

**MEMORANDUM
FROM THE
OFFICE OF COUNTY ATTORNEY**

DATE: July 7, 2009

TO: Board of County Commissioners

FROM: 

David M. Owen
County Attorney

RE: Potential Legal Issues Relating to the Proposed Revisions to the
Comprehensive Plan Based on the Dover Kohl Study, CPA 2008-06

My office has reviewed the proposed Comprehensive Plan Amendments for Southeast Lee County pertaining to planning for the Density Reduction/Groundwater Resource Area prepared by Dover Kohl & Partners. We have identified and are outlining several legal issues that may arise from the currently proposed changes to the Plan:

1. Vision Statement for Southeast Lee County.

The Vision Statement for Southeast Lee County references a restoration of existing farm lands. It is unclear in the text as to who will be responsible for restoring existing farmlands. If it will be the County, what is the funding source for the restoration effort? By what vehicle will this be accomplished? Lee Plan Policy 158.6.1 requires that the County assess the financial impact of new regulations on the local economy before adopting new regulations that will potentially impose new costs to taxpayers. What is the estimated cost/economic impact to the farm lands property owners for implementing restoration as envisioned by the proposed text?

Agricultural activities are typically not subject to local permitting. If existing farming operations will be required to alter a property's configuration such that less area is available for existing agricultural pursuits, the requirement may likely expose the County to potential liability under the Bert J. Harris Private Property Protection Act (Bert J. Harris Act) or to claims of taking by inverse condemnation.

2. Future Land Use Policy 1.2.2., Tradeport.

The proposed text stating that limerock mining may be approved through planned developments within the Tradeport Future Land Use category may be problematic. It creates an inconsistency within the Lee Plan. Mining is not similar to the character of development anticipated within the Tradeport category. The Lee Plan authorizes uses characterized as employment centers consisting primarily of commerce, light industrial, research, and lodging in this category. The conversion of Tradeport classified properties to mining use is not consistent with the objective of the Tradeport Future Land Use category, which is to expand the County's

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employment base and provide support to the Airport. Development within the Tradeport classification is encouraged to include a mixture of land uses that are described in Policy 1.2.2.

The County added more than 1,400 acres to the Tradeport category south of the Airport in 1994 to ensure adequate land would be available to promote the expansion of the County's employment base. (See *Lee Plan Policy 2.4.4.*) The loss of those nearly 1,400 acres of Tradeport classified lands to mining activities is not proposed for recoupment elsewhere. Lee Plan Policy 158.3.5 requires the County to ensure that adequate land is allocated in the Lee Plan to meet future commercial, industrial, agricultural, and residential needs of its residents. In order to be consistent with the Economic Element of the Lee Plan, the proposed plan amendment will need to address the potential loss of approximately 1,400 acres of land to mining activities that are currently classified for Tradeport uses.

3. Policy 1.4.5. and Policy 1.7.14.

The proposed revisions to these policies state that land use in the DR/GR must be compatible with maintaining surface and ground water at historic levels, now identified as the depths and hydroperiods based on the Kevin Erwin analysis of 1953 conditions. To the extent 1953 conditions no longer exist, the use of the word "*maintaining*" in the first sentence of the policy creates an impression that existing surface and groundwater levels may not be degraded. However, the reference to the 1953 conditions later in the policy implies an affirmative obligation to "restore" existing conditions rather than simply maintain them.

The obligation to restore is confirmed by the proposed additions to the text of Policy 1.7.14., which states in the Erwin Report and detailed analysis of 1953 aeriels that they *will be the basis for determining compliance with Policy 1.4.5.* It is clear that the expectation is that new development must restore surface and groundwater depth and hydroperiods to 1953 conditions.

If restoration to 1953 conditions is the intended result, then there is a legal issue with regard to how the restoration of water depths and hydroperiods will affect upstream and downstream property owners. Other property owners may likely be impacted if existing development approvals or farming operations were designed based on existing conditions.

If the restoration of historical flows impacts upstream and downstream property owners, this impact may likely subject the County to liability under a possible claim of inverse condemnation. Recent case law from of the Florida First District Court of Appeals advises that alteration of existing water flow patterns creates liability on the local government, *even if the changes in water patterns are to restore historic conditions*, if the alterations of the existing conditions result in negative impacts to other property owners. (See also *Policy 30.1.3.*, which reiterates the requirement to restore depths and hydroperiods to 1953 levels.)

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It is also unclear who will perform the restoration on agricultural properties currently in operation on the date of the proposed Plan amendment. Is the restoration requirement applicable only to new Agricultural operations, or is it intended to apply to existing operations as well? If the restoration of flows, etc., impact areas that could otherwise be placed into active agricultural use, will this adversely impact the "right-to-farm" as protected by Florida Statutes? Typically, agricultural operations are not subject to the local development permitting process. There is a question as to how the restoration requirement to be implemented. It is not clear who will be responsible for performing the restoration referenced in connection with agricultural properties.

4. Policy 1.4.5.2.c. - Density Reduction Groundwater Resource Policy

Proposed language in subsection c, may expose the County to liability under the Bert J. Harris Act. Existing mines are not subject to the extinguishment of residential density for lake areas mined. The application of the proposed language to existing mining operations will result in a loss of development expectations that exist today. Further, the exclusion of mining lakes from the area considered for the purposes of calculated residential density differs from the standard that is applicable elsewhere in the County, where man-made lakes are typically considered in the calculation of residential density. The proposed text in Policy 30.3. reiterates that mining activity extinguishes the property owner's right to utilize lake area for the calculation of density on the property. This loss of post mine development potential may likely expose the County to liability under the Bert J. Harris Act on existing operations and may possibly subject the County to liability on future proposed operations as well.

The following text within Proposed Policy 1.4.5.2.c should be deleted from consideration:

c. Residential uses, other than a single bonafide caretaker's residence or a resident manager's unit, are not permitted in conjunction with private recreational uses or mining activities. Residential density associated with land zoned Private Recreational Facility will be extinguished and cannot be transferred, clustered, or otherwise assigned to any property in accordance with Policy 16.2.3. Residential density of mined land will be extinguished unless it is transferred to an eligible property in accordance with Policy 30.3.3.

The text regarding Private Recreational Facilities is unnecessary. The last sentence does not recognize post mining density approval existing at this time as discussed above. It also does not account for the market factors and future Commission vision(s) that may prevail in the future, when post mining development approvals will be actually sought.

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5. Policy 1.4.5.d. (Policy 1.7.12 and Map 14).

Subsection d. of Policy 1.4.5. states that sufficient land exists near a traditional Alico Road corridor to meet the regional demand for limerock to 2030. However, Map 14 includes approximately 1,400 acres in the Tradeport category (mentioned previously in Paragraph 2., above), as well as significant acreage in the DR/GR proximate to the University Community that is owned by persons who have expressed no intention to pursue mining. Certain areas south of Alico Road, if mined as recommended by proposed Map 14, will impact existing communities and the University. This potential impact is contrary to Goal 10 of the Lee Plan, which discourages the approval of natural resource extraction operations, if adverse effects on surrounding land uses cannot be minimized or eliminated.

Map 14 should be modified to remove the above referenced areas from the classification of "preferred mining". The removal of this property will likely require the designation of new/additional other lands in order to maintain the representation that sufficient land is designated to meet the region's need for limerock to 2030.

6. Policy 1.7. Public Acquisition Overlay.

This policy states that the Public Acquisition Overlay does not restrict the use of land "in and of itself," but this is less clear in the policies under Goal 30. It would be helpful to reiterate the point in the Objectives and Policies that follow Goal 30.

7. Policy 1.7.13. - Rural Residential Overlay (Map 17); Policy 30.2.3.2.(c). and references to Transferred Development Rights

These policies and Map identify Mixed Use Communities along State Route 82 (SR 82) as a preferred area to cluster development of commercial, industrial, and residential uses. These Mixed Use Communities are also identified as potential receiving sites for Transferred Development Rights ("TDR's") created within the DRGR. The goal of concentrating development within nodes along the south side of the SR 82 corridor is first stated in Policy 1.7.13 by reference to Map 17 and then reiterated in Policy 30.2.3.2.(c). SR 82 currently operates below the adopted level of service on all segments. For this reason, no development orders or building permits can be issued along this corridor unless construction of improvements to widen SR 82 are included in the first three years of the FDOT five-year work program. As of today, there is only a PD&E Study underway for improvements east of Lee Boulevard. No funds are identified in the five or ten-year work program for right-of-way acquisition, permitting or construction. Moreover, Lee Plan Map 3A (2030 Financially Feasible Transportation Plan) does not reflect improvements to SR 82 until 2030. Finally, the MPO Long Range Transportation Plan does not include

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improvements to SR 82 east of Lee Boulevard as a financially feasible improvement by 2030. Given these facts, it is not reasonable to assume the development of Mixed Use Communities along SR 82, because permitting cannot be achieved within the current planning horizon of the Lee Plan.

Regarding the proposed creation and use of TDRs, it is our understanding that the details of the TDR program will be released shortly in the form of a report. Once our office has had an opportunity to review this report, further adjustments to the proposed Lee Plan Policies may be necessary to ensure the viability of the TDR program.

8. Proposed Policy 30.1.1. - Proposed Policy for Limerock Mining

This policy may potentially subject the County to claims under the Bert J. Harris Act. Policy 30.1.1. states that new and expanded limerock mines will be allowed *only in the areas identified on Map 14*. Mining will be precluded in other areas until there is a "clear necessity" to do so and Map 14 is amended through the comprehensive plan amendment process. Exposure to liability under the Bert J. Harris Act arises from restricting other areas containing material suitable for limerock mining within Southeast Lee County from mining pursuits. These properties are precluded from limerock mining unless it can be established there is a "clear necessity" to expand the areas already designated for mining on Map 14. The Lee Plan must be amended to change Map 14 to include the property before an application to mine may be considered by the County.

Further, to the extent Map 14 designates property that is not currently mined as preferred mining areas, it is important to establish that there is sufficient credible data (soil borings, etc.) to substantiate the designation of those properties as suitable for mining.

9. Proposed Policy 30.1.4., Subsections 1 through 3. - Limerock Mining

These new policies may negatively impact the ongoing efforts to achieve settlement of the current Florida Rock lawsuit. Settlement discussions are currently underway to achieve a resolution and the proposed policies are inconsistent with the direction of those discussions.

Proposed Policy 30.1.4.1. limits an existing mine with development order approval from amending the development order to dig a larger pit on the property. The County may face challenges under the Bert J. Harris Act, since the right to apply for an expansion of a mine footprint is currently available under our existing regulations.

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The text in proposed Policy 30.1.4.2. is not consistent with the text in 30.1.4.1. The new Land Development Code regulations combine zoning and development order processes into one permitting procedure for mining operations.

10. Policy 30.2.4. - Restoration of Critical Lands in Southeast Lee County.

There is no identified funding source for the proposed restoration effort. In what permitting context does Lee County have the ability to impose restoration on property that is not seeking approval to mine pursuant to Map 14? Agricultural operations do not require local permits for the most part. If scattered large lot residential development continues in the areas outside of preferred mining, there is no identified means for accomplishing the restoration of those lands. Lee Plan Policy 158.6.1 requires an assessment of the financial impact of proposed regulations prior to adopting the new regulation. Has the financial impact to private property owners been performed and analyzed? If the County is to bear some or all of the cost of that restoration, there is no proposed funding source for this restoration effort.

11. Policy 30.3.5. - Proposed Policy for Residential Mixed Use Development

Proposed Policy 30.3.5. states that Lee County will establish *and fund* a DR/GR TDR bank that will offer to purchase development rights for resale. Again, a funding source for this program has not been identified.

These are some initial legal issues that need to be addressed by staff and the Board as they proceed with the consideration of the Lee Plan amendments proposed by Dover Kohl & Partners. We will address them in additional detail as the Comprehensive Plan revisions progress.

DMO/dm

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