



John Manning
District One

January 18, 2018

Cecil L Pendergrass
District Two

Larry Kiker
District Three

Brian Hamman
District Four

Frank Mann
District Five

Roger Desjarlais
County Manager

Richard Wm. Wesch
County Attorney

Donna Marie Collins
Hearing Examiner

Ray Eubanks, Plan Processing Administrator
State Land Planning Agency
Caldwell Building
107 East Madison – MSC 160
Tallahassee, FL 32399-0800

**Re: Amendment to the Lee Plan
Transmittal Submission Package
January 17, 2018 Transmittal Hearing**

Dear Mr. Eubanks:

In accordance with the provisions of F.S. Chapter 163, please find attached the proposed Comprehensive Plan Amendments, known locally as CPA2014-00008 (Overriding Public Necessity). The proposed amendments are being submitted through the expedited state review process as described in Chapter 163.3184. The amendments are as follow:

To remove the Overriding Public Necessity (OPN) requirement and revise 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.

The Local Planning Agency held a public hearing for these plan amendments on November 27, 2017. The Board of County Commissioners voted to transmit the amendments on January 17, 2018. The proposed amendments are not applicable to an area of critical state concern. The Board of County Commissioners stated their intent to hold an adoption hearing following the receipt of the review agencies' comments.

The name, title, address, telephone number, and email address of the person for the local government who is most familiar with the proposed amendments is as follows:

Mr. Brandon Dunn, Principal Planner
Lee County Planning Section
P.O. Box 398
Fort Myers, Florida 33902-0398
(239) 533-8585
Email: bdunn@leegov.com

Included with this package are one paper copy and two CD ROM copies, in PDF format, of the proposed amendments and supporting data and analysis. By copy of this letter and its attachments, I certify that this amendments and supporting data and analysis have been sent on this date to the agencies listed below.

Sincerely,
**Lee County Department of Community Development
Planning Section**



Mikki Rozdolski
Manager, Community Development Operations

All documents and reports attendant to this transmittal are also being sent by copy of this cover in an electronic format to:

Comprehensive Plan Review
Department of Agriculture and Consumer Services

Tracy D. Suber
Department of Education

Plan Review
Department of Environmental Protection

Deena Woodward
Florida Department of State

Scott Sanders
Florida Fish and Wildlife Conservation Commission

Sarah Catala
FDOT District One

Margaret Wuerstle
Southwest Florida Regional Planning Council

Terry Manning, A.I.C.P., Senior Planner, Intergovernmental Coordination Section
South Florida Water Management District

The News-Press media group

news-press.com A GANNETT COMPANY

Attn: *TINA*

**LCBC-DEPT OF COMM DEVELOPMENT-
1500 MONROE ST
FORT MYERS, FL 33902**

STATE OF FLORIDA COUNTY OF LEE:

Before the undersigned authority personally appeared Sue Bridges, who on oath says that he or she is a Legal Assistant of the News-Press, a daily newspaper published at Fort Myers in Lee County, Florida; that the attached copy of advertisement, being a Legal Ad in the matter of


Notice Public Hearing

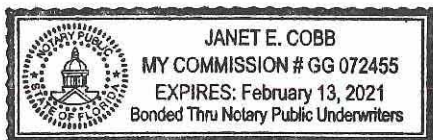
In the Twentieth Judicial Circuit Court was published in said newspaper in the issues of:

01/05/18

Affiant further says that the said News-Press is a paper of general circulation daily in Lee, Charlotte, Collier, Glades and Hendry Counties and published at Fort Myers, in said Lee County, Florida, and that the said newspaper has heretofore been continuously published in said Lee County, Florida each day and has been entered as periodicals matter at the post office in Fort Myers, in said Lee County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he or she has never paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

Sworn to and Subscribed before me this 5th of January 2018, by Sue Bridges who is personally known to me.


Janet E Cobb
Notary Public for the State of Florida
My Commission expires February 13, 2021



**NOTICE OF PROPOSED AMENDMENT TO THE
LEE COUNTY COMPREHENSIVE LAND USE PLAN
(TRANSMITTAL HEARING)**

The Lee County Board of County Commissioners will hold a public hearing to consider proposed amendments to the Lee County Comprehensive Land Use Plan (Lee Plan) on Wednesday, January 17, 2018. The hearing will commence at 9:30 a.m., or as soon thereafter as can be heard, in the Board Chambers at 2120 Main Street in Downtown Fort Myers. At the hearing, the Board will consider the proposed amendments for transmittal to the Florida Department of Economic Opportunity:

CPA2014-00008 – Overriding Public Necessity Definition: Amendments to the Lee Plan Objectives 17.1 and 20.1 and Policies 21.1.5 and 26.2.2 with regards to removing the overriding public necessity requirement in the Buckingham, Caloosahatchee Shores, Alva, and Bayshore community plans and to Policy 1.4.3 in reference to the Rural Community Preserve future land use category.

This transmittal hearing is the first step in a two step public hearing process to amend the Lee Plan. A second hearing will follow the Department of Economic Opportunity's review of the application.

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.

It is the intent of the Board of County Commissioners that the provisions of this Comprehensive Plan Amendment may be modified as a result of consideration that may arise during Public Hearing(s). Such modifications shall be incorporated into the final version.

Lee County will not discriminate against individuals with disabilities. To request an accommodation, contact Joan LaGuardia, (239) 533-2314, Florida Relay Service 711, or jlguardia@leegov.com, at least five business days in advance.
AD# 2629228 Jan. 5, 2018

RECEIVED
JAN 05 2018
COMMUNITY DEVELOPMENT

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

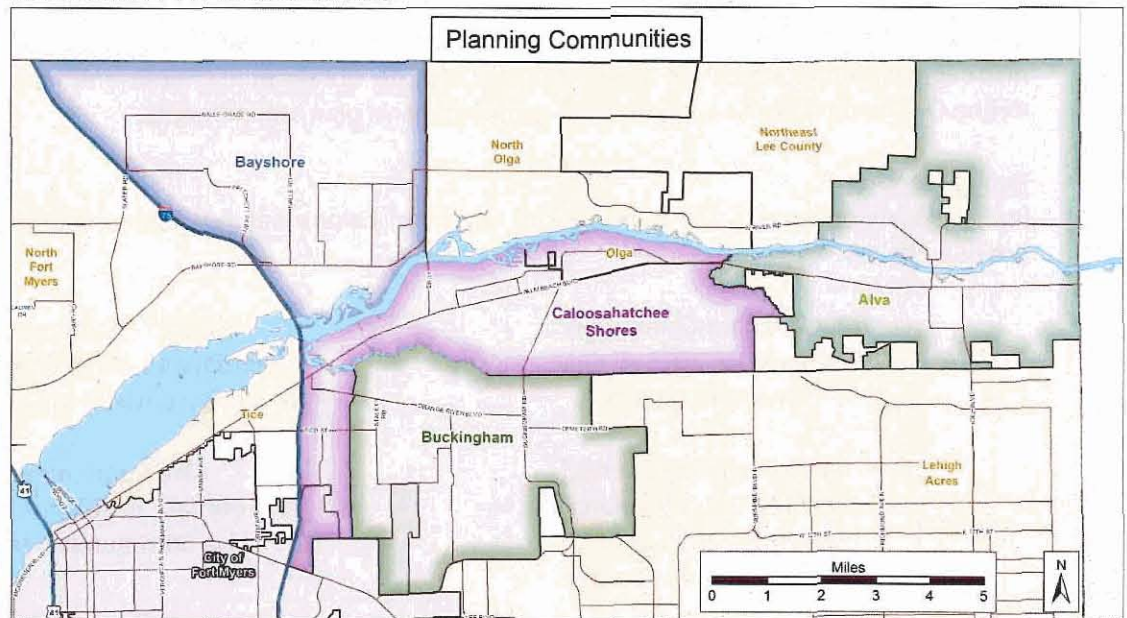
Hearing Dates:
LPA:
2/27/2017
11/27/2017

BoCC Transmittal:
3/22/2017
1/17/2018

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

The LPA 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. Staff also recommends the Board transmit the amendment.

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: CALOOSAHAATCHEE 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 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.~~

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 its² 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 its² 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.~~

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

PART 3
LOCAL PLANNING AGENCY
Review and Recommendation

DATE OF PUBLIC HEARING: November 27, 2017

A. LOCAL PLANNING AGENCY REVIEW:

Staff provided a brief presentation on the proposed amendment to remove the Overriding Public Necessity (OPN) requirement and text changes 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. The presentation included an overview, consistency with the Lee Plan and a recommendation that the amendment be transmitted to the state for review. Members of the LPA asked general questions about the amendment including policy interpretation, and the community input regarding the amendment. Four members of the public spoke against the proposed amendment wishing to add alternative language, questioning procedures and requesting more community input.

Members of the Bayshore Community proposed the following amendment to Goal 20. The proposed language is vague. Staff is not supporting this change at this time and recommends that the changes would be best vetted through the visioning workshop that will be conducted during the upcoming year.

Goal 20: Bayshore Community. In order to preserve the Bayshore Community's rural quality of life and to promote public safety by addressing the hazards caused by flooding since most of Bayshore lies in a flood plain, residential densities will be kept low and commercial activity will be limited and focused on serving the local 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. For the purposes of this goal and related objectives and policies, the boundaries of the Bayshore Community will be I-75 on the west, SR 31 on the east, the Caloosahatchee River on the south and the Charlotte County line on the north.

The LPA considered the Bayshore Community's proposed language did not include it in their motion.

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

The LPA recommended that the Board of County Commissioners **transmit** the amendment to the Lee Plan as proposed by Staff.

C. VOTE:

A motion was made recommending that the Board of County Commissioners *transmit* the amendment based on consistency with the Lee Plan as provided in the Staff Report. The motion was passed by a 4 to 1 vote.

NOEL ANDRESS	NAY
DENNIS CHURCH	AYE
JIM GREEN	ABSENT
CHRISTINE SMALE	ABSENT
STAN STOUDE	AYE
GARY TASMAN	AYE
JUSTIN THIBAUT	AYE

**PART 4
BOARD OF COUNTY COMMISSIONERS
HEARING FOR TRANSMITTAL OF PROPOSED AMENDMENT**

DATE OF TRANSMITTAL HEARING: January 17,2018

A. BOARD REVIEW:

Staff gave a brief presentation and made a recommendation that the BOCC transmit the proposed amendment. One member of the Board voiced concerns about the potential of weakening community plans. No members of the public spoke in support or opposition of the amendment.

B. BOARD ACTION:

A motion was made that the BOCC *transmit* CPA2014-08 as recommended by staff. The motion was called and passed 4-1.

VOTE:

BRIAN HAMMAN	<u>AYE</u>
LARRY KIKER	<u>AYE</u>
FRANK MANN	<u>NAY</u>
JOHN MANNING	<u>AYE</u>
CECIL L. PENDERGRASS	<u>AYE</u>

EXHIBIT 1

Lee Plan Goals 17, 20, 21, 26 and Policy 1.4.3 with Proposed 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)

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.~~

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.~~

POLICY 21.1.5: ~~One important aspect of the Protect Caloosahatchee Shores' Community Plan goal is to retain its 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.~~

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 24, 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.

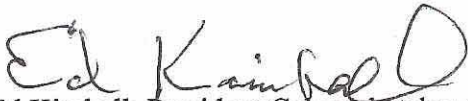
Thank you,



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

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.

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

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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.¹ 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?”

¹ 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.

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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.

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).² 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

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