



**LOCAL PLANNING AGENCY  
ADMINISTRATION EAST BUILDING  
2201 SECOND STREET, FORT MYERS, FL 33901  
ROOM 118 (FIRST FLOOR)  
MONDAY, NOVEMBER 27, 2017  
8:30 AM**

**AGENDA**

1. Call to Order/Review of Affidavit of Publication/Pledge of Allegiance
2. Public Forum
3. Approval of Minutes – October 23, 2017
4. Land Development Code Amendments
  - A. Chapters 30, 33, 34 (HB1021, Septic)  
Proposed amendments will provide consistency with Florida Statutes Sections 553.79 (which preempts local regulation of specified development, construction or improvements on property associated with franchise or the sale of liquid fuel, and preempts local regulation of signage relating to the retail price of gasoline) and Florida Statutes Section 381.0065 (which provides for regulation of septic systems by the Florida Department of Health).
5. Lee Plan Amendment
  - A. CPA2014-00008 Overriding Public Necessity Definition: Amend the Lee Plan to remove the overriding public necessity requirement found in Objective 17.1, Objective 20.1, Policy 21.1.5, and Policy 26.2.2 with regards to the Buckingham, Caloosahatchee Shores, Alva, and Bayshore community plans.
6. Other Business
7. Adjournment – Next Meeting Date: December 18, 2017

Documentation for the Proposed Comprehensive Plan Amendment is available at <https://www.leegov.com/dcd/planning/cpa>. This meeting is open to the public. Interested parties may appear at the meeting and be heard with respect to the proposed plan amendment.

A verbatim record of the proceeding will be necessary to appeal a decision made at this hearing.

Lee County will not discriminate against individuals with disabilities. To request an accommodation, contact Janet Miller (239) 533-8583, Florida Relay Service 711, or [jmiller@leegov.com](mailto:jmiller@leegov.com) at least five business days in advance.

**CPA2014-00008**

**Overriding Public Necessity Definition**

STAFF REPORT FOR  
CPA2014-08: Overriding Public Necessity  
County-Initiated Text Amendments to the Lee Plan



**Applicant:**

Board of County Commissioners

**Representative:**

Department of Community Development

**Location:**

Buckingham, Bayshore, Caloosahatchee Shores & Alva Communities

**Commission District:** #5

**Amendment:**

Objective 17.1  
Objective 20.1  
Policy 1.4.3  
Policy 21.1.5  
Policy 26.2.2

**Attachments:**

Text Amendments

**Hearing Dates:**

LPA:  
2/27/2017

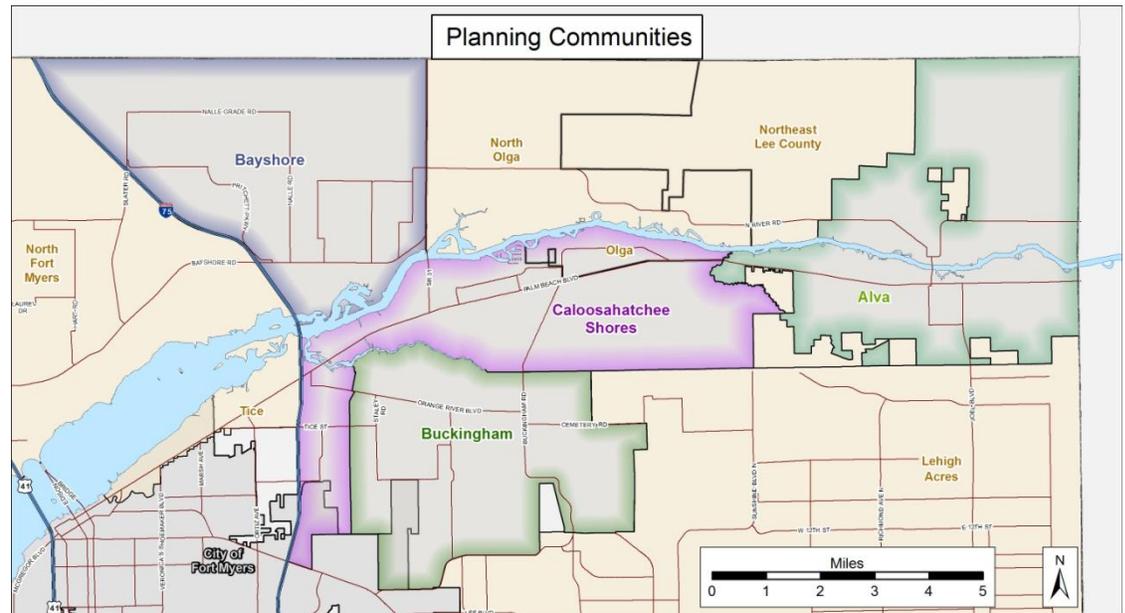
BoCC Transmittal:  
3/22/2017

LPA:  
11/27/2017

**REQUEST**

To remove the Overriding Public Necessity (OPN) requirement found in Lee Plan Objectives 17.1 and 20.1 and Policies 1.4.3, 21.1.5 and 26.2.2 with regards to the Buckingham, Bayshore, Caloosahatchee Shores, and Alva community plans.

**COMMUNITY PLANNING AREAS**



**BACKGROUND**

CPA2014-08 was heard by the Local Planning Agency (LPA) on February 27, 2017 and was recommended for transmittal. On March 22, 2017 the Board of County Commissioners transmitted the proposed amendment to the state reviewing agencies and directed staff to work with the four affected communities to identify legally defensible solutions to their individual concerns. As directed by the Board, staff worked with the Bayshore, Buckingham, Caloosahatchee Shores and Alva communities to obtain additional input and modify the amendment language where appropriate.

The State agencies did not object to the amendment as it was transmitted, however based on work with the four communities, there are substantive changes to the proposed amendments that necessitate bringing the amendments back to the LPA and BoCC for review and transmittal.

**RECOMMENDATION**

Staff recommends that the Board of County Commissioners **transmit** the proposed amendments to Objectives 17.1 and 20.1 and Policies 1.4.3, 21.1.5 and 26.2.2 as provided in Exhibit 1.

**PART 1**  
**DISCUSSION AND ANALYSIS**

The Buckingham, Caloosahatchee Shores, Alva, and Bayshore community planning areas identified in the Lee Plan contain an OPN provision as a standard for approving density increases on lands within their respective communities. OPN is not a defined term in the Lee Plan and there are no clear standards or criteria for its application. The ambiguity of the OPN provisions creates potential legal challenges to its use. Legal concerns regarding OPN provisions are detailed in a memo from the County Attorney's Office dated January 12, 2017, attached hereto as Exhibit 3. After considering the advice and recommendation of the County Attorney's Office and conducting thorough analysis, it is staff's recommendation that the OPN provisions be deleted from the Lee Plan. There are existing provisions throughout the Lee Plan that provide protections against inconsistent and incompatible development making OPN unnecessary.

The ambiguity of OPN became apparent during the River Hall Comprehensive Plan Amendment proceedings during which the Board directed staff to obtain public input and amend the Lee Plan to define OPN and clarify its application to comprehensive plan amendments.

**Public Meetings:**

Staff held a workshop in the Buckingham, Bayshore, Caloosahatchee Shores and Alva communities as provided below:

Buckingham Community  
February 19, 2015 @ 6PM  
Mosquito District

Bayshore Community  
February 10, 2015 @ 6:30PM  
New Hope Church, N. Fort Myers

Caloosahatchee Shores/  
East Lee County Council  
March 17, 2015 @ 6PM  
Olga Community Center

Alva Community  
February 9, 2015 @ 7PM  
Alva Community Center

Since the initial workshops in 2015, Staff met with members of the Bayshore, Caloosahatchee Shores and Alva communities on May 15, 2017. These members then conferred with their communities to determine if additional protections were necessary given the Lee Plan language and conditions specific to their communities. Individual meetings were also held in October 2017 with the Bayshore, Caloosahatchee Shores and Alva communities. Staff also worked with the Buckingham Community to obtain additional input. As a result, changes were made to the proposed amendment as provided in Exhibit 1.

**Issue:**

Each one of these communities have community-specific OPN language contained in Objective 17.1 (Buckingham), Objective 20.1 (Bayshore), Policy 21.1.5 (Caloosahatchee Shores) and Policy 26.2.2 (Alva). The goal of the initial workshops was to create a single definition of OPN with criteria for approval that apply to all four communities. This task was proved impossible. Although the four communities agreed on a general definition for OPN, they could not reach a consensus on standards for its application. In general, each community indicated that OPN should be based on the unmet needs of the individual planning community and not based on the overall needs of the residents of Lee County.

The definition submitted by the four communities in a joint letter dated March 14, 2015, attached hereto as Exhibit 2, was as follows:

*Overriding Public Necessity* - An essential need of the residents of the individual Planning Community as a whole, where the interests of the individual Planning Community are regarded as superior to the interests of individuals and businesses, and when there is a conflict between them, the latter must give way. Increases in density to support services and/or infrastructure (e.g. schools, hospitals, fire and rescue services, water and sewer, etc.) do not qualify as an “overriding public necessity.” The requirement of overriding public necessity applies to the actual land use amendment being requested, not the need for amenities offered, and will be considered only for the actual footprint of the intended use.”

Like the existing policy language requiring an OPN, this definition includes vague and ambiguous terms as well as regulatory language not appropriate for a definition. The County Attorney’s Office memo (Exhibit 3) highlights the challenge of creating a single definition of OPN with a single set of criteria to be applied to all four distinct areas: “For example, what qualifies as an overriding public necessity in Alva may not be an overriding public necessity in Bayshore. Additionally, the criteria for determining OPN in Alva could differ from the criteria in Bayshore, even though the term is defined the same.” In order to objectively and consistently apply OPN, specific standards or criteria are mandatory. Without the specificity for how to apply OPN, it remains a nebulous and futile provision that undermines the legal integrity of the Lee Plan.

Beyond the issue of defining OPN, are procedural due process concerns. As written, applicants are required to demonstrate compliance with the OPN standard. The Lee Plan does not provide procedures for providing evidence and demonstrating compliance with OPN. The OPN requirement created a quasi judicial process within a legislative forum. As a result, Board decisions regarding OPN must be based on competent substantial evidence and provide applicant’s with certain due process rights under state law for quasi judicial proceedings. These concerns are conveyed in the County Attorney’s Office memo which asserts, “In short, any decision the Board makes regarding the application of the existing OPN provisions may lead to costly and lengthy legal challenges stemming from unknown criteria.”

To overcome the complexities of defining and objectively applying OPN and to avoid potential legal challenges, the OPN provisions must be removed from Lee Plan Objective 17.1 (Buckingham), Objective 20.1 (Bayshore), Policy 21.1.5 (Caloosahatchee Shores) and Policy 26.2.2 (Alva). Removing the OPN provisions does not preclude review of compatibility and consistency required by other provisions of the Lee Plan from being applied, such as:

- Objectives 2.1 and 2.2 direct new growth to urban areas in contiguous and compact patterns, in part, to contain urban sprawl. Proposed developments in non-urban areas must demonstrate during the rezoning process consistency with these Objectives.
- Goal 5 contains policies that protect existing residential areas by prohibiting residential uses in areas where flood and other hazards exist and from the encroachment of uses that are potentially destructive to the character and integrity of the residential environment.

- Commercial development is limited in rural areas by Goal 6 and within the non-urban future land use categories to serving the needs of the residents in the immediate area. Compatibility, impact on infrastructure, locating the commercial development at intersections, protecting against premature, scattered, or strip development and encouraging infill development are key to protecting the non-urban areas.
- Goal 9 is to protect existing and potential agricultural lands from the encroachment of incompatible land uses

In addition to the County-wide provisions, each of the four community planning areas has community-specific provisions that address the unique community character of each area. The Lee Plan Goal for each of the four communities and the Rural Community Preserves policy is provided, in part, below:

**GOAL 17: BUCKINGHAM.** *To manage the future growth in the Buckingham Community; to preserve the existing rural and agricultural land use pattern; to diversify the choice of housing for Lee County by maintaining and enhancing the historic and rural character; and to protect the unique historical and environmental values of the Buckingham Community.*

**POLICY 1.4.3: The Rural Community Preserves** *are established following special studies of Lee County's intact rural communities. Within these areas, special design approaches are to be used to maintain the existing rural character, for example: conservation easements, flexible road design standards (including relocation of future arterials not serving the rural community), special fencing and sign standards, and retention of historic rural uses. These areas are not to be programmed to receive urban-type capital improvements. Lands within this category are not intended to be converted to any Future Urban Areas; rather, they are to remain permanently rural in character and use. These areas are restricted to low density residential uses (with minimum lot size requirements), agricultural uses, and minimal non-residential uses that are needed to serve the rural community. Property in this category may not be rezoned to any RV district. Additional goals, objectives, policies, and standards for these areas may be included in this plan based on the special studies (see for example, Goal 17). Maximum density is one dwelling unit per acre (1 du/acre).*

**GOAL 20: BAYSHORE COMMUNITY.** *To protect the existing rural residential, agricultural and equestrian-oriented character of the community by maintaining low residential densities and minimal commercial activities, while excluding incompatible uses that are destructive to the character of this rural residential environment.*

**GOAL 21: CALOOSAHATCHEE SHORES:** *To protect the existing character, natural resources and quality of life in Caloosahatchee Shores, while promoting new development, redevelopment and maintaining a more rural identity for the neighborhoods east of I-75 by establishing minimum aesthetic requirements, planning the location and intensity of future commercial and residential uses, and providing incentives for redevelopment, mixed use development and pedestrian safe environments.*

**GOAL 26: ALVA.** *To support and enhance Alva's unique rural, historic, agricultural character and natural environment and resources, including the rural village and surrounding area.*

There are adequate objectives and policies in place without the OPN requirement that further the Goal of each individual community. Striking the OPN requirement from the Lee Plan does not preclude the Board from reviewing future cases for consistency and compatibility with these plans.

**Proposed Amendments:**

After the Board of County Commissioners (BoCC) Transmittal Hearing on March 22, 2017 staff worked with the four communities to obtain additional input and modified the amendment language where appropriate. The following section identifies the amendments that were previously transmitted and the currently proposed amendments for each community. The proposed amendments based on continued work with the four communities are also shown in strikethrough and underline in Exhibit 1.

**Buckingham Community**

The proposed amendments to the Lee Plan, affecting the Buckingham Planning Community changed to include amending Policy 1.4.3 which describes the Rural Community Preserve future land use category. This land use category is limited to the Buckingham planning area. Through working with the community, staff is recommending that proposed amendment, identified below, will help to remove ambiguity in the implementation of the Policy. This policy had not previously been transmitted by the BoCC for review by state agencies.

**POLICY 1.4.3:** The Rural Community Preserves future land use category requires special design approaches to maintain existing rural character, for example: conservation easements, flexible road design standards (including relocation of future arterials not serving the rural community), special fencing and commercial sign standards, and retention of historic rural uses. These areas are not programmed to receive urban-type capital improvements. Lands within this category are not ~~intended~~ to be converted to future urban or suburban areas; rather, they are to remain permanently rural in character and use. These areas are restricted to low density residential uses (with minimum lot size requirements), agricultural uses, and minimal non-residential uses that are needed to serve the rural community. Property in this category may not be rezoned to any RV district. Maximum density is one dwelling unit per acre (1 du/acre).

Proposed amendments to Objective 17.1 are the same as was previously transmitted to the state reviewing agencies. The amendments to Objective 17.1 remove duplication with Policy 1.4.3 and do not change the intent of the Buckingham Goal.

**OBJECTIVE 17.1: LAND USE.** ~~The primary land use designation for the Buckingham Community is “Rural Community Preserve.” Other land use designations exist within the Buckingham Community, such as Rural, Sub-Outlying-Suburban, Conservation Lands, and Wetlands. Public Facilities have also been designated as appropriate. No land in the Buckingham Community will be changed to a land use category more intense than Rural Community Preserve (including Public Facilities) unless a finding of overriding public necessity is determined by three members of the Board of County Commissioners. Land use decisions will be guided by preserving the Land uses in the Buckingham Community will be developed in a manner that is consistent with the rural and agricultural land use pattern.~~

**Bayshore Community**

Previously Lee County had transmitted a proposed amendment to Objective 20.1 that required development of industrial and commercial land uses be developed consistent the “Bayshore Community rural character.” These previously transmitted amendments are shown below.

**OBJECTIVE 20.1: COMMERCIAL AND INDUSTRIAL LAND USE.** ~~Commercial and industrial land uses will be located and developed in a manner consistent with the Bayshore Community rural character. The existing land use designations of the Lee Plan (as of September 30, 2001) are appropriate to achieving the goal of the Bayshore Plan. No land use map amendments to a more intensive category will be permitted after March 11, 2003, unless a finding of overriding public necessity is made by three members of the Board of County Commissioners.~~

After meeting with the community staff revised the proposed amendments to be more consistent with the vision of the community members. The proposed amendments to Objective 20.1 have been revised to focus on enforcement of existing Land Development Code and Lee Plan requirements. The addition of the concurrent planned development rezoning, required to amend the future land use map, will help staff and the public assure the intent of the Bayshore Goal will be maintained. The recommended amendments are shown below.

**OBJECTIVE 20.1: LAND USE.** ~~The county will continue to enforce land development regulations that ensure separation of urban and rural land uses through the implementation of open space, buffers, and setback requirements that protect high quality environmental areas, such as creeks, oak hammocks, floodplains and wetlands from potential impacts of development. Planned developments, through appropriate conditions of approval, will be required to locate low residential densities along the perimeters of the development. Amendments to the future land use map must demonstrate compatibility through a concurrent planned development rezoning. The existing land use designations of the Lee Plan (as of September 30, 2001) are appropriate to achieving the goal of the Bayshore Plan. No land use map amendments to a more intensive category will be permitted after March 11, 2003, unless a finding of overriding public necessity is made by three members of the Board of County Commissioners.~~

### **Caloosahatchee Shores Community**

Previously Lee County had transmitted a proposed amendment to Policy 21.1.5 to remove the use of overriding public necessity by stating rural character would be protected from the encroachment of inconsistent and incompatible urban uses. The previously transmitted amendments are shown below.

**POLICY 21.1.5:** ~~One important aspect of the Protect Caloosahatchee Shores' Community Plan goal is to retain its<sup>2</sup> rural character from the encroachment of inconsistent and incompatible urban development, and rural land use where it currently exist. Therefore no land use map amendments to the remaining rural lands category will be permitted after May 15, 2009, unless a finding of overriding public necessity is made by three members of the Board of County Commissioners.~~

Upon further review and working with the community, staff finds that the proposed amendment can be further clarified by adding how protecting the rural character will be implemented. The required planned development must demonstrate compatibility with rural character for any future land use map amendment. These recommended amendments are shown below.

**POLICY 21.1.5:** ~~One important aspect of the Protect Caloosahatchee Shores' Community Plan goal is to retain its<sup>2</sup> rural character from the encroachment of inconsistent and incompatible urban development and rural land uses where it currently they exist as of May 15, 2009, by requiring that amendments to the future land use map be accompanied with a concurrent planned development rezoning that demonstrates compatibly with the rural character. Therefore no land use map amendments to the remaining rural lands category will be permitted after May 15, 2009,~~

~~unless a finding of overriding public necessity is made by three members of the Board of County Commissioners.~~

### **Alva Community**

Lee County had previously transmitted a proposed amendment to Policy 26.2.2 to remove the use of overriding public necessity without requiring amendments to the future land use map must be reviewed with a concurrent planned development to demonstrate compatibility. These previously transmitted amendments are shown below.

~~**POLICY 26.2.2:** Future Land use map amendments that would increase the allowable total density of Alva are discouraged. Future Land use map amendments that would decrease the allowable total density of ~~the area~~ Alva and that are otherwise consistent with the objectives and policies of this goal are encouraged. ~~in Alva. No land use amendments to a more intensive category will be permitted unless a finding of overriding public necessity is made by a supermajority of the members of the Board of County Commissioners.~~~~

The proposed amendments to Policy 26.2.2 add that in order to amend the future land use map to a more intense category a concurrent planned development rezoning is required and must demonstrate compatibility with rural character. These recommended amendments are shown below.

~~**POLICY 26.2.2:** Future Land use map amendments that would increase the allowable total density of Alva are discouraged and must demonstrate consistency with the objectives and policies of this goal through concurrent planned development rezoning. Future Land use map amendments that would decrease the allowable total density of ~~the area~~ Alva and that are otherwise consistent with the objectives and policies of this goal are encouraged. ~~in Alva. No land use amendments to a more intensive category will be permitted unless a finding of overriding public necessity is made by a supermajority of the members of the Board of County Commissioners.~~~~

## **PART 2 CONCLUSION and RECOMENDATION**

Based on existing requirements of non-urban future land use categories and provisions of Goals 2, 5, 6, and 7 staff found that there are existing Lee Plan policies in place that are adequate to protect against incompatible uses and urban encroachment into rural areas without needing to define OPN or develop criteria that apply throughout all four communities. This finding led to a staff recommendation that the OPN provisions could be deleted and development review could rely other compatibility and land use requirements of the Lee Plan.

However, on March 22, 2017 the Board of County Commissioners directed staff to work with the four affected communities and identify additional amendments and implementation measures to help assure development within these communities maintain compatibility with the communities' rural character.

The intent of CPA2014-08, to remove potential legal liabilities and ambiguity from the Lee Plan while continuing to protect against incompatible uses and urban encroachment into rural areas, has remained unchanged. Staff recommends that the Board of County Commissioners **transmit** the proposed amendments to Objectives 17.1 and 20.1 and Policies 1.4.3, 21.1.5 and 26.2.2 as provided in Exhibit 1.

**EXHIBITS:**

- Exhibit 1 Proposed Text Amendments
- Exhibit 2 Communities' letter dated March 14, 2015
- Exhibit 3 County Attorney Memorandum dated January 12, 2017

**EXHIBIT 1**

**Proposed Text Amendments**

**POLICY 1.4.3:** The Rural Community Preserves future land use category requires special design approaches to maintain existing rural character, for example: conservation easements, flexible road design standards (including relocation of future arterials not serving the rural community), special fencing and commercial sign standards, and retention of historic rural uses. These areas are not programmed to receive urban-type capital improvements. Lands within this category are not intended to be converted to future urban or suburban areas; rather, they are to remain permanently rural in character and use. These areas are restricted to low density residential uses (with minimum lot size requirements), agricultural uses, and minimal non-residential uses that are needed to serve the rural community. Property in this category may not be rezoned to any RV district. Maximum density is one dwelling unit per acre (1 du/acre). (Ordinance No. 91-19, 94-30, 17-13)

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**OBJECTIVE 17.1: LAND USE.** ~~The primary land use designation for the Buckingham Community is “Rural Community Preserve.” Other land use designations exist within the Buckingham Community, such as Rural, Sub Outlying Suburban, Conservation Lands, and Wetlands. Public Facilities have also been designated as appropriate. No land in the Buckingham Community will be changed to a land use category more intense than Rural Community Preserve (including Public Facilities) unless a finding of overriding public necessity is determined by three members of the Board of County Commissioners. Land use decisions will be guided by preserving the Land uses in the Buckingham Community will be developed in a manner that is consistent with the rural and agricultural land use pattern.~~

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**OBJECTIVE 20.1: LAND USE.** ~~The county will continue to enforce land development regulations that ensure separation of urban and rural land uses through the implementation of open space, buffers, and setback requirements that protect high quality environmental areas, such as creeks, oak hammocks, floodplains and wetlands from potential impacts of development. Planned developments, through appropriate conditions of approval, will be required to locate low residential densities along the perimeters of the development. Amendments to the future land use map that increase density or intensity must demonstrate compatibility through a concurrent planned development rezoning. The existing land use designations of the Lee Plan (as of September 30, 2001) are appropriate to achieving the goal of the Bayshore Plan. No land use map amendments to a more intensive category will be permitted after March 11, 2003, unless a finding of overriding public necessity is made by three members of the Board of County Commissioners.~~

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**POLICY 21.1.5:** ~~One important aspect of the Protect Caloosahatchee Shores’ Community Plan goal is to retain its<sup>2</sup> rural character from the encroachment of inconsistent and incompatible urban development and rural land uses where it currently they exist as of May 15, 2009. by requiring that amendments to the future land use map that increase density or intensity be accompanied with a concurrent planned development rezoning that demonstrates compatibly with the rural character. Therefore no land use map amendments to the remaining rural lands category will be permitted after May 15, 2009, unless a finding of overriding public necessity is made by three members of the Board of County Commissioners.~~

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**POLICY 26.2.2:** ~~Future land use map amendments that would increase the allowable total density of Alva are discouraged and must demonstrate consistency with the objectives and policies of this goal through concurrent planned development rezoning. Future land use map amendments that would decrease the allowable total density of the area Alva and that are otherwise consistent with the objectives and policies of this goal are encouraged, in Alva. No land use amendments to a more intensive category will be permitted unless a finding of overriding public necessity is made by a supermajority of the members of the Board of County Commissioners.~~

**EXHIBIT 2**

**Communities' Letter dated March 14, 2015**

3/24/15

Mr. Paul O'Connor  
Director Community Development  
Lee County Florida

Re: "Overriding Public Necessity" definition

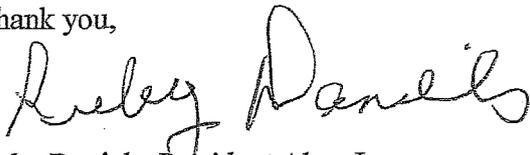
Dear Mr. O'Connor,

The East Lee County Council and its member Community Planning Panels submit the following definition for "Overriding Public Necessity" to be included in the Lee Plan glossary and our Community Plans.

**Overriding Public Necessity**

An essential need of the residents of the individual Planning Community as a whole, where the interests of the individual Planning Community are regarded as superior to the interests of individuals and businesses, and when there is a conflict between them, the latter must give way. Increases in density to support services and/or infrastructure (e.g. schools, hospitals, fire and rescue service, water and sewer, etc.) do not qualify as an "overriding public necessity". The requirement of overriding public necessity applies to the actual land use amendment being requested, not the need for amenities being offered, and will be considered only for the actual footprint of the intended use.

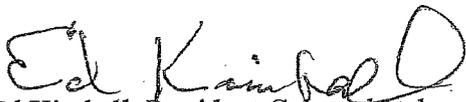
Thank you,



Ruby Daniels: President Alva, Inc.



T.J. Cannamela: President Buckingham Community Association, Inc.



Ed Kimball: President Caloosahatchee Shores Planning Committee and the ELCC



Steven Brodtkin: President Concerned Citizens of Bayshore Community

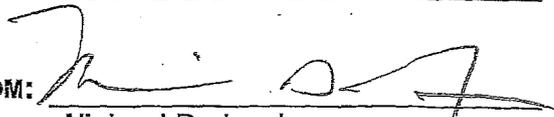
**EXHIBIT 3**

**County Attorney Memorandum dated January 12, 2017**

**MEMORANDUM  
FROM THE  
OFFICE OF COUNTY ATTORNEY**

DATE: January 12, 2017

TO: Dave Loveland  
Director of Community  
Development

FROM:   
Michael D. Jacob  
Managing Assistant County Attorney

RE: **CPA2014-00008**  
**Overriding Public Necessity**

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On October 7, 2014, the County Attorney's office requested the Board authorize County Staff to amend the Lee Plan to address procedural issues and provide clarification of the overriding public necessity requirement found within several policies. These issues arose during the River Hall proceedings. At that time, the County Attorney's office recommended the Board amend the Lee Plan to provide a definition of "overriding public necessity" and associated text amendments to clarify the application of the overriding public necessity requirement within the Lee Plan. Specifically, the Blue Sheet provided for amendments to the Glossary, Objective 17.1 (Buckingham Community), Objective 20.1 (Bayshore Community), Policy 21.1.5 (Caloosahatchee Shores Community), and Policy 26.2.2 (Alva Community). Following Board authorization, the above referenced Lee Plan case was created.

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As you are aware, after approval of the River Hall Plan Amendment and Rezoning applications, certain residents challenged the Board's decision under Chapters 120 and 163, Fla. Stat. The residents incorrectly argued, among other things, that the Board was required to make a finding of overriding public necessity ("OPN") and that the Board's decision in the River Hall case was inconsistent with the Comp Plan for failing to find an OPN.

Subsequent to the October 7, 2014 BoCC hearing and throughout the proceedings initiated by the River Hall opponents, legal concerns were brought to light concerning the OPN provisions that extend beyond just defining the term. Existing OPN provisions create potential legal challenges to its application based on substantive and due process claims that are not isolated to just the River Hall case. In fact, the same legal challenges could also be raised if the OPN requirement is applied under Objective 17.1, Objective 20.1, or Policy 26.2.2.

The primary legal concern is the lack of clear standards or criteria for applying OPN. A County regulation may be found facially invalid under the void-for-vagueness

RE: CPA2014-00008 (Overriding Public Necessity)

doctrine if “*the language of the statute [or ordinance] [does not] provide a definite warning of what conduct is required or prohibited, measured by common understanding and practice.*” Kuvin v. City of Coral Gables, 62 So. 3d 625, 639–40 (Fla. 3d DCA 2010) (citing Jones v. Williams Pawn & Gun, Inc., 800 So.2d 267, 270 (Fla. 4th DCA 2001)). The vagueness doctrine is designed to “*assure compliance with the due process clause of the United States Constitution.*” See Se. Fisheries Ass'n, Inc. v. Dep't of Nat. Res., 453 So. 2d 1351, 1353 (Fla. 1984). Unconstitutionally vague regulations may lead to arbitrary and discriminatory enforcement. Id. An ordinance that is found constitutionally vague is void and unenforceable.

Currently, the OPN requirements in Objective 17.1, Objective 20.1, Policy 21.1.5, and Policy 26.2.2 do not provide adequate notice of the criteria a property owner must satisfy to permit approval of a future land use map amendment. The Board's future application and interpretation of the OPN requirement will be left solely to the discretion of each Board based on the facts present in each case. Such a circumstance “*invites arbitrary and selective enforcement*” that may serve as a deprivation of the rights protected by the due process clause of the Florida and United States Constitutions. See Kuvin at 639.

The failure of a property owner to accurately guess the criteria that must be met to satisfy the OPN requirement will lead to the inability of the property owner to acquire the same development rights that similarly situated property owners within the County may acquire. The Board's decision to deny an application in such a case could create legal challenges stemming from the County's failure to provide criteria for its application as well as challenges due to arbitrary and capricious enforcement.<sup>1</sup> If unsuccessful, the OPN requirements may be rendered void and unenforceable. Still further, the Board's decision to approve an application after making a finding of OPN could likely still be challenged under Chapters 120 and 163, Fla. Stat., by opponents and gadfly litigants based on their own definitions and subjective criteria for applying the OPN requirement. As proof of that potential, I draw your attention to the Transcripts of the October 25, 2016 Administration Commission hearing. Attorney General Bondi asked opposing counsel:

Q: “So if we find that the correct standard is that the County must determine if there is an overriding public necessity, you will be disputing that back at the County level?”

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<sup>1</sup> In legal challenges based on unconstitutionally vague provisions, the Courts hold that when there is doubt about the vagueness of a statute “the doubt should be resolved ‘in favor of the citizen and against the state.’” See Brown v. State, 629 So. 2d 841, 843 (Fla. 1994) (citing State v. Wershow, 343 So.2d 605, 607-608 (Fla.1977)). Even if it is argued that the OPN requirements are not vague, if there is potential doubt as to vagueness, the case would be ruled in favor of the property owner and invalidate the provision.

RE: CPA2014-00008 (Overriding Public Necessity)

A: "Yes. In fact, we had made presentations, taken common dictionary definitions of "overriding," "public," and "necessity" and stating that it did not meet those...."

(Transcripts, Administration Commission Hearing, p 148, 16-24). In short, any decision the Board makes regarding the application of the existing OPN provisions may lead to costly and lengthy legal challenges stemming from unknown criteria.

In addition to the potential vagueness claim, there are procedural due process concerns with the OPN requirements. As written, if the OPN provisions apply, the Lee Plan requires the applicant to demonstrate the existence of an OPN. The very character of the hearing inherently required to demonstrate that the project meets the OPN requirement creates the potential due process issue.

In *Bd. of County Com'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993), the Florida Supreme Court distinguished the types of proceedings that are deemed legislative or quasi judicial. The *Snyder* Court stated "*it is the character of the hearing that determines whether or not board action is legislative or quasi-judicial.*" *Bd. of County Com'rs of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993)(citing *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648 (Fla. 3d DCA1982)). If the action "*results in the formulation of a general rule of policy*" it is legislative. If the action concerns the "*application of a general rule of policy*" then it is judicial. *Id.* at 474. Stated another way, "*a judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions.*" *Id.* The Court further went on to state that certain rezoning actions that "*have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of ... quasi-judicial action....*" *Id.*

It is well settled that normal Comprehensive Plan amendments are legislative in nature and therefore subject to different legal standards and procedural requirements. However, simply labeling a decision as legislative because it is part of a Comprehensive Plan amendment is not sufficient to avoid the potential legal issues. As the *Snyder* Court indicated, it is the character of the proceeding and not just the label we place on it that determines whether the case is legislative or quasi judicial.

As we saw in River Hall, the OPN provisions create a bifurcated process wherein the Board must first conduct a hearing to determine whether a project meets the currently undisclosed OPN criteria. The Board's OPN decision is contingent upon the application of a general rule (i.e. OPN-although those criteria are not yet prescribed) to the facts presented to the Board during a hearing. Furthermore, the determination regarding compliance with OPN has "*an impact on a limited number of persons or property owners, on identifiable parties and interests*" and will only apply to a particular

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property and set of facts. The Board's determination of whether an applicant has demonstrated compliance with the OPN requirement "*can be functionally viewed as policy application*" and not policy creation. Consequently, the unintended consequence of creating these OPN policies and objectives was the apparent creation of a quasi judicial determination within a historically legislative realm. This result triggers a number of due process concerns.

There are no procedures set out in the Lee Plan for providing evidence and demonstrating compliance with OPN. There are no requirements for the quality of the evidence that must be demonstrated, i.e., whether competent substantial evidence is required. Testimony is not under oath. Expert witnesses are not qualified or accepted to present opinions during their testimony. The applicant is not afforded an opportunity to cross examine witnesses. In fact, currently, there are no procedures that would even require disclosure of the facts supporting the Board's decision regarding OPN.

In a quasi judicial proceeding, to survive challenge, the Board's decision must be supported by competent substantial evidence; the Board must observe the essential requirements of the law; and, the Board must afford the applicant with due process. Florida law is clear on the due process that must be afforded an applicant in a quasi judicial hearing. The applicant "*must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.*" See Carillon Cmty. Residential v. Seminole County, 45 So. 3d 7, 10 (Fla. 5th DCA 2010)(citing Kupke v. Orange County, 838 So.2d 598, 599 (Fla. 5th DCA 2003) (citing Lee County v. Sunbelt Equities, II, Ltd. Partnership, 619 So.2d 996 (Fla. 2d DCA 1993))). Application of the OPN provision under the existing Lee Plan will not afford the applicant these essential due process requirements.

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Finally, as a practical matter, creating a single definition within the Glossary or set of criteria that are to be applied to four distinct areas has its problems. For example, what qualifies as an overriding public necessity in Alva may not be an overriding public necessity in Bayshore. Consequently, the criteria for approval of a Plan amendment in Alva could differ from the criteria in Bayshore, even though the term is defined the same. In a practical sense, trying to define OPN and develop criteria that apply throughout the four communities is problematic if not impossible.

Based on the foregoing, our Office does not recommend moving forward with transmittal or adoption of the previously recommended draft language concerning OPN. More importantly, we are recommending to Staff and the Board that CPA2014-00008 be revised to strike the OPN requirements from Objective 17.1 (Buckingham Community), Objective 20.1 (Bayshore Community), Policy 21.1.5 (Caloosahatchee Shores

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Community), and Policy 26.2.2 (Alva Community).<sup>2</sup> Striking the OPN requirement from the Lee Plan will in no way preclude the Board from reviewing the compatibility and consistency of future cases in these four communities. Existing Lee Plan policies are in place and are adequate to provide the protections that these policies and objectives were apparently designed to address without providing an unnecessary lightning rod for litigation and unduly creating legal liability for the County. If you would like further information or would like to discuss this matter further, please do not hesitate to let me know.

Email Only:

Roger Desjarlais, County Manager  
Doug Meurer, Assistant County Manager  
Dave Loveland, Director of Community Development  
Mikki Rozdolski, Planning Manager  
Richard Wesch, County Attorney

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<sup>2</sup> Policy 41.2.2 also includes a similar term, "overriding public interest." This policy should also be reviewed for similar revision.