did. The staff analysis went on to note that such a rezoning would have been inconsistent with Goal 9 of the Lee Plan which is, “To protect existing and potential agricultural lands from the encroachment of incompatible land uses.” This Goal supports the basic dichotomy set out in the Lee Plan which is to direct agricultural development to rural areas rather than urban areas. The staff denial was also based upon the lack of compatibility between some of the potential agricultural uses and the surrounding residential properties. The lack of compatibility made the request inconsistent with Policy 5.1.5 which requires the protection of existing and future residential areas from the encroachment of uses which are destructive to the character and integrity of the residential environment. Based on these inconsistencies, the second request received a recommendation of denial from the Hearing Examiner and a denial by the Board of County Commissioners.

In 1993, a request to rezone from IL to AG-2 within the Intensive Development land use category was denied by the Board (Case #93-11-02-Z-01, Resolution Z-93-083). Planning staff recommended denial of the request because it was inconsistent with the intent of Future Urban Areas, and because it represented an inefficient use of existing and planned infrastructure. The Board of County Commissioners denied the request based on inconsistency with Lee Plan Policy 1.1.2 which defines the Intensive Development land use category, and inconsistency with Policy 5.1.5, which requires the protection of existing and future residential areas from encroachment of uses that are potentially destructive to the character and integrity of the residential neighborhood.

Two down zonings to AG-2 within the Outlying Suburban land use category have been approved by the Board, but there were unique circumstances that warranted down zoning in each case. Both parcels were part of the abandoned Danport DRI and CPD. Both sites were being utilized at the time of the rezoning request for agricultural purposes. One tract was a 45-acre tract that was shown on the Master Concept Plan as the water management area for the overall DRI (Case #97-03-029.03Z 01.01, Resolution Z-97-078). Without a rezoning to something other than CPD, the owner would have been bound by the Master Concept Plan of that CPD, which would have made other development on that site unachievable. The only thing that could have built on this property was a lake/water management system. The DRI ownership was fragmented and no longer under unified control, so an amendment of the DRI/CPD was determined to be inappropriate. It was determined that the AG-2 zoning district could act as a “holding district” until firm plans were made. The other site within the DRI was a five acre tract that did not have road access (Case #99-02-193.01Z 01.01, Resolution Z-99-083).

A recent request to down zone a property from Community Commercial (CC) to Agricultural (AG-2) in the Urban Community land use category (Case #REZ1999-00018) further highlights this issue. Staff was prepared to recommend denial of the request

based on the potential underutilization of public services and the potential for urban sprawl. Also, the subject property is at an intersection that can meet the current Lee Plan interpretation for retail site location standards for a Neighborhood Commercial project. Staff asserted that CC is the correct zoning for the property because it has commercial potential and it is within a Future Urban Area. This case was withdrawn by the applicant as the County Attorney's Office opined that the 1981 rezoning was void. The Development Services letter to the applicant's representative informing him of this decision provides the following:

Mr. Paletsky has not attempted to develop the parcel based upon the rights apparently granted in the Resolution and does not claim any benefit of equitable estoppel relating to the 1981 Resolution. Mr. Paletsky has indicated, by requesting a rezoning to AG-2 the original zoning, that the property revert to the agricultural zoning that existed prior to the 1981 action.

The County Attorney's Office reviews conventional rezoning resolutions containing conditions on a case-by-case basis. Where the facts establish the basis of an equitable estoppel claim, that office will generally consider the zoning change, without the conditions, as appropriate and correct. When the facts establish that an equitable estoppel claim is not appropriate, then that office will generally recommend that the rezoning be considered void ab initio, causing the zoning district to be the one applicable prior to the void zoning action. The County Attorney's office has opined that Zoning Resolution Z-81-29 is void ab initio with respect to the 10 acre parcel currently owned by Steven Paletsky.

Also at issue with this plan amendment is the establishment of new agricultural lands within Planned Development zoning districts once the property has been rezoned. After a property has been rezoned to a Planned Development district, there is a period of time, sometimes several years, before a development order is approved and development begins. There have been instances where agricultural uses have expanded within a vacant Planned Development, and land has been cleared or otherwise disturbed in areas that are shown on the Master Concept Plan as conservation or open space. It has been the policy of the County in such cases to allow existing bona fide agricultural uses to continue within a newly established Planned Development until development commences, but to prohibit the establishment of new agricultural uses on the property once rezoning has been approved. The Board has supported this position for a long period of time.

PAT98-18 recognized that the establishment of new agricultural uses could potentially be appropriate in Outlying Suburban areas based on a lack of available infrastructure, compatibility with surrounding land uses, and the location of these areas at the urban fringe. This amendment recognized that permitting new agricultural uses in the Future Urban Areas could represent an underutilization of existing and planned infrastructure in these areas. Rezoning for agricultural

uses in Future Urban Areas potentially could lead to tax revenue losses that could hinder the County's ability to provide urban services in these areas.

The amendment also recognized that down zoning to agricultural zoning districts within the Future Urban Areas could cause compatibility problems between urban uses such as residences and businesses, and agricultural uses such as raising of livestock and other farming activities. The amendment staff report also noted that the Lee Plan does not envision the establishment of new agricultural uses within the Future Urban Areas, with the exception of the Outlying Suburban category. PAT98-18 contained the following discussion concerning this point:

As the above-referenced cases show, rezoning to Agricultural districts has been consistently denied by the Board in all Future Urban land use categories except Outlying Suburban. The requests have been denied based mainly on the inefficient use of existing or planned infrastructure, and the lack of compatibility with surrounding land uses. Rezoning were approved in Outlying Suburban because of a lack of available infrastructure and because the property was beyond the existing urban fringe. According to the Lee Plan, Outlying Suburban areas are characterized by their peripheral location in relation to established urban areas. Some, but not all of the requisite infrastructure needed for higher density development is generally planned or in place. Given the nature of the Outlying Suburban category, rezonings to agricultural districts should be given consideration in these areas.

PAT98-18 was adopted by the Board of County Commissioners on November 1, 2000.

Subsequent to the adoption of PAT98-18 and Policy 9.2.1, the Lee Plan incorporated a new category out of areas that were designated Outlying Suburban and limited to a maximum of 2 dwelling units per acre. This new category, the Sub-Outlying Suburban future land use category, was called for by the 2004 Evaluation and Appraisal Report (EAR). An EAR plan amendment, CPA2005-40, was prepared by staff, and adopted by the Board of County Commissioners on May 16, 2007 by Ordinance 07-09. Policy 9.2.1 was not modified to reflect this new category. Not referencing this new category in Policy 9.2.1 was an oversight, as these lands had previously been allowed the consideration of agricultural rezoning under Policy 9.2.1 when they were designated as Outlying Suburban.

PART II - STAFF ANALYSIS

A. STAFF DISCUSSION

The applicant of this instant request, CPA2013-00002, submitted a privately sponsored text amendment on June 25th, 2013. The amendment is similar to a staff proposed modification contained in the EAR based amendments.

The applicant is proposing the following amendment to Policy 9.2.1:

Policy 9.2.1: Rezoning of land to agricultural zoning districts is prohibited in those areas designed by the Lee Plan as Future Urban Areas, with the exception of those areas designated as Outlying Suburban or Suburban where rezoning of parcels five acres or more to an agriculture zoning district may be reviewed and approved on a case by case basis. The recommendations will be based on:

- a. current and future availability of Urban infrastructure;
- b. compatibility of the existing and future land uses;
- c. acreage of rezoning request; and
- d. consideration of applicable community plans.

~~In Outlying Suburban areas, such requests will be reviewed on a case by case basis, and recommendations will be made based on current and future availability of urban infrastructure and compatibility of existing and future land uses.~~

Staff notes that several community plans have been adopted expressing a desire to preserve or maintain a rural character. The Pine Island and Caloosahatchee Shores community plans are two examples. The EAR process also stressed maintaining rural character in appropriate communities. Staff finds that allowing rezoning for new agricultural uses on a case by case basis, with the criteria that is outlined by the EAR amendment language and the applicant submitted language may be appropriate in Suburban areas. The specific criteria include consideration of applicable community plans. The criteria also include assuring compatibility of existing and future land uses as well as the efficient use of infrastructure. The proposed language also incorporates a minimum parcel size of 5 acres, further assuring compatibility and preventing single family lot consideration in existing subdivisions. Rezoning to achieve new agriculture uses in the more urban land use categories (Intensive Development, Central Urban, and Urban Community) will remain inconsistent with the Lee Plan.

The current language of Policy 9.2.1 allows consideration for agricultural rezoning in the Outlying Suburban future land use category. The Sub-Outlying Suburban future land use category is a less intense category and should be allowed this same consideration. The applicant, however, neglected to include this category in their proposed language. Staff finds that the applicant's language should be modified to include the Sub-Outlying Suburban category. Staff also proposes an additional criterion to assure that the cumulative affect of new rezonings to agricultural districts in these suburban categories is evaluated over time. In addition, staff proposes other minor modifications to more closely match the proposed EAR amendment language. Staff proposes the following modifications to Policy 9.2.1 below:

Policy 9.2.1: Rezoning of land to agricultural zoning districts is prohibited in those areas designed by the Lee Plan as Future Urban Areas, with the exception of those areas designated as Sub-Outlying Suburban, Outlying Suburban, or Suburban where parcels five acres or larger may request rezoning to an agricultural zoning district. These requests will be reviewed on a case by case basis. Approval will be based on:

- a. current and future availability of urban infrastructure;
- b. compatibility of the existing and future land uses;
- c. acreage of rezoning request
- d. cumulative effect on county tax base; and
- e. support of applicable community plans.

~~In Outlying Suburban areas, such requests will be reviewed on a case by case basis, and recommendations will be made based on current and future availability of urban infrastructure and compatibility of existing and future land uses.~~

B. STAFF RECOMMENDATION

Staff recommends that the Board of County Commissioners **transmit** the proposed amendment to Policy 9.2.1 of the Lee Plan.

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

DATE OF PUBLIC HEARING: September 23, 2013

A. LOCAL PLANNING AGENCY REVIEW

Planning staff provided a brief summary of the proposed amendment. The staff offered revised language that includes an additional Suburban category not included in the applicant's proposed language. The recommended revision includes criteria that should be evaluated at time of rezoning such as impact on the county tax rolls. One LPA member asked a question concerning zoning and an agricultural exemption. Staff responded that zoning is just one factor; the actual use is also another important factor. One LPA member asked for a clarification concerning the compatibility criteria in 9.2.1.b. as to whether it is the subject parcel or surrounding parcels. This member suggested adding the word "surrounding" to the criteria. One LPA member stated that rezoning to an AG district in one of the Suburban areas should not be seen as a precedent to preclude development rights on adjacent properties. Staff agreed that the rezoning should not be seen as a precedent.

The applicant's representative addressed the LPA and introduced the applicant's to the Board. He discussed the applicant's property on S. Olga Road and the recent planned development rezoning on the property, and their desire to rezone the property back to an agricultural district. The representative next responded to LPA questions about agricultural exemptions by citing Supreme Court of Florida case, *Schultz v. Love PGI Partners, LP*, 1999. The court found that, "Thus, making the good faith agricultural use determination based exclusively on zoned use as a matter of law, would violate the broad examination required by statute, which is properly focused on the actual use of the land." The representative stated that the property appraiser will make the determination on the actual use of the property. The representative provided that the Florida legislature has been concerned with preservation of agricultural lands. The representative also provided that the Caloosahatchee Shores planning panel reviewed the application on September 17th and supports the application.

No members of the public appeared before the LPA.

One LPA member further discussed the issue of not limiting suburban uses for adjacent parcels as a result of a rezoning back to an agricultural use. Another member brought up that many agricultural uses are not compatible with Suburban residential uses, such as slaughterhouses, hog farms, chicken farms, and runoff issues that may have an adverse impact on adjacent uses. Staff responded that these are factors to be considered at the

rezoning stage. One member brought up the goat farm on College Parkway adjacent to a shopping center, and that they seemed to coexist, and that his point was to have these issues discussed on the record for later reference.

B. LOCAL PLANNING AGENCY RECOMMENDATION AND FINDINGS OF FACT SUMMARY

- 1. RECOMMENDATION:** The LPA recommends that the Board of County transmit the proposed amendment as modified by staff.
- 2. BASIS AND RECOMMENDED FINDINGS OF FACT:** The LPA accepted the findings of fact as advanced by the staff.

C. VOTE:

NOEL ANDRESS	AYE
STEVE BRODKIN	AYE
WAYNE DALTRY	AYE
JIM GREEN	AYE
MITCH HUTCHCRAFT	AYE
ANN PIERCE	AYE
ROGER STRELOW	AYE

D. ACTIONS SUBSEQUENT TO THE LPA MEETING

Following the LPA meeting, Lee County Planning staff met with Zoning and Environmental Sciences staff. At this meeting potential adverse environmental impacts of rezoning to an agricultural district were discussed. Staff also discussed possible land clearing activities that could occur as part of an agricultural operation. Planned development rezoning allow for conditions to be placed on the approval. These conditions are often used to address environmental features on the site such as protection of flowways, protected species, and indigenous habitat. These types of environmental features can occur in all future land use categories. Conventional rezonings do not allow for conditions to be attached to the approval. However, the Land Development Code (LDC) contains minimum requirements to address these features for residential, commercial and industrial uses. The LDC does not have minimum development requirements for agricultural uses, and Development Orders are not required for most

agricultural activities. Agricultural operations are protected under the state's "Right to Farm" act as defined in the Florida Statutes.

The applicant for the proposed Lee Plan amendment has also submitted a rezoning case that would rezone a Residential Planned Development to AG-2. The approved planned development provided for the protection of onsite flowways. Rezoning the applicant's property to an agricultural district would eliminate the conditions that protect the onsite flowways.

In light of these discussions, staff believes that Policy 9.2.1 should be revised to address potential environmental impacts as the result of allowing rezonings to agricultural districts in suburban areas. Staff recommends that a criterion be added to Policy 9.2.1 to address this. Staff recommends the following additional criteria:

- f. evaluation of how environmental features, including but not limited to flowways, protected species, and habitat, will be protected or mitigated.

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

DATE OF PUBLIC HEARING: October 21, 2013

A. BOARD REVIEW

Planning staff provided a brief summary of the proposed amendment. One Board member expressed concern over compatibility issues created by agricultural uses with surrounding urban uses. This member also expressed concern as to the type of agricultural uses that could result such as hog and chicken farms and potential runoff and odor concerns. Another Board member asked for clarification of the land use categories that this amendment affects. Staff responded that the Suburban and Sub-Outlying Suburban categories would be added for case by case consideration in addition to the already permitted Outlying Suburban category. Staff stated that compatibility concerns could lead to a recommendation of denial of a requested rezoning. The Assistant County Attorney clarified that the requested zonings would be conventional requests with no ability to condition the requested uses.

The applicant's representative next provided a brief presentation concerning the request. The Chairman next called for public input, however, no members of the public came forward to address the proposed amendment.

The Chairman asked the Assistant County Attorney the extent of liability that the amendment could potentially create. The Attorney said liability exposure does not exist in denying the transmittal request. Liability may exist on individual rezoning requests. The applicant's representative suggested that the Board could limit the applicability of the proposed policy to the Pine Island and Caloosahatchee Shores Community Planning areas. The Board accepted this restriction and incorporated this into the transmittal motion.

B. BOARD ACTION AND FINDINGS OF FACT SUMMARY

1. **RECOMMENDATION:** The Board approved a motion to transmit the proposed amendment and restrict the applicability of the proposed amendment to the Pine Island and the Caloosahatchee Shores Community Plan areas.
2. **BASIS AND RECOMMENDED FINDINGS OF FACT:** The Board accepted the recommended findings of fact with the restriction of applicability to the Pine Island and Caloosahatchee Shores Community Plan areas.

C. VOTE:

LARRY KIKER	AYE
FRANK MANN	ABSENT
JOHN MANNING	AYE
CECIL L PENDERGRASS	AYE
VACANT	VACANT