



Protecting Southwest Florida's unique natural environment and quality of life ... now and forever.

June 20, 2019

Department of Economic Opportunity
Bureau of Comprehensive Planning
State Land Planning Agency
Attn: Ray Eubanks
ray.eubanks@deo.myflorida.com

Re: Impacted Wetlands, Lee County 19-05ESR

Dear Mr. Eubanks:

Pursuant to Florida Statutes Section 163.3184(3), the Conservancy of Southwest Florida submits these comments on behalf of our 7,000 supporting families as Lee County 19-05ESR is reviewed. We have participated at the Lee County meetings both by submitting written comments as well as speaking at the meetings held on March 20, 2019 and May 22, 2019.

The proposed amendments would expand the allowable uses in the Wetlands Future Land Use Category designated on the Future Land Use Map (FLUM) to include non-residential uses so long as the applicant has a permit from a state agency allowing impacts on the wetland. These proposed changes will encourage and incentivize the destruction of wetlands. The extent or intensity of the impact is unknown as the amendment allows for the non-residential use to be consistent with "adjacent uplands". The adjacent upland FLUM category could vary for each wetland and each project. This creates a self-amending policy which is prohibited by Florida Statutes.

Self-Amending Policies

A self-amending policy is "one which changes as the result of an event that is unknown and unspecified at the time the policy is adopted." Palm Bch. County Bd. of County Comm. et al. v. Town of Jupiter and Dep't of Comm. Affrs., DOAH Case No. 95-5930GM

Typically, a self-amending policy is one that provides that a certain thing (to recognize and confer non-residential uses on land designated as Wetland on the FLUM as allowed in adjacent upland areas) will occur if some other event (such as the issuance of a permit to impact wetlands) takes place. Because this other event (issuance of a permit to impact wetlands) cannot be known because the event takes place in the future and is outside of the control of Lee County, Lee County's reliance on this event (the issuance of a permit) to change the land use makes the policy self-amending.



Conservancy of Southwest Florida has been awarded Charity Navigator's prestigious 4-Star top rating for good governance, sound fiscal management and commitment to accountability and transparency. Charity Navigator is America's largest and most respected independent evaluator of charities.

As we understand the policy, what staff essentially intends on doing is treating land designated on the FLUM as Wetlands as a different designation – not Wetlands – when the landowner obtains a permit through DEP or SFWMD. The “different designation” depends entirely on what the adjacent upland designation is, and whatever uses are allowed on that adjacent upland area will, in essence, spill over onto the Wetlands designated land.

Of additional concern for the Department of Economic Opportunity is that the proposed amendments do not provide and are not based on data and analysis. The staff report is silent on this issue, however, in 2010, when the Lee Plan was changed to allow low density residential uses in Wetlands, it was stated that there were a “substantial number of projects with large wetland impacts” involving “non-residential components” but that these non-residential “uses should be able to meet floor area ratios without filling [wetlands] , through multistory structures” and recognized that that use, along with density, provides “incentive to fill wetlands”.¹ This staff report is enclosed for your review and consideration. This is evidence that this damaging policy is unneeded in addition to being contrary to good planning and inconsistent with Florida Statutes.

The Conservancy opposes policy amendments that incentivize filling wetlands. Lee County is asking for an amendment that will incentivize such wetland destruction by creating a self-amending policy that circumvents the Future Land Use Map designation change process in favor of relying on issuance of a state issued permit. This should not be allowed to happen. Lee County should be creating a system that incentivizes creative site design and incorporation of natural systems into site plans, not destruction and filling of wetlands. Wetlands are – or should be – considered a resource of statewide importance, and thus, the DEO should be able to provide comment on plans that impact wetlands.

Data and Analysis

Florida Statutes require that comprehensive plans be based on data and analysis and react to data in appropriate ways.² Lee County has failed to do this, and as such, adoption of these amendments is countervailing to good planning policies. Good planning policies provide meaningful and predictable standards for the use and development of land. Good planning utilizes and requires data, studies and surveys when amending policies and objectives. Of note is the requirement that the “distribution, location and extent of” land uses including the “building and structure intensities” allowed on the land “shall be based upon...data regarding...[t]he character of undeveloped land”.³ Lee County does not meet these standards. There is no way for Lee County to determine building and structure intensities based on their existing policies, and this amendment only furthers that problem by inviting and encouraging development at unsuitable locations. There is no data or analysis about the amount of additional non-residential development that could be permitted, the extent of these uses, or the intensity of the proposed uses.

The proposed amendments appear to assume that any wetland where an agency has granted a permit is – by virtue of this permit – rendered appropriate for the same use and intensity as the nearest adjacent upland without any consideration for where these wetlands are located, the acreage of wetlands impacted, or the role wetlands play in Lee County’s ecosystems. This is circuitous and inappropriate. The staff report is void of data and analysis supporting the assumption that wetland permitting decisions by the South Florida Water Management District (SFWMD) and Florida Department of Environmental Protections (FDEP) have protected and supported functioning wetlands, or fully mitigated permitted wetland losses in appropriate locations.

¹ Lee County Staff Report for CPA2008-18, Page 5 of 20, October 20, 2010

² Section 163.3177(1)(f), Florida Statutes

³ Section 163.3177(1)(f) , (6)(a)(2), and (8), Florida Statutes

We note for the record that another point that must be considered when reviewing this amendment is that local comprehensive plan must protect and conserve wetlands, and direct future land uses that are incompatible with the protection and conservation of wetlands and wetland functions away from wetlands.⁴ These changes do not protect or conserve wetlands, and, in fact, direct uses incompatible with conservation and protection of wetlands toward wetlands instead of away from this important resource. This is yet another example of how these changes are inconsistent with Florida Statutes.

Conclusion

Please consider this information as you review Lee County 19-05ESR. Please provide comment to Lee County that the proposed amendments are not consistent with Florida Statutes and should not be adopted. Enclosed is our letter provided to the South Florida Water Management District and the Florida Department of Environmental Protection. Please feel free to contact me if you have any questions, or need additional information.

Sincerely,



Julianne Thomas
Senior Environmental Planning Specialist
239-262-0304 x 252
juliannet@conservancy.org

Enclosure: Letter to South Florida Water Management District, and Florida Department of Environmental Protection, Lee County Staff Report CPA2008-18

- cc: Brandon Dunn, Principal Planner, Lee County
David Loveland, Director, Community Development, Lee County
Mikki Rozdolski, Manager, Community Development Operations, Lee County
Rebecca Sweigert, Principal Planner, Lee County
John Manning, Lee County Commissioner, District 1
Cecil Pendergrass, Lee County Commissioner, District 2
Brian Hamman, Lee County Commissioner, District 4
Frank Mann, Lee County Commissioner, District 5

⁴ Section 163.3177(6)(d)2, Florida Statutes



Protecting Southwest Florida's unique natural environment and quality of life ... now and forever.

June 20, 2019

Terry Manning, AICP, Senior Planner
Intergovernmental Coordination Section
South Florida Water Management District
tmanning@sfwmd.gov

Sent Via Email

Plan Review
Florida Department of Environmental Protection
Plan.Review@dep.state.fl.us

RE: Opposition to Comprehensive Plan Amendment 2019-00001(Lee County 19-05ESR)

Dear Reviewers:

On behalf of the Conservancy of Southwest Florida and our over 7,000 supporting families, we are submitting comments opposing Comprehensive Plan Amendment 2018-10014 also known as Lee County 19-05ESR. These comments are being submitted pursuant to Florida Statutes Section 163.3184(3). We did participate in Lee County meetings concerning these amendments via testimony at meetings held on March 20, 2019, and May 22, 2019. We also submitted written comments to Lee County in support of our testimony.

We are writing to you because your agencies are charged with comments related to flood protection, water pollution, floodplain management, wetlands, and other surface waters, and regional water supply. The proposed amendment will negatively impact the water and wetlands in Lee County.

Importance of Wetlands

Wetlands are among the most productive ecosystems in the world, and play an integral role in the ecology of watersheds.¹ Wetlands are vital to the health of the environment as they filter and remove pollutants. Additionally, and more importantly for southwest Florida, wetlands can help prevent flooding by temporarily storing and then slowly releasing water from storms including large storm events such as hurricanes. As we learned from Hurricane Irma in 2017, and know from many other storms, much of the damage and impacts are caused by floods and storm surge.² The benefits from wetlands in reducing flood damages cannot be

¹ <https://www.epa.gov/wetlands/how-do-wetlands-function-and-why-are-they-valuable>

² Using an extensive database of property exposure, the regional study shows that wetlands avoided \$625 Million in direct flood damages during Hurricane Sandy from "The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA" by Narayan, S. et al, Scientific Reports, 2017, available at <https://www.nature.com/articles/s41598-017-09269-z#Abs1>. This article also states that "Observations of coastal water levels during Hurricanes Katrina (2005) and Wilma (2005) show that intact mangrove wetlands reduced surge heights by up to 9.4 cm/km inland".



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overstated, as one acre of wetland is able to store up to 1.5 million gallons of floodwater.³ Coastal wetlands are a major part of “natural and nature-based” solutions, minimizing the impacts of disasters by buffering coastal communities from storms and erosion and absorbing flood waters.⁴

Lee County 19-05ESR

Lee County has proposed amendments which will change the Future Land Use Map (FLUM) outside of the FLUM amendment process to the designation of adjacent uplands when an environmental resource permit (ERP) is issued by the South Florida Water Management District (SFWMD) or Florida Department of Environmental Protection (FDEP) for non-residential activities. In doing so, Lee County is abdicating its responsibility of planning for land uses to your organizations.

We have some questions and are hoping that you can provide answers to our questions and advise Lee County that these amendments are not appropriate as your agencies do not participate in planning on a local level.

Please provide comments/answers to the following questions:

- Do either SFWMD or FDEP consider land uses in reviewing wetland permits?
- Is it the responsibility of SFWMD or FDEP to determine appropriate land uses for Lee County either as part of the wetland permitting process or other process?
- Are wetland permits considered on an individual basis or cumulatively?
- At what point are cumulative impacts considered?
- Is the environmental health of Lee County considered in the ERP process?
- What is the success of mitigation in preserving the spatial extent of wetlands?
- How often does SFWMD or FDEP deny permits impacting wetlands?

Conclusion

Permitting is not planning. In this case, Lee County is attempting to replace planning requirements with permits issued from SFWMD and FDEP. Please provide comments that acknowledge that permitting is not planning, and that SFWMD and FDEP do not intend to usurp planning responsibilities through the permitting process. Thank you for your time and consideration of our issues and concerns. If you have any questions or need additional information, please feel free to contact me at 239-262-0304 x 252 or juliannet@conservancy.org.

Sincerely,



Julianne Thomas
Senior Environmental Planning Specialist

³ “Functions and Values of Wetlands” newsletter. United States Environmental Protection Agency. Office of Water, Office of Wetlands, Oceans and Watersheds/ EPA 843-F-01-002c. September 2001, available at <https://www.epa.gov/sites/production/files/2016-02/documents/functionsvaluesofwetlands.pdf>

⁴ Sutton-Grier, A.E. & Sandifer, P.A. Wetlands (2018). <https://doi.org/10.1007/s13157-018-1039-0>

cc: Brandon Dunn, Principal Planner, Lee County
David Loveland, Director, Community Development, Lee County
Mikki Rozdolski, Manager, Community Development Operations, Lee County
Rebecca Sweigert, Principal Planner, Lee County
Ray Eubanks, Plan Processing Administrator, Department of Economic Opportunity
John Manning, Lee County Commissioner, District 1
Cecil Pendergrass, Lee County Commissioner, District 2
Brian Hamman, Lee County Commissioner, District 4
Frank Mann, Lee County Commissioner, District 5

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

LEE COUNTY COMPREHENSIVE PLAN

THE LEE PLAN

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

BoCC Adoption Document

*Lee County Planning Division
1500 Monroe Street
P.O. Box 398
Fort Myers, FL 33902-0398
(239) 533-8585*

October 20, 2010

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

Text Amendment

Map Amendment

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

STAFF REPORT PREPARATION DATE: May 17, 2010

PART I - BACKGROUND AND STAFF RECOMMENDATION

A. SUMMARY OF APPLICATION

1. APPLICANT:

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

2. REQUEST:

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

B. STAFF RECOMMENDATION AND FINDINGS OF FACT SUMMARY

1. RECOMMENDATION:

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

CONSERVATION AND COSTAL MANAGEMENT

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

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

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

TABLES

Staff recommends that the Board of County Commissioners transmit the following amendments to the "Clarifications and Exceptions" of Table 1(a) of the Lee Plan. Modifications made subsequent to the Transmittal Hearing are shown with double underline.

No changes are proposed for Table 1(a)

No changes are proposed for clarifications 1 through 7

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

(a): **no changes**

(b): Dwelling units may be relocated to developable contiguous uplands ~~from preserved wetlands~~ designated Intensive Development, Central Urban, or Urban Community, Suburban, Outlying Suburban, or Sub-Outlying Suburban from preserved freshwater wetlands at the same underlying density as is permitted for those uplands. Impacted wetlands will be calculated at the standard Wetlands density of 1 dwelling unit per 20 acres.,- so long as the uplands density does not exceed the maximum standard density plus one-half of the difference between the maximum total density and the maximum standard density; or, Planned Developments or Development Orders approved prior to October 20, 2010 are permitted the density approved prior to the adoption of CPA2008-18.

(c): Dwelling units may be relocated from ~~preserved freshwater wetlands, to developable contiguous uplands designated Suburban, Outlying Suburban, or Sub-Outlying Suburban~~ at the same underlying density as is permitted for those uplands, so long as the uplands and preserved wetlands density does not exceed eight (8) dwelling units per acre for lands designated Suburban, four (4) dwelling units per acre for lands designated Outlying Suburban, and three (3) dwelling units per acre for lands designated Sub-Outlying Suburban.

No changes are proposed for clarifications 9 through 12

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

- This amendment was initiated at the Direction of the Smart Growth Director.
- As part of County coordination with natural resource management and permitting agencies, the Lee County Board of County Commissioners directed staff to review Environmental Resource

Permits (ERP). Through the regulatory review, staff noted that the Lee Plan unintentionally provides an incentive to developers to calculate an increased density/intensity for wetland impacts.

- Through review of South Florida Water Management District (SFWMD) permits and review of zoning applications a discrepancy was noted in the amount of wetlands and uplands depicted on the SFWMD permits compared to the amount of wetlands and uplands depicted on zoning applications. Impacted wetlands were being presented as “uplands” during the zoning application review and counted in the density/intensity calculations.

C. BACKGROUND INFORMATION

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

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

PART II - STAFF ANALYSIS

A. STAFF DISCUSSION

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

Staff notes that there are two incentives to filling wetlands. These incentives are density, and use. Under current practice the filled wetland is re-designated with the adjacent upland’s designation. This equates to a substantial amount of “unrecorded” small scale plan amendments being proposed through

the Environmental Resource Permit process. The staff analysis revealed that the current practice was leading to unplanned for increases in the population accommodation capacity of the Future Land Use Map.

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

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

GOAL 114 WETLANDS:

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

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

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

[Staff notes that this policy was slightly modified at the March 3rd, 2010 Comprehensive Plan Amendment Adoption hearing. This modification is not in effect at the time of this writing.]

Reason for the Preservation of Wetlands:

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

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

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

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

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

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

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

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

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

Policy Revision:

A single policy is difficult to interpret correctly, if taken in isolation. In the review of other County Policy in the Lee Plan, the general theme is to NOT support wetland destruction. There is a theme, however, to eliminate unnecessary duplication, AND also that the County will not

undertake an independent review of impacts to wetlands from development in wetlands that is authorized by a DEP or SFWMD dredge and fill permit.

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

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

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

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

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

POLICY 114.1.2.

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

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

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

TABLES

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

No changes are proposed for Table 1(a)

No changes are proposed for clarifications 1 through 7

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

(a): **no changes**

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

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

No changes are proposed for clarifications 9 through 12

B. CONCLUSIONS

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

C. STAFF RECOMMENDATION

County staff recommends that the Board of County Commissioners transmit this amendment to correct the identified internal inconsistencies within the Lee Plan and clarify the intent of **Policy 114.1.2.(6):**

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

DATE OF PUBLIC HEARING: August 24, 2009

Note: This amendment was included in the 2008/20089 round of plan amendments. This section reflects the LPA discussion and recommendation for that amendment cycle. When the Board reviewed this amendment for transmittal, the Board decided to continue the amendment to the next amendment cycle. That board action and the subsequent second review by the LPA is included in this document.

A. LOCAL PLANNING AGENCY REVIEW

Mr. Noble provided a summary of the proposed amendment and staff recommendations. This was followed by questions and answers between the LPA; planning staff; and Wayne Daltry, Smart Growth Director. Through the questions the LPA was seeking additional information and examples of places where developers have used filled wetlands to gain additional density, amounts of wetlands filled, and how many additional units have been allowed.

Following the question and answer session, the item was opened for public comment. Three members of the public, who represented developers and large property owners, stated that they were against the proposed amendment. The LPA stated that they did not feel that they had enough information to address this item. Members of the LPA did not agree that impacts to wetlands are happening solely because of the density incentive that is provided. And further the LPA members did not agree that this regulation would have the desired result. One member stated that if the real issue is wetlands and stormwater storage, then provide the same incentive if you don't fill in the wetlands. He also reiterated that the two issues should be separated (density issue and wetland issue). Other members of the LPA stated their agreement with this.

Planning staff noted there would not be another LPA meeting before the September 23rd and 24th BOCC Transmittal Hearing. He stated the LPA could make a motion stating they did not feel enough information was provided and that they are recommending non-transmittal. The outcome of this meeting will be presented to the Board of County Commissioners.

B. LOCAL PLANNING AGENCY RECOMMENDATION AND FINDINGS OF FACT SUMMARY

1. RECOMMENDATION:

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

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

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

C. VOTE:

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

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

DATE OF TRANSMITTAL HEARING: September 23, 2009

A. BOARD REVIEW:

Staff provided a brief summary of the proposed amendment and passed out a density table for selected projects. Staff provide a short history of where the incentive came from. The incentive was intended to provide additional density if the wetland is in fact preserved. One Board member had a question and discussion concerning bonus density and affordable housing. The Smart Growth Director provided a short history of the proposed amendment. Eight members of the public appeared and provided comments.

B. BOARD ACTION AND FINDINGS OF FACT SUMMARY:

1. BOARD ACTION: The Board continued the amendment to the next regular amendment cycle to allow for additional clarification and LPA review.

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

C. VOTE:

A. BRIAN BIGELOW	AYE
TAMMARA HALL	AYE
BOB JANES	ABSENT
RAY JUDAH	AYE
FRANKLIN B. MANN	AYE

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

DATE OF PUBLIC HEARING: May 24, 2010

A. LOCAL PLANNING AGENCY REVIEW

At the May 24th hearing, the Local Planning Agency was unable to hear the request due to time constraints. The LPA continued the case to June 7, 2010.

DATE OF PUBLIC HEARING: June 7, 2010

A. LOCAL PLANNING AGENCY REVIEW

Staff reintroduced the proposed amendment and provided the additional information that the LPA had requested on August 24, 2009. After the reintroduction and a brief history explaining why the amendment was being proposed, staff presented the revised policy language to the LPA. This was followed by questions and answers between the LPA and staff. One LPA member expressed concerns specifically if developers would be able to obtain the same density by preserving all of the wetlands and counting the preserved wetlands as uplands, compared to impacting wetlands and counting them as uplands. Staff explained that each project would be different and in some instances the project would receive a reduction in density and in some cases there would be an increase. Another concern expressed by the LPA was if the wetland was of poor quality, would it not be better to mitigate in some way to offset the inferior wetland. Staff responded that some wetlands in urban areas of Lee County may fall into this category, either infested with exotics, isolated by ditches, or having their hydrological connection impaired or severed. Staff's concern is that addressing this issue would ultimately place us back into the same situation that the county finds itself in today; impacting wetlands, mitigating offsite, and counting the impacted wetlands as uplands. The best way to protect wetlands is to clarify the existing incentive that is available to developers for preservation, restoration and/or hydrological reconnection.

B. LOCAL PLANNING AGENCY RECOMMENDATION AND FINDINGS OF FACTSUMMARY

1. RECOMMENDATION:

The LPA recommends that the Lee County Board of County Commissioners transmit the proposed amendment.

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

The LPA accepted the basis and recommended findings of fact as advanced by staff.

C. VOTE:

NOEL ANDRESS	AYE
CINDY BUTLER	AYE
CARIE CALL	AYE
WAYNE DALTRY	AYE
JIM GREEN	AYE
MITCH HUTCHCRAFT	AYE
RONALD INGE	NAY

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

DATE OF TRANSMITTAL HEARING: **June 16, 2010**

A. BOARD REVIEW:

Staff reintroduced the proposed amendment and provided the additional information that had been requested on data and examples. Staff provided a brief history explaining why the amendment was being proposed, and the need for the revisions to the Lee Plan. This was followed by questions and answers between the Board and staff. One Board member opened the discussion commenting that the revisions would close a loophole that had allowed impacted wetlands to be counted as uplands when calculating density.

Board discussion also focused on impaired wetlands particularly in the urban areas. The Board wanted to know if flexibility would be incorporated into the revisions concerning wetlands that were hydrologically impaired and would the applicant be able to claim density for impaired wetlands. Staff explained that the wetland density could be transferred if the wetlands were preserved onsite. The County would not be regulating the wetland impacts but only the density that could be obtained from the wetland. The Board requested an example and Staff further explained the density process in a land use category that if the wetlands were preserved, the acreage of the preserved wetlands could then be transferred to the neighboring uplands. The Board questioned what happens when county staff does not agree with the wetland designation by state or federal agencies. Staff emphasized that the amendment was not to regulate wetlands but the amount of units or density that can be utilized. Three member of the public appeared and provided comments. One member expressed concerns about low quality wetlands and the other two members expressed support for the language revisions.

B. BOARD ACTION AND FINDINGS OF FACT SUMMARY:

1. BOARD ACTION:

The Board of County Commissioners voted unanimously to transmit the proposed amendment to the Department of Community Affairs.

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

The Board of County Commissioners accepted the findings as advanced by staff and the Local Planning Agency.

C. VOTE:

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

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

DATE OF ORC REPORT: August 27th, 2010

A. DCA OBJECTIONS, RECOMMENDATIONS AND COMMENTS:

The Florida Department of Community Affairs provided no objections, recommendations, or comments concerning the proposed amendment.

B. ACTIONS SUBSEQUENT TO THE TRANSMITTAL HEARING

After review of the proposed amendment by staff and an affected property owner, it was agreed that the existing and proposed wetlands density calculations were complicated and did not address the original intent of the “Clarifications and Exceptions” of Table 1(a). This owner also raised the concern that the proposed language would cause a project that was already approved or currently in the approval process to be rendered inconsistent with the Lee Plan. It was suggested that an exception be provided for projects with Planned Development zoning or Development Order approvals. Staff agreed and did not want to cause projects approved under existing Lee Plan provisions to be rendered inconsistent with the Lee Plan. Staff is mindful of Lee County’s exposure under the Bert J. Harris Act, and finds that once transmitted, many project approvals could be rendered invalid. Therefore staff recommends an exception for Development Orders and Planned Development zoning approved prior to October 20, 2010, recognizing that these property rights exist.

In addition, Department of Community Development staff has recently reviewed active projects for residential development within the six affected land use categories . There are three active cases that could be impacted by the proposed amendment to the wetlands density calculations (see table below)

Case Number	Case Name	Status	Prior Approval	Consistent with proposed policy revision
DOS2008-00122	Alico Lakes Village	Awaiting Resubmittal	Z-07-16 (RPD) 12-03-2007	Yes
DOS2010-00019	Freedom Subdivision	Awaiting Resubmittal	Z-07-002 (RPD) 03-18-2007	Yes
DCI2007-00034	Emerald Lakes	Awaiting Resubmittal	No	No, but project also inconsistent with current density requirements
DCI2009-00019	Cypress Hammock	BoCC hearing scheduled 10-18-2010	No	Pending BoCC hearing on 10-18-2010 - Consistent if approved

Two of the above cases involve Development Orders that have previous Residential Planned Development (RPD) approvals, and would therefore be covered by the proposed exception. Cypress Hammock is a request for an RPD. The case is pending the outcome of the Board of County Commissioners zoning hearing on October 18th, 2010. If the Board approves then the rezoning would

be covered by the proposed exception language. The Emerald Lakes project was found to be insufficient by staff on March 5th, 2010. This project would be affected by the proposed amendment, however, staff had found this project to be over density using the current methodology, and would have to be redesigned.

To simplify the wetlands density calculation, staff is recommending that the notes that follow Table 1(a) should be further revised. Specifically the additional revisions would be to note 8(b) and 8(c). Staff recommends that the limiting portion of these requirements could be removed to simplify the calculation and provide a greater incentive to preserve wetlands. The portion of the provision that would be removed is as follows: *“so long as the uplands density does not exceed the maximum standard density plus one-half of the difference between the maximum total density and the maximum standard density”*

This is consistent with the recent direction that the county has taken to preserve wetlands, and will provide a financial incentive for developers to cluster units rather than impact or fill wetlands. This is also consistent with the original intent of the wetlands density calculations, which was not to “punish” a land owner for having wetlands on their property that were not depicted on the Future Land Use Map. It would allow all of the units that would have been permitted at the underlying land use category to be clustered on the uplands portion of the site.

The proposed change would also allow staff to simplify the notes that follow Table 1(b) by creating a single formula for the six future land use categories that receive this benefit. If the future land use categories that are currently in note 8(c) were relocated to note 8(b), note 8(c) could be eliminated.

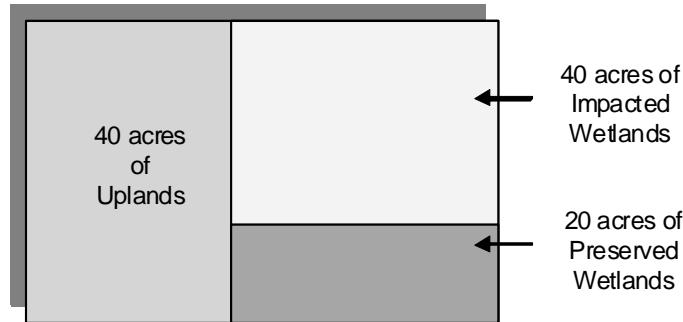
Below are the staff recommended revisions. Suggested language that has been added since the Transmittal Hearing is shown with a double underline

(b): Dwelling units may be relocated to developable contiguous uplands ~~from preserved wetlands~~ designated Intensive Development, Central Urban, ~~or Urban Community, Suburban, Outlying Suburban, or Sub-Outlying Suburban from preserved freshwater wetlands~~ at the same underlying density as is permitted for those uplands. Impacted wetlands will be calculated at the standard Wetlands density of 1 dwelling unit per 20 acres, ~~so long as the uplands density does not exceed the maximum standard density plus one-half of the difference between the maximum total density and the maximum standard density; or. Planned Developments or Development Orders approved prior to October 20, 2010 are permitted the density approved prior to the adoption of CPA2008-18.~~

(c): Dwelling units may be relocated from ~~preserved~~ freshwater wetlands, to developable contiguous uplands designated Suburban, Outlying Suburban, or Sub-Outlying Suburban at the same underlying density as is permitted for those uplands, so long as the uplands and preserved wetlands density does not exceed eight (8) dwelling units per acre for lands designated Suburban, four (4) dwelling units per acre for lands designated Outlying Suburban, and three (3) dwelling units per acre for lands designated Sub-Outlying Suburban.

Examples are provided below that demonstrate how the density of a parcel would be calculated with different degrees of preserved wetlands. These examples show a clear financial incentive for property owners and developers to preserve onsite wetlands as opposed to filling or otherwise impacting them.

Examples:

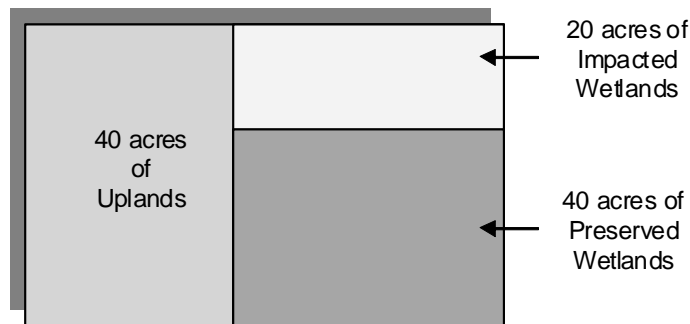


$$(Uplands + Preserved Wetlands) \times (Uplands Density) + (Impacted Wetlands \times 1/20) = \text{dwelling units}$$

Intensive Development Example: $(40 + 20) \times (14) + (40 \times 1/20) = 840$ dwelling units

Urban Community Example: $(40 + 20) \times (6) + (40 \times 1/20) = 362$ dwelling units

Outlying Suburban Example: $(40 + 20) \times (3) + (40 \times 1/20) = 182$ dwelling units



$$(Uplands + Preserved Wetlands) \times (Uplands Density) + (Impacted Wetlands \times 1/20) = \text{dwelling units}$$

Intensive Development Example: $(40 + 40) \times (14) + (20 \times 1/20) = 1,122$ dwelling units

Urban Community Example: $(40 + 40) \times (6) + (20 \times 1/20) = 482$ dwelling units

Outlying Suburban Example: $(40 + 40) \times (3) + (20 \times 1/20) = 242$ dwelling units

C. STAFF RECOMMENDATION

Staff recommends adoption of the amended language to Policy 114.1.2 as transmitted and the revised language to the notes found under Table 1(a). Complete language recommended for adoption is shown below:

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

No changes are proposed for paragraphs 1 through 5.

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

TABLES

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

No changes are proposed for Table 1(a)

No changes are proposed for clarifications 1 through 7

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

(a): **no changes**

(b): Dwelling units may be relocated to developable contiguous uplands ~~from preserved wetlands~~ designated Intensive Development, Central Urban, ~~or~~ Urban Community, Suburban, Outlying Suburban, or Sub-Outlying Suburban from preserved freshwater wetlands at the same underlying density as is permitted for those uplands. Impacted wetlands will be calculated at the standard Wetlands density of 1 dwelling unit per 20 acres, so long as the uplands density does not exceed the maximum standard density plus one-half of the difference between the maximum total density and the maximum standard density; or, Planned Developments or Development Orders approved prior to October 20, 2010 are permitted the density approved prior to the adoption of CPA2008-18.

(c): ~~Dwelling units may be relocated from preserved freshwater wetlands, to developable contiguous uplands designated Suburban, Outlying Suburban, or Sub-Outlying Suburban at the same underlying density as is permitted for those uplands, so long as the uplands and preserved wetlands density does not exceed eight (8) dwelling units per acre for lands designated Suburban, four (4) dwelling units per acre for lands designated Outlying Suburban, and three (3) dwelling units per acre for lands designated Sub-Outlying Suburban.~~

No changes are proposed for clarifications 9 through 12

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

DATE OF ADOPTION HEARING: October 20th, 2010

A. BOARD REVIEW:

This amendment to the Lee Plan was included on the Administrative Agenda due to proposed revisions to the “Clarifications and Exceptions” of Table 1(a). Staff provided a brief presentation to discuss these revisions. One revision clarified the wetlands density calculation. Staff also proposed a revision that would exempt projects that had been granted zoning approval prior to the adoption of this amendment so that past approvals would not be deemed inconsistent with the Lee Plan. These revisions are discussed in greater detail in Part VII of this report.

No members of the public addressed the Board of County Commissioners concerning this amendment. The Board of County Commissioners provided no discussion concerning the proposed amendment.

B. BOARD ACTION AND FINDINGS OF FACT SUMMARY:

1. BOARD ACTION:

The Board of County Commissioners voted to adopt the proposed amendment.

2. BASIS AND RECOMMENDED FINDINGS OF FACT:

The Board of County Commissioners accepted the findings of fact as advanced by staff and the Local Planning Agency.

C. VOTE:

BRIAN BIGELOW	<u>AYE</u>
TAMMARA HALL	<u>AYE</u>
RAY JUDAH	<u>AYE</u>
FRANK MANN	<u>AYE</u>
JOHN MANNING	<u>AYE</u>

DENSITY FROM WETLAND IMPACTS

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

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