

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA DUBIN, WILLIAM DUBIN, and)
GREATER PINE ISLAND CIVIC)
ASSOCIATION, INC.,)
)
Petitioners,)
)
vs.) Case No. 99-2047GM
)
LEE COUNTY,)
)
Respondent,)
)
and)
)
GREGORY EAGLE,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Lawrence P. Stevenson, held a formal hearing in the above-styled case in Fort Myers, Florida, on August 17 and 18, 1999.

APPEARANCES

For Petitioners: Thomas W. Reese, Esquire
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For Respondent: Thomas L. Wright, Esquire
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether PAM 98-01, a small scale amendment to the future land-use map ("FLUM") of the Lee County Comprehensive Plan (the "Lee County Plan" or the "Plan"), changing the future land-use designation of approximately 9.9 acres of land on Pine Island from Rural to Outlying Suburban, complies with the requirements of the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part II, Florida Statutes.

PRELIMINARY STATEMENT

On May 3, 1999, Petitioners filed with the Division of Administrative Hearings a pro se petition for a formal administrative hearing, pursuant to Section 163.3187(3), Florida Statutes. The petition alleged that PAM 98-01, adopted by the Board of County Commissioners of Lee County (the "Board") on April 13, 1999, was not in compliance with Chapter 163, Part II, Florida Statutes. On May 7, 1999, the case was assigned to the undersigned.

Also on May 7, 1999, Gregory Eagle filed a motion to intervene on the side of Respondent. The motion was granted by an order entered June 1, 1999.

On May 17, 1999, Intervenor filed a Motion to Dismiss the petition, citing several deficiencies in that pleading and requesting that the petition be dismissed without prejudice to Petitioners filing an amended petition curing the alleged defects. On June 9, 1999, Petitioners (now represented by counsel) filed a Motion for Leave to Amend, attaching an amended petition that appeared on its face to cure the defects cited in Intervenor's motion to dismiss. On June 15, 1999, an order was entered granting Petitioners' Motion to Amend and Deeming Intervenor's Motion to Dismiss Mooted Thereby.

On June 7, 1999, the undersigned issued a Notice of Hearing that set the final hearing in this matter for September 15 and 16, 1999. In so doing, the undersigned overlooked the requirement of Section 163.3187(3)(a), Florida Statutes, that hearings on small scale amendments be held not less than 30 days nor more than 60 days following the filing of a petition and the assignment of an Administrative Law Judge. This oversight was noted by Intervenor's Motion to Set Expedited Hearing, filed June 23, 1999. On June 25, 1999, the undersigned issued an Order Rescheduling the Hearing for July 6-9, 1999.

On June 28, 1999, Petitioners filed a response to the Motion for Expedited Hearing, asserting that Intervenor had waived his right to an expedited hearing by his delay in requesting same. Petitioners requested that the hearing not be held before July 28, 1999, due to witness unavailability. A telephonic

hearing was held on June 29, 1999. By order issued on that date, the undersigned concluded that the statute does not provide for involuntary waiver and that its requirement concerning the scheduling of hearings is mandatory. The undersigned also noted that, given the circumstances, Petitioners would be granted a measure of flexibility in presenting their case, with the cooperation of Respondent and Intervenor.

On July 2, 1999, Intervenor, by letter notified the undersigned that he waived the 60 day hearing requirement of Section 163.3187(3)(a), Florida Statutes. On July 6, 1999, a telephonic hearing was held during which the parties agreed to hearing dates of August 17-19, 1999.

On July 9, 1999, Intervenor filed a Motion for Summary Final Order, contending that Petitioner Pine Island Civic Association (the "Civic Association") lacked standing to maintain its petition. The Civic Association filed its response in opposition to the motion on July 19, 1999. On July 23, 1999, an order was entered denying the motion, because it appeared that the extent of "business activities" engaged in by the Civic Association was a matter of factual dispute and thus not a proper subject for summary adjudication.

On August 9, 1999, Petitioners filed a motion to amend their first amended petition to include additional rule citations and Lee County Plan objectives and policies. At the outset of the

final hearing, Respondent and Intervenor stated they had no objection to the motion, which was granted ore tenus.

At hearing, Petitioners presented the testimony of Barbara K. Dubin, a resident and landowner on Pine Island; Betsie Newton Hiatt, a senior environmental planner with Lee County and an expert in environmental planning; Matt Noble, a planner with Lee County and an expert in land-use planning and comprehensive land-use planning; William M. Spikowski, a city planner and expert in land-use planning, comprehensive land-use planning, and the use and interpretation of the Lee County Plan; and public comment from Pine Island residents Paul Holloway, Anna Stober, Edith Schulte, and Tanya Player. Petitioners' Exhibits 1 through 5 and 8 through 11 were received into evidence.

Intervenor presented the testimony of Rae Ann Boylan, president of Boylan Environmental Consultants and an expert in environmental land-use planning; James Banks, a professional engineer and an expert in transportation engineering, transportation planning, and land-use planning as it relates to transportation issues; and Greg Stuart, a planner and expert in comprehensive land-use planning, land-use planning, and the use and interpretation of the Lee County Plan. Intervenor's Exhibits 3, 4, 8 through 17, 19, 21, 22, 24 through 27, 30, and 31 were received into evidence. Respondent called no witnesses and offered no exhibits, but adopted the testimony and exhibits presented by Intervenor.

The Transcript of hearing was filed September 17, 1999. Petitioners filed a Proposed Recommended Order on October 18, 1999, and Intervenor filed a Proposed Recommended Order on October 19, 1999. On November 4, 1999, Respondent filed a notice that it adopted the proposed recommended order of Intervenor.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record of this proceeding, the following findings of fact are made:

Parties

1. Petitioners, Barbara Dubin and William Dubin, are residents and property owners on Pine Island in the portion of Lee County affected by PAM 98-01. Ms. Dubin testified that she and her husband timely participated in the adoption process and made their objections before the Lee County Local Planning Agency (the "LPA") and the Board. No evidence was offered to contest Ms. Dubin's testimony on this point. Therefore, the Dubins are each "affected persons" as that term is used in Sections 163.3184(1)(a) and 163.3187(3)(a), Florida Statutes, and have standing to file a petition challenging the adoption of PAM 98-01.

2. Ms. Dubin is a member of the Civic Association and knowledgeable regarding its activities. She testified that the Civic Association has been incorporated as a not-for-profit corporation in the State of Florida for at least the past ten

years. The purpose of the Civic Association is the preservation and protection of the environment and quality of life of Pine Island. The Civic Association has between 130 and 160 members, all of whom reside on Pine Island.

3. Ms. Dubin testified that the Civic Association owns land and a building on Pine Island, at the intersection of Pine Island Road and Stringfellow Road, near the 9.9-acre parcel that is the subject of PAM 98-01. The Civic Association uses this building for its meetings, conducted monthly for ten months of the year with a break during the summer months.

4. The Civic Association collects member dues within Lee County, and has a bank account in Lee County. It conducts educational activities, monthly meetings, publishes a monthly newsletter containing educational information concerning Pine Island land-use and quality of life issues, and participates in governmental meetings concerning Pine Island.

5. Through members who spoke on its behalf, the Civic Association participated in the adoption process and objected to PAM 98-01 at the LPA hearing and the Board meeting at which the amendment was adopted. The Civic Association is an "affected person" as that term is used in Sections 163.3184(1)(a) and 163.3187(3)(a), Florida Statutes, and has standing to file a petition challenging PAM 98-01.

6. Respondent, Lee County, is the local government whose land-use plan amendment is at issue in this proceeding.

7. Intervenor, Gregory Eagle, is the owner of the real property that is the subject of PAM 98-01, and has standing to participate as a party in this proceeding.

Pine Island

8. The Greater Pine Island Area is located in Lee County west of the City of Cape Coral, south of the open waters of Charlotte Harbor, east of Captiva Island, North Captiva Island and Cayo Costa Island, and north of Sanibel Island. The Greater Pine Island Area consists of Pine Island, Little Pine Island, and the historic community of Matlacha, which is located on the Pine Island Road Causeway across the Matlacha Pass Aquatic Preserve between Little Pine Island and the Lee County mainland.

9. The waters surrounding the Greater Pine Island Area are the waters of the Matlacha Pass Aquatic Preserve to the east, San Carlos Bay to the south, the Pine Island Sound Aquatic Preserve to the west, and Charlotte Harbor to the north.

10. Pine Island is a long, narrow, roughly rectangular island, with the long sides running north and south. The island is roughly 16 miles long and two miles wide.

11. Existing communities and residential development on Pine Island are essentially confined to five parts of the island. At the far north end of the island is the fishing community of Bokeelia, where the Dubins live. A golf course sits just south of Bokeelia. A residential development called Pineland is situated on the island's northwest coast, between Bokeelia and

Pine Island Road. At the center of the island, at the junction of Pine Island Road and Stringfellow Road, is the Pine Island Center, which is the main urban area of the island. A residential development called Flamingo Bay is situated between the Pine Island Center and the south end of the island. At the south end of the island is the small fishing village of St. James City.

12. Matlacha is a small historic village that grew up around the Pine Island Causeway, which was built in the early decades of this century to connect Pine Island to the mainland. Lee County has designated parts of Matlacha as an historic district.

13. Lee County statistics indicate a total of 26,393 acres on Pine Island, 13,693 acres of which are reserved for conservation uses. The existing land-uses of the remaining approximately 12,700 acres are as follows: 6,032 acres are vacant or undeveloped; 3,273 acres are used for active and passive agricultural activities; 2,084 acres are used for residential activities, including 822 acres classified as rural; 138 acres are used for commercial activities; 24 acres are used for industrial activities; and 1,148 acres are allocated for public uses.

14. The current permanent population of Pine Island is 10,511 persons, and the seasonal population is 15,900 persons. There are currently 5,954 dwelling units on Pine Island.

15. In 1990, the population of Pine Island was 7,300 persons, and the number of dwelling units was 5,520. The Lee County Plan recognizes and gives priority to property rights previously granted for about 6,800 additional dwelling units in Policy 14.2.2, set forth infra in the discussion of Transportation Need Projections.

Lee County Plan

16. In 1984, Lee County adopted its first official FLUM as an integral part of the Lee County Plan. On that initial FLUM, Intervenor's property was divided into two land-use categories: Urban Community and Rural. The maximum standard density for the Urban Community designation established by the 1984 Plan was six dwelling units per acre (du/ac). Maximum density for the Rural designation was 1 du/ac.

17. In 1985, the Florida Legislature passed the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part II, Florida Statutes. In 1987, the Civic Association hired a professional planner to study the Greater Pine Island Area and prepare recommendations that Lee County could incorporate in its 1989 revision of the Lee County Plan, pursuant to the 1985 legislation.

18. In 1988, the Civic Association issued the resulting study, which provided a description of the population, generalized land-use and zoning patterns, historic and archaeological resources, the area's transportation network, and

the availability of public services such as potable water and sewer facilities as of 1987. The "development suitability" of Intervenor's property was discussed in relation to the listed items as well as hurricane evacuation and the condition of Pine Island and Stringfellow Roads.

19. The study made extensive recommendations to amend the Lee County Plan, and was used by the Civic Association as the basis for initiating amendment PAM/T 88-07 to the Lee County Plan.

20. Lee County staff analyzed and evaluated the recommendations of the study, and incorporated many of them into the 1988/89 update of the Lee County Plan, including what is now Goal 14 relating to Greater Pine Island. As to the property at issue in this proceeding, staff recommended that the land-use category be changed to all Rural. The FLUM was indeed amended to include all of the subject property in the Rural category.

21. William Spikowski, who was the Lee County planner in charge of preparing the 1988/89 update to the Lee County Plan, testified that the intent was to limit most industrial and commercial development on the island to the Pine Island Center, which was given the Urban Community designation allowing the greatest number of mixed and nonresidential uses.

22. Mr. Spikowski testified that the lines around this area were tightly drawn to clearly separate urban from rural uses,

with some exceptions where the intensities "stepped down" to recognize existing development.

PAM 98-01

23. Since about 1992, Intervenor has owned 58 acres of vacant land approximately 3/4 of a mile south of the intersection of Pine Island Road and Stringfellow Road. The 9.9-acre property that is the subject of PAM 98-01 is a portion of this 58-acre parcel, and is currently zoned CC and CG, both commercial zoning designations.

24. The 58-acre parcel has been considered for a change in land-use classification three times since 1989, when it was excluded from the adjacent urban center of Pine Island and given a Rural designation. This parcel was the only commercially-zoned property adjacent to the urban center that was excluded from the urban center in 1989. Prior to 1989, as noted above, the subject parcel was designated as Urban Community in the Lee County Plan. The change of the parcel from Urban Community to Rural in 1989 was not challenged at the time it was adopted.

25. On two prior occasions, the Board has considered but not approved proposals that would have returned the full 58-acre parcel to an urban land-use designation; on another occasion, the Board rejected a proposal that would have effectively locked the parcel out of any urban use designation.

26. Greg Stuart, an expert in land-use planning who sits on the LPA, testified that the county's concern with the earlier

proposals was a reluctance to change the entire 58-acre parcel to an urban land-use and thus increase population capacity on the island. PAM 98-01 was in part an attempt to satisfy this concern by proposing a change for a smaller portion of the tract, and to the least intense urban use available.

27. Matt Noble, Lee County's principal planner, also testified that he believed the smaller area and less intense classification were factors in the Board's decision to approve PAM 98-01. He added that another factor in the Board's approval of PAM 98-01 was that this property "appears to have been singled out" in the 1988 amendment cycle, in that it was the only commercially-zoned property adjacent to the Pine Island Center not to have been included in the Pine Island Center.

28. Immediately south of the 58 acre parcel is a vacant Rural designated parcel with AG-2 and RM-2 zoning. South of this vacant parcel are three parcels (two Rural designated, one Wetlands designated) owned by the Greater Pine Island Water Association. The Water Association has constructed a reverse osmosis ("RO") plant on one of the Rural parcels.

29. Immediately south of the RO plant site is the Island Acres Subdivision, with a Rural designation. On June 5, 1995, the Board approved a rezoning of this property to RPD, which permits the development of 31 single-family residential dwellings on lots ranging from just over one acre to just over 1/2 acre, the excavation of a 12.23-acre lake, and an 8.55-acre wetland

preserve area. As of the submission of the Staff Report on April 13, 1999, the internal roads of Island Acres Subdivision had been constructed but no dwellings had yet been built.

30. Immediately east of Intervenor's 58-acre parcel are vacant lands designated Rural and Wetlands. To the west is Stringfellow Road, and on the west side of Stringfellow Road is a 134-acre vacant parcel designated Rural. Additional vacant land designated Rural is on the west side of Stringfellow Road.

31. To the north of and abutting Intervenor's 58-acre parcel is a developed property with a Huntington Bank building. This property is zoned CC and CG, and is split between Urban Community and Rural land-use designations. To the north of the Huntington Bank parcel is a Winn-Dixie Shopping Center, zoned C-1A and located within the Urban Community of Pine Island Center.

32. In summary, while Intervenor's parcel is the only commercially-zoned property adjacent to the Pine Island Center that does not also have an Urban land-use designation, it is also the case that the only urban or commercial development in the vicinity is to the north of Intervenor's property, with the exception of the RO plant.

33. Mr. Noble testified that Intervenor's parcel is served by public services at least to the same extent as the nearby properties included in the Pine Island Center designation. Mr. Noble agreed that the Staff Report's notation that there is

no sewer service available to Intervenor's property was not a unique characteristic of this property; in fact, there is no central sewer service on Pine Island that property owners at large may tap into.

34. As noted above, there are over 600 acres of land in the Greater Pine Island Area with commercial zoning. This acreage includes vacant land in the Pine Island Center with a current land-use designation of Urban Community, which indicates "a mixture of relatively intense commercial and residential uses," "distinctly urban" but developed at "slightly lower intensities."

35. PAM 98-01 would change the land-use designation of Intervenor's vacant 9.9-acre parcel from Rural to Outlying Suburban, increasing the permissible residential density from 1 du/ac to 3 du/ac, an increase of 20 dwelling units, assuming the entire parcel is developed residentially.

36. Intervenor's application proposed 25,000 square feet of commercial development on three acres of the parcel, and 21 dwelling units on the remaining acreage. The Staff Report pointed out, however, that Lee County cannot condition the requested change in land-use designations to limit development potential to this proposed scenario. Therefore, the Staff Report applied the most intensive scenario of retail commercial uses that could occur on the property.

37. At the hearing, Mr. Noble, Lee County's lead planner on this application, testified that while the staff's conclusions

were based on commercial uses, the residential aspects of the project were also evaluated in the section of the Staff Report dealing with population accommodation.

38. The Staff Report concluded as follows:

The subject property has had quite a long history concerning it's [sic] future land-use designation. The property's owners have consistently been requesting an increase in density and intensity, while the citizens of Pine Island, just as consistently, have been opposed. This request is the smallest in area to date, with the least intensive increase in density and intensity. The owner argues that, under the current designation, the property is not developable. This contention would appear to be invalid, given the development of the Island Acres subdivision, immediately to the south of the RO plant.

Pine Island is a unique place with considerable constraints to development as an urban area. With no increase in land-use designation, the level of service on Pine Island Road and Stringfellow Road will operate below the adopted standard before the year 2020. The thresholds established by Policy 14.2.2 will be exceeded by the year 2005.

Limited access and it's [sic] location in regards to hurricane vulnerability make it difficult to entertain or justify increases in density and/or intensity. There are ample areas currently designated on the island to accommodate the proposed development scenario. The full range of urban services, such as sanitary sewer and mass transit, are not and will not be available to this site.

This would be the first land-use amendment on Pine Island since the 1988 Pine Island Land-use Study was incorporated into the Lee Plan. Even though a considerable amount of time has passed since the study's

completion, few changes in the condition of the island have occurred.

Staff concludes that there are viable uses allowed on this property. Staff can see no compelling reason to support this proposed land-use amendment. While the impact of ten acres changing from a Rural designation to the Outlying Suburban category, when looked at on a county wide basis, is minimal, the unique circumstances on Pine Island do not support this change.

39. The LPA voted against adoption of PAM 98-01 by a vote of 4-1, with two members (including Mr. Stuart, who worked on the project for Intervenor) abstaining. The LPA adopted the findings of fact set forth in the Staff Report, and added its concern with maintaining the current line of separation between urban and suburban uses. One LPA member did comment that "if there is another shopping center site on Pine Island, it's probably this property," and in the "long run" there may be a need for another shopping center on Pine Island.

40. The Board voted 3-2 to adopt PAM 98-01, finding that "the request would result in minimal impacts to such services as transportation, public safety, schools, and population accommodation."

41. The petition filed by Petitioners, as amended, raised the following issues of fact and law:

a. Data and Analysis: that PAM 98-01 is unsupported by data and analysis for increased residential and commercial designation on Pine Island and thus is not in compliance with Section 163.3177(8) & (10)(e), Florida Statutes, and Rules 9J-5.005(2), 9J-5.006(2)(b) & (c), and 9J-

5.006(5)(a) & (g), Florida Administrative Code.

b. Coastal Hazard: that PAM 98-01 is not in compliance with Section 163.3178(2), Florida Statutes, and Rules 9J-5.006(2), 9J-5.012(3), and 9J-5.012(3)(b)6., Florida Administrative Code, because it directs population to the known or predictable coastal high hazard area.

c. Land-use Suitability: that PAM 98-01 is unsupported by data and analysis supporting the suitability of land for increased residential density or intensity of commercial development and thus is not in compliance with Section 163.3177(6)(a), Florida Statutes, and Rules 9J-5.006(2), 9J-5.006(2)(b), and 9J-5.006(5)(a) & (g), Florida Administrative Code.

d. Internally Inconsistent: that PAM 98-01 is internally inconsistent with the following Lee County Plan goals, objectives, and policies:

(1) Policy 5.1.2 prohibiting residential development where physical constraints or hazards exist, or requiring the density and design to be adjusted accordingly. Constraints or hazards include flood, storm, or hurricane hazards, and environmental limitations.

(2) Goal 14 requiring that the management of growth on Pine Island maintain the island's unique natural resources and character, and insure that island residents and visitors have a reasonable opportunity to evacuate when a hurricane strike is imminent.

(3) Objective 14.1 requiring that Pine Island have no unnecessary loss of native upland vegetation or habitat.

(4) Policy 14.2.2, set out in full above, concerning future development regulations to limit future development approvals when traffic reaches certain thresholds.

(5) Objective 14.3 requiring that county regulations, policies and discretionary actions to recognize "certain unique characteristics" of Greater Pine Island justifies different treatment of existing and future residential areas than in mainland Lee County.

(6) Goal 75 protecting human life and developed property from natural disasters.

(7) Objective 75.1 and Policies 75.1.2 and 75.1.4 concerning densities in coastal high hazard areas.

(8) Objective 77.2 and Policies 77.2.3 and 77.2.6 concerning protection of natural plant communities.

(9) Policy 77.4.4 restricting the use of protected plant and wildlife species habitat to that which is compatible with the requirements of endangered and threatened species and species of special concern.

(10) Policy 77.8.1 concerning the protection of gopher tortoise burrows.

(11) Goal 79 and Objectives 79.1 and 79.2 concerning evacuation times and shelter capacity.

e. Inconsistent with State Plan: that PAM 98-01 is inconsistent with Section 187.201(7)(b)23, Florida Statutes, which concerns protecting life and property from natural disasters such as hurricanes, and Section 187.201(10)(a), Florida Statutes, which concerns protecting natural habitats and ecological systems.

Suitability

42. In 1989, Lee County's Department of Community Development prepared the Pine Island Commercial Study, in response to a general directive by the Board to develop a means of identifying future commercial sites throughout Lee County, and in direct response to issues emerging from the review of two specific commercial zoning cases on Pine Island. The Commercial Study was initiated to research, analyze, and quantify commercial zoning needs for Pine Island, and then identify suitable locations for potential future development.

43. The Commercial Study concluded that in 1989 there were over 600 acres of commercially-zoned property on Pine Island, and that this acreage was "far in excess of any possible need, even at build-out, of Pine Island." The study went on to say:

However, it is recognized that not all the lands currently zoned commercially are in advantageous locations, nor are they in appropriate land-use categories. In fact, properties in locations with strong market demand and good transportation access and suitable lot sizes are relatively limited.

44. The Commercial Study also concluded that much of the land already zoned for commercial use was zoned C-1 and C-1A, "carryover" categories from older Lee County ordinances based on "pyramid" zoning, i.e., they also allowed residential uses. The study found that the most desirable solution to this problem would be to rezone these properties to non-commercial categories, but recognized the prohibitive cost of such a "relatively massive undertaking." It recommended the more practical option of modifying zoning regulations to make it clear that retail commercial uses can only be located within "designated commercial nodes," regardless of their zoning categories.

45. The Commercial Study also concluded that additional retail uses would be needed on Pine Island as the population grows, although current uses were adequate to meet existing needs "until the year 2000," and that commercial development should be concentrated in the Pine Island Center, with possible convenience store sites at St. James City and Bokeelia.

46. Approximately 236 acres were identified in the Commercial Study as appropriate commercial areas. The Commercial Study stated that this was more than four times the amount needed for 1990 retail and general commercial uses. Mr. Spikowski testified that it is typical for more property to be zoned commercial than is actually needed, because land owners are attempting to maximize the value of their property. He testified that a "slight surplus," in the range of 15 to 25 percent, is appropriate to avoid giving a few land owners a monopoly on future development. The property at issue in this proceeding was not included in the 236 acres deemed appropriate for commercial development.

47. Despite several efforts from 1990 through 1993, no amendment establishing these commercial nodes was ever adopted by the Board. Ultimately, the Civic Association itself withdrew its support for the commercial nodes plan, stating that the plan as proposed would promote commercial strip development and commercial sprawl.

48. In 1993, the Board adopted Policy 14.4.3, which would have required Lee County staff to update the Commercial Study in 1995. However, no such update was ever undertaken, and in 1998 the Board amended the Lee County Plan to delete Policy 14.4.3. The staff report recommending deletion of the policy noted that current demand for commercial sites had been minimal and did not warrant a full scale update of the Commercial Study, and

concluded that the 1989 Commercial Study was "still a current document" not in need of an update.

49. The Lee County Plan incorporates a "planning community" concept through an overlay, commonly referred to as the "FLUM 2020 Overlay," that establishes certain acreage allocations for uses that can occur within 20 discrete planning areas before the year 2020. Pine Island is one of these planning areas.

50. The FLUM 2020 Overlay is intended to allocate development throughout the county and prevent excessive development in particular land-use categories beyond the projected need. The FLUM 2020 Overlay allocates development on Pine Island through the year 2020 as follows:

<u>Category</u>	<u>Allocation</u> (in acres)
a. Intensive Development (for Residential Development)	5
b. Urban Commercial (for Residential Development)	526
c. Suburban (for Residential Development)	636
d. Outlying Suburban (for Residential Development)	466
e. Rural (for Residential Development)	1,129
f. Outer Island (for Residential Development)	37
g. Wetlands (for Residential Development)	88
h. Commercial	165
i. Industrial	64

j. Public	1,722
k. Active Agriculture	2,313
l. Passive Agriculture	960
m. Conservation	13,693
n. Vacant	<u>4,586</u>
Total	26,390

51. Below this list of allocations is a table called "Non Regulatory Allocations," which shows a total of 26,393 acres, slightly different from the total derived above. The "Non Regulatory Allocations" table lists 13,738 acres as conservation lands, leaving 12,700 acres. An additional 4,586 acres are designated "Vacant" in the "Non Regulatory Allocations," but their land-use designation is not identified.

52. The FLUM 2020 Overlay provides for 165 acres of commercial development on Pine Island by the year 2020. Mr. Spikowski testified that Lee County's database indicated that as of 1997 there were 138 acres developed commercially on Pine Island, leaving a need of 27 acres of vacant land for commercial development before the year 2020.

53. Mr. Noble, the principal planner for Lee County, testified that his conclusion, reflected in the Staff Report, was that there is no need for additional commercial or urban lands on Pine Island, and that approval of PAM 98-01 would cause unnecessary commercial development on Pine Island. He testified

that these conclusions were largely based on the findings of the 1989 Commercial Study of Pine Island.

54. Mr. Noble also testified that, despite his conclusion as to the lack of need for commercial development, the FLUM 2020 Overlay allocates sufficient acreage to accommodate the property involved in PAM 98-01 without requiring an amendment to the overlay.

55. Mr. Noble testified that no effort was made to update the findings of the 1989 study, because none was needed. He testified that there has been very little rezoning or development activity on Pine Island since 1989 aside from some clearing for agricultural uses, and therefore the 1989 study represents the best available data.

56. Mr. Spikowski agreed with this assessment, testifying that while the 1989 study is somewhat out of date, it still provides good information on how much commercial development is needed to serve the community. Mr. Spikowski testified that the study still provides more information than exists for other parts of Lee County regarding the relationship between commercial development and commercial zoning.

57. Mr. Noble admitted that the county's capabilities in collecting and categorizing data have improved since 1989, but did not agree that revising the study would result in improved information, because the county's zoning information is so inaccurate that one could not rely on the existing land-use data

base to update the study. Thus, despite the fact that the county's data base is now linked to the property appraiser's records on a parcel by parcel basis, an accurate revision of the study would require verification of each parcel, and the lack of activity on Pine Island indicated to Mr. Noble that such an expenditure of resources was not needed to assess this application.

58. Mr. Noble testified that the staff recommendation against approval was not a statement that approval of PAM 98-01 would be illegal. Mr. Noble also agreed there was a difference between opining that there is no need for more commercial and urban classifications, and holding that more such classifications are not allowed. He attended the meeting at which the Board approved the amendment, and believed the Board understood staff's presentation and considered all relevant information in arriving at its decision. Mr. Noble testified that the Lee County Plan is currently in compliance with all applicable legal requirements, and he did not think that PAM 98-01 would place the plan out of compliance.

59. Mr. Stuart, Intervenor's planner, testified that once he began to understand that Lee County staff had concerns with overcommercialization of Pine Island based on the 1989 study, he took a hard look at that data. He testified that the 602 acres of commercial property set out in the Commercial Study did not appear correct "when you look at the map."

60. Mr. Stuart testified that he performed a specific land-use study using the Lee County Division of Planning geographic information system resources.

61. Mr. Stuart began by looking at the 1989 study, and noted that no information was available to show how the county derived the 602-acre figure. The only thing available in the county's files was a single sheet aggregating the numbers into a total, without explanation of how the constituent numbers were derived. Mr. Spikowski, who was Lee County's head planner in 1989, testified that the 602-acre figure was calculated "very carefully," but offered no detail to illumine that conclusory statement. Mr. Stuart testified that, though he suspected the total was inflated, he assumed that it was reasonably accurate for purposes of his analysis.

62. Mr. Stuart considered the currently expected population of Pine Island based upon currently available data, the county's planning conversion ratio of 2.09 persons per household on Pine Island, the county's conversion ratio adjusting Pine Island's population for seasonal residents, and then calculated the projected need for commercial development expressed in acres, using the same ratios that Lee County uses in planning for this purpose.

63. Mr. Stuart also developed a computer table, with the assistance of county staff, of all the commercially-zoned property on Pine Island. He then adjusted the output to correct

data entry errors and approximated the commercial acreage determined to be available in the 1989 Commercial Study.

64. Mr. Stuart next examined the properties parcel by parcel to delete those commercially-zoned properties that have already been put to non-commercial use, that are wetlands unlikely to be commercially developed, that are in use as public facilities, and those that may not be developed because they are designated with outdated zoning categories that are restricted under the Lee County Land Development Code. This process derived an estimate of the number of commercially-zoned acres on Pine Island that are either in commercial use or are available for commercial use.

65. Mr. Stuart's analysis concluded that there is actually a deficit on Pine Island of 69 acres of commercially-zoned property that may as a practical matter be put to commercial use, when the projected demand for such property to serve the projected population of Pine Island is taken into account.

66. In summary, it is found that Petitioners failed to demonstrate by a preponderance of the evidence that the increase in residential density and commercial intensity contemplated by PAM 98-01 is not suited to accommodate the population of Pine Island. The most conservative estimate rendered by the data and analysis indicates a need for an additional 27 acres of commercial development. No amendment of the FLUM 2020 Overlay is needed to effect this small-scale FLUM amendment. Mr. Stuart's

analysis is credited to the extent it supports a finding of substantial need.

67. Petitioners offered no competent substantial evidence regarding residential allocations and the lack of any need for additional residential density, and thus failed to overcome the presumption that the Board's action in adopting PAM 98-01 was correct on this point.

Transportation

68. Vehicular access from the mainland to Pine Island is provided solely by way of Pine Island Road, a two-lane road that proceeds over Matlacha Pass, through the Matlacha community, and over Little Pine Island by a series of bridges and causeways. North/south access on Pine Island is by way of Stringfellow Road, a two-lane road that runs from the community of Bokeelia at the north end of Pine Island to the community of St. James City at the south end of Pine Island.

69. William Spikowski, a planner who testified on behalf of Petitioners, stated that widening the narrow, two-lane Pine Island Road to accommodate more traffic would be at best a difficult and expensive proposition. He testified that the right-of-way through most of the Matlacha community is only about 66 feet wide, and the buildings are often located directly adjacent to the right-of-way. He testified that if the right-of-way were widened to 90 feet to accommodate extra lanes, 75 buildings would have to be removed and several other businesses

would lose their parking lots. Mr. Spikowski concluded that Pine Island Road is the biggest limitation on the island's development.

70. The Lee County Plan designates Pine Island Road as a constrained roadway as it passes through Matlacha, due to the narrow right-of-way and scenic, aesthetic, and environmental considerations. Matt Noble, a Lee County planner, testified that there were no improvements scheduled for Pine Island Road for the next three years, and that the road is projected to operate at Level of Service "F" in the year 2020 based on the applicant's analysis. Level of Service "F" is below the standard adopted by the Lee County Plan.

71. Mr. James Banks, a professional engineer expert in transportation engineering and planning, testified that the predictive methodology employed by county staff, i.e., assuming no road improvements while loading the system with future traffic demands, would result in a Level of Service "F" rating for nearly every major roadway in Lee County for the year 2020. He testified that this was an improper method for reviewing development permits.

72. Mr. Banks testified that the proper method is to look at the roadway's capacity at the time of the development application to determine whether there is available capacity today. If there is no capacity available, then the developer must devise a way to mitigate the impact, alleviating any

degradation below the road's adopted level of service. The permitting system is "first come, first serve," meaning that if the capacity is available today, then the permit is issued. Mr. Banks testified that there is no data indicating that the capacity of Pine Island Road will be exceeded by the year 2005.

73. The sole hurricane evacuation route from the Greater Pine Island Area is by way of Stringfellow Road to Pine Island Road, then north on Burnt Store Road. Burnt Store Road is also the evacuation route for the City of Cape Coral.

74. Several Pine Island residents testified as to their concerns that any increase in development on the island will further compromise the ability to evacuate the island in the event of a hurricane. There are no hurricane shelters on Pine Island, and no public services on the island during hurricanes.

75. The Lee County Staff Report for PAM 98-01 raised similar concerns, concluding that the applicant is "seeking to increase density thereby increasing the number of persons at risk, impacting evacuation routes and shelter space."

76. At the hearing, Matt Noble, Lee County's principal planner and the lead planner working on the Staff Report, testified that the quoted statement in the Staff Report assumed that the development on the 9.9-acre parcel would be residential. He further testified that commercial development of the property would have no effect on evacuation times, which are based on the number of residents attempting to leave the island.

77. Mr. Noble's testimony on this point conflicts somewhat with the Staff Report's statement that the application was reviewed using the most intensive scenario of retail commercial uses occurring on the property. However, given that the proposed plan amendment could not limit the development that could ultimately be requested on the property, it was not arbitrary for the county staff to consider both residential and commercial uses as potential development scenarios.

78. James Banks, Intervenor's transportation planning expert, testified that if residential demand on Pine Island exceeds the capacity of commercial development to satisfy it, there would be an increase in traffic on Pine Island Road as residents leave the island to do their basic shopping. Conversely, if enough commercial development occurs on the island to consume the residential demands, the number of off-island trips would be reduced.

79. Mr. Noble agreed that there might be an increase in trips off the island if there were insufficient commercial development to serve the residents on Pine Island. He testified that there is a planning principle supporting integrated and coordinated land-use development, and part of that principle is to capture as many trips as close to residential development as possible to avoid urban sprawl.

80. Mr. Noble testified that the Board considered this principle in its deliberations, and that one Commissioner

expressly stated that having additional commercial capacity on Pine Island might improve the transportation flow on Pine Island Road by decreasing the number of trips off the island.

81. Policy 14.2.2 of the Lee County Plan states as follows:

In order to recognize and give priority to the property rights previously granted by Lee County for about 6,800 additional dwelling units, the county shall consider for adoption development regulations which address growth on Pine Island and which implement measures to gradually limit future development approvals. The effect of these regulations would be to appropriately reduce certain types of approvals at established thresholds prior to the adopted level-of-service standard being reached, as follows:

* When traffic on Pine Island Road between Burnt Store Road and Stringfellow Boulevard reaches 810 peak hour, annual average two-way trips, the regulations shall provide restrictions on further rezonings which would increase traffic on Pine Island Road.

* When traffic on Pine Island Road between Burnt Store Road and Stringfellow Boulevard reaches 910 peak hour, annual average two-way trips, the regulations shall provide restrictions on the further issuance of residential development orders (pursuant to the Development Standards Ordinance), or other measures to maintain the adopted level of service, until improvements can be made in accordance with this plan.

82. Lee County has not actually adopted regulations restricting rezonings and/or development orders based upon the 810/910 peak hour traffic thresholds on Pine Island Road between Burnt Store and Stringfellow Roads.

83. Mr. Noble testified that the main reason for the adoption of Policy 14.2.2 was the county's concerns regarding hurricane evacuation. He agreed that, even if the prescribed regulations had been adopted, they would restrict rezonings and development orders, not amendments to the comprehensive plan.

84. Mr. Noble testified that the 810 and 910 vehicle limits are not standard calculations derived by the Department of Transportation, and cannot be mathematically derived from any planning model. Mr. Spikowski testified that the 810 and 910 vehicle per hour thresholds were based on roughly 80 percent and 90 percent, respectively, of the level of service proposed by either the Civic Association or Lee County staff at the time of the policy's adoption. He further testified that the 810 trip per hour threshold has already been reached.

85. James Banks, Intervenor's expert in transportation planning, agreed with Mr. Noble that the 810 and 910 vehicle limits were essentially arbitrary thresholds adopted by the Board, and further testified that these thresholds are unrelated to the actual capacity of the road.

86. Mr. Banks testified that Lee County's own Concurrency Management Inventory and Projections indicate that the actual capacity of Pine Island Road between Burnt Store and Stringfellow Roads is 2,170 vehicles per hour at Level of Service "E", and that the road is currently operating at Level of Service "A," the highest designation. Mr. Banks testified that under any possible

development scenario involving the parcel at issue in this proceeding, the impact would be no worse than Level of Service "B" for this portion of Pine Island Road, still well below the road's capacity.

87. In summary, Petitioners failed to demonstrate by a preponderance of the evidence that PAM 98-01 will compromise evacuation of Pine Island in the event of a hurricane, or that the development that might ultimately be allowed pursuant to the Outlying Suburban designation will strain the operating capacity of Pine Island Road in the critical areas described above. Even assuming the additional traffic generated will push trips per hour beyond the 810 threshold and toward the 910 trip per hour threshold, Policy 14.2.2 by its terms places no restrictions on development; rather, it provides that the Board will consider adopting development regulations "to gradually limit future development approvals."

Coastal High Hazard Area

88. Closely related to the transportation and evacuation concerns is the issue of development limitations on barrier islands such as Pine Island.

89. Goal 75 of the Lee County Plan and its implementing objectives and policies addresses development in coastal high-hazard areas. Objective 75.1 limits new development on barrier islands to densities that meet required evacuation standards, and

states that allowable densities for undeveloped areas within the coastal high hazard areas will be considered for reduction.

90. Mr. Noble testified that other Outlying Suburban lands and proposed residential development on Pine Island have been found to comply with Objective 75.1, but that there have only been a "couple" of such projects due to the sparse development activity on the island.

91. Policy 75.1.2 prohibits rezonings to allow higher densities on barrier and coastal islands if the capacity of critical evacuation routes would be exceeded. Mr. Spikowski conceded that approval of three homes per acre on the seven acres proposed for residential development by Intervenor would not exceed the Lee County Plan's stated evacuation times, but argued that taking a narrow view of this project in a vacuum is "the antithesis of planning," which calls for a view of the "big picture" rather than the individual project.

92. Policy 75.1.4 states that density reductions for undeveloped areas within the coastal high-hazard areas will be considered, but does not require such reductions.

93. In 1993, the Florida Legislature amended Section 163.3178(2)(h), Florida Statutes, to require that coastal elements of comprehensive plans designate "coastal high-hazard areas," defined as Category One evacuation zones, i.e., areas that must be evacuated for a Category One hurricane. Rule 9J-

5.003(17), Florida Administrative Code, was subsequently amended to reflect the statutory change.

94. Petitioners contend that PAM 98-01 cannot be adopted at this time because the Lee County plan amendments defining the coastal high hazard area have not been finally adopted.

Petitioners contend that adoption of PAM 98-01 would violate Rule 9J-5.002(8), Florida Administrative Code, which provides:

Effect of Rule Amendments. No amendment to this chapter shall have the effect of causing plans or plan amendments which were adopted prior to the effective date of the amendment to become not in compliance. Minimum criteria contained in any amendment to this chapter shall be addressed in the first subsequent transmitted plan amendment which is directly related to or requires the application of those criteria.

95. Petitioners contend that the quoted rule provision operates to give effect only to such plan amendments dealing with potential "coastal high-hazard areas" as were adopted prior to the amendment of Rule 9J-5.003(17), Florida Administrative Code. Petitioners argue that until the mandated definitions are finally adopted, PAM 98-01 would render the Lee County Plan out of compliance.

96. Petitioners' reading of the quoted rule is strained and not persuasive. They are correct that the first sentence operates to grandfather plan amendments adopted prior to a given rule amendment. The language of the second sentence requires the local government to address rule amendments "in the first subsequent transmitted plan amendment." By its terms, the rule

would have the practical effect of prohibiting interim plan amendments dealing with the subject matter of the rule amendments, as urged by Petitioners, because such an interim plan amendment would by definition not be the "first subsequent transmitted amendment."

97. However, the second sentence does not address the situation presented here, of a small-scale plan amendment that is not formally "transmitted" to the Department of Community Affairs for review pursuant to Section 163.3184(3), Florida Statutes. "Transmittal" of a plan amendment triggers an array of procedural requirements that Section 163.3187(1)(c), Florida Statutes, is specifically designed to avoid. Petitioners' argument on this point would effectively tie the small-scale plan amendment process irrevocably to the more cumbersome "large-scale" amendment process each time the Department of Community Affairs chooses to amend Chapter 9J-5, Florida Administrative Code, in such a way as to require compliant local plan amendments. This would defeat the Legislature's purpose in disengaging small-scale amendments from many of the formalities of the plan amendment process.

98. In any event, no party to this proceeding seriously contended that the property in question in fact lies outside of the coastal high-hazard area. The Staff Report, while acknowledging that the property is not yet "technically included" in the coastal high-hazard area, expressly treated the property

as if it were, applying Goal 75 of the Lee County Plan in its analysis of the project. The Intervenor did not contest this treatment. These findings of fact accept that the subject property lies within the coastal high-hazard area, and that the property was treated by both Lee County staff and the Board as lying within the coastal high-hazard area, rendering moot Petitioners' procedural arguments regarding the formal adoption of the new statutory definition.

99. In summary, Petitioners failed to establish by a preponderance of the evidence that PAM 98-01 does not comply with statutory, rule, or Lee County Plan provisions dealing with development in coastal high-hazard areas.

Natural Resources

100. Intervenor's 9.9 acre parcel, a pine flatwood community dominated by slash pine in the canopy with an understory of saw palmetto and other upland species, contains protected plants and animals. Uniformly distributed over the parcel are 551 beautiful pawpaws, as counted in the survey of the property conducted by Boylan Environmental Consultants on behalf of Intervenor. Petitioners did not dispute this count of the beautiful pawpaws on the site.

101. The beautiful pawpaw has been designated an endangered species by the United States Fish and Wildlife Service and the Florida Game and Freshwater Fish Commission (now called the

Florida Fish and Wildlife Conservation Commission). Lee County has designated the beautiful pawpaw as a protected species.

102. Beautiful pawpaws are small plants with deep tubers, and are difficult to relocate. The beautiful pawpaws on the 9.9-acre parcel are currently healthy and viable.

103. Intervenor's 9.9-acre parcel also contains 10 active, 21 inactive, and 22 abandoned gopher tortoise burrows, as counted by Boylan Environmental Consultants and not disputed by Petitioners. Gopher tortoises are listed as a species of special concern by the Florida Fish and Wildlife Conservation Commission, and are listed as a protected species by Lee County. Gopher tortoise burrows are also appropriate habitat for indigo snakes and gopher frogs, both of which are listed as protected species by Lee County.

104. Betsie Newton Hiatt, a senior environmental planner with Lee County and an expert in environmental planning, testified that she made a " cursory inspection" of the subject property and observed the beautiful pawpaws and gopher tortoise burrows on the site. She did not actually count the plants or burrows, but testified that she observed enough to consider the counts made by Boylan Environmental Consultants to be accurate.

105. Ms. Hiatt testified that a management plan would be necessary prior to development of the parcel, and that it would be possible to submit a detailed management plan meeting all Lee County Land Development Code requirements for property that has

beautiful pawpaws and gopher tortoise burrows and that lies within an Outlying Suburban land-use category.

106. Ms. Hiatt testified that part of her duties is the implementation of Policy 77.2.6 of the Lee County Plan, which requires avoidance of needless destruction of upland vegetation communities through consideration during the site plan review process of alternative layouts of permitted uses. She testified that this policy is implemented in the Lee County Land Development Code through open space and indigenous preservation requirements. She finally testified that it would be possible to meet the open space requirement while developing the parcel at issue in this proceeding.

107. Ms. Hiatt testified that the policy requires that approximately one third of the beautiful pawpaws found on a site be preserved in place, one third may be relocated in preservation areas, and one third may be removed. She testified that the open space requirement for commercial use of a 9.9-acre site would be about three acres, and that about 380 beautiful pawpaws could survive in this area. This would be about 69 percent of the 551 beautiful pawpaws found on the site, slightly more than the requisite two-thirds that must be preserved.

108. Rae Ann Boylan, the expert in environmental land-use planning whose company performed the species survey on the property, testified that allowing the site to lay fallow would be as bad for the beautiful pawpaws as development, because other

shrubs would eventually overgrow them without management of the site.

109. Ms. Boylan also testified that a management plan would be required prior to development to accommodate the listed species. She testified that Lee County requires a developer to excavate the tortoises that can be found and place them out of harm's way. She further noted that Policy 77.8.1 of the Lee County Plan provides for off-site mitigation, if unavoidable conflicts make on-site protection of the tortoises infeasible.

110. Policy 5.1.2 of the Lee County Plan prohibits residential development where physical constraints or hazards exist, including hurricane hazards and environmental limitations. Mr. Noble of Lee County testified that residential development has been approved on Pine Island under this policy, and that the decision whether this policy applies to a given project is made at the time of development or site plan approval.

111. Mr. Spikowski agreed that Policy 5.1.2 is a limitation on development, but argued that now is the time to evaluate the matter. He testified that if there are physical constraints or hazards that should stop approval of additional subdivisions on Pine Island, the county should not wait for the development order stage to draw the line. Mr. Spikowski explained that, as a practical matter, the development order stage consists of arguments about the details of the development, not whether it will occur at all. Mr. Spikowski's testimony is credited as a

valid statement of planning philosophy, but not as stating a legal barrier to the Board's decision in this matter.

112. In summary, Petitioners failed to demonstrate by a preponderance of the evidence that PAM 98-01 by its terms will have any adverse impacts on native upland vegetation, wildlife habitat, natural plant communities, or protected plant and wildlife habitat. Even after PAM 98-01 is enacted, the Lee County Plan provisions protecting all these natural resources will remain in place. Any subsequent development will be required to comply with the provisions of the Lee County Plan and the State Comprehensive Plan establishing protection of the resources.

Data and Analysis

113. Section 163.3177(8), Florida Statutes, requires that all elements of a comprehensive plan be based upon data appropriate to the element involved.

114. Rule 9J-5.005(2)(a), Florida Administrative Code, provides in relevant part:

All goals, objectives, policies, standards, findings and conclusions within the comprehensive plan and its support documents, and within plan amendments and their support documents, shall be based upon relevant and appropriate data and the analyses applicable to each element. To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of the adoption of the plan or plan amendment at issue.

115. The local government is not required to engage in original data collection, but the data used must be the best available. Rule 9J-5.005(2)(b) and (c), Florida Administrative Code.

116. Rule 9J-5.006(2)(c), Florida Administrative Code, provides that the Future Land-use Element, including the FLUM and amendments thereto, must include an analysis of the amount of land needed in each category of land-use to accommodate the projected population. This analysis must estimate the gross acreage needed by land-use category and their densities and intensities, and describe the methodology used to arrive at those estimates.

117. The preponderance of the evidence establishes that there was sufficient data and analysis to permit the Board to conclude that PAM 98-01 was justified. As found above, even the most conservative estimate of Mr. Spikowski, the expert retained to oppose the amendment, conceded that the data indicated there remains a need for 27 acres of vacant land for commercial development on Pine Island before the year 2020.

118. The Commercial Study relied upon by Petitioners also concedes that much of the property currently zoned for commercial uses is not in fact appropriate for such uses. The evidence establishes that Lee County itself has historically recognized this fact but has declined to expend the resources needed to

update the zoning on Pine Island, largely due to the overall paucity of development activity on the island.

119. The evidence in this proceeding establishes that the property at issue is the only commercially-zoned property adjacent to the Pine Island Center that was not included in that center during the 1989 Plan update process, presumably because it was vacant property at the time. Despite all the testimony regarding properties on Pine Island having inappropriate commercial zonings, not one witness suggested that the property at issue should not be zoned commercially.

120. At least one member of the LPA recognized the appropriateness of this property for development "in the long run," but the LPA voted against the amendment to preserve the clear demarcation between urban and rural uses in the current FLUM.

121. However, even Mr. Spikowski conceded that the clear line between urban and rural uses was compromised at the outset to allow for existing uses, and that the FLUM change contemplated by PAM 98-01 would merely add another "blip" to a line on the map that already contains breaks and changes between urban and rural uses.

122. Mr. Spikowski's argument that PAM 98-01 would create urban sprawl is thus overstated. PAM 98-01 does not designate uses in excess of demonstrated need. It does not appreciably

compromise the clear separation between rural and urban uses. It does not discourage or inhibit infill development.

123. In fact, PAM 98-01 could just as plausibly be said to constitute infill in the vicinity of the Pine Island Center; at the very least, it does not leap over undeveloped lands that are available and suitable for development. The subject property lies between commercial uses to the north and a public facility use, the RO plant, to the south.

124. PAM 98-01 does not fail to protect environmentally sensitive habitat, because the beautiful pawpaws and the gopher tortoise burrows on the site will be dealt with as provided in the Lee County Plan during any subsequent development and site planning of the property.

125. Mr. Spikowski's ultimate opinion that PAM 98-01 is "illegal" is based on his view, also expressed in the Staff Report, that there is "no compelling reason" to adopt the requested amendment. Mr. Spikowski testified that, because Pine Island has an overallocation of commercial land, anyone wishing to add to the total has "a really high burden to show that this is so much better located than the existing land, or [that] other land should be eliminated in favor of this land, and that burden hasn't been met." As explained in the conclusions of law below, this is not the standard for judging the legality of a small scale development amendment. Mr. Spikowski's policy disagreement

with the Board's action has been noted and fully considered, but his judgment that PAM 98-01 is "illegal" cannot be credited.

126. In summary, Petitioners failed to demonstrate by a preponderance of the evidence that PAM 98-01 is not supported by relevant and appropriate data and analysis as required by Section 163.3177(8), Florida Statutes, and Rule 9J-5.005(2), Florida Administrative Code.

CONCLUSIONS OF LAW

127. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. Sections 120.569, 120.57, and 163.3187(3), Florida Statutes.

128. As recited in the findings of fact above, Petitioners Barbara Dubin, William Dubin, the Civic Association, and Intervenor Gregory Eagle have standing as "affected persons" under Section 163.3184(1)(a), Florida Statutes, to participate in this proceeding.

129. Proposed amendment PAM 98-01 is a "small scale development amendment" as defined in Section 163.3187(1)(c), Florida Statutes.

130. Section 163.3187(3), Florida Statutes, sets forth the standard of proof in this proceeding:

In the proceeding, the local government's determination that the small scale development amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown by a preponderance of the

evidence that the amendment is not in compliance with the requirements of this act.

131. Section 163.3184(1)(b), Florida Statutes, defines "in compliance" to mean:

consistent with the requirements of ss. 163.3177, 163.3178, and 163.3191, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with chapter 163, part II and with the principles for guiding development in designated areas of critical state concern.

132. Section 163.3177(10)(a), Florida Statutes, sets forth legislative intent as to the definition of "consistency" as that term is applied in Chapter 9J-5, Florida Administrative Code.

The relevant portion of the statute reads as follows:

[F]or the purpose of determining whether local comprehensive plans are consistent with the state comprehensive plan and the appropriate regional policy plan, a local plan shall be consistent with such plans if the local plan is "compatible with" and "further" such plans. The term "compatible with" means that the local plan is not in conflict with the state comprehensive plan or appropriate regional policy plan. The term "furthers" means to take action in the direction of realizing goals or policies of the state or regional plan. For the purposes of determining consistency of the local plan with the state comprehensive plan or the appropriate regional policy plan, the state or regional plan shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies of the plans.

133. The State Comprehensive Plan expresses a similar intent, at Section 187.101(3), Florida Statutes:

The goals and policies contained in the State Comprehensive Plan shall be reasonably applied where they are economically and environmentally feasible, not contrary to the public interest, and consistent with the protection of private property rights. The plan shall be construed and applied as a whole, and no specific goal or policy shall be construed or applied in isolation from the other goals and policies in the plan.

134. The elements of a local government comprehensive plan must be internally consistent. Section 163.3177(2), Florida Statutes. A comprehensive plan may be amended only in a way that preserves the internal consistency of the plan. Section 163.3187(2), Florida Statutes.

135. The Lee County Plan has previously been determined to be in compliance with Chapter 163, Part II, Florida Statutes, and internally consistent.

136. The Lee County Plan includes a future land-use element ("FLUE") setting forth policies related to proposed general distribution, location and extent of the uses of land. The FLUE must be based upon data, including the amount of land required to accommodate anticipated growth, projected population, the character of undeveloped land, and the availability of public services. Section 163.3177(6)(a), Florida Statutes.

137. PAM 98-01 has not been shown to be inconsistent with the FLUE of the adopted Lee County Plan. The subject parcel is suitable for the Outlying Suburban designation. The facts demonstrated that this property historically had an urban designation, but was singled out for a rural designation during

the 1989 amendment cycle for the purpose of maintaining a clear separation between the commercially developed properties to the north and the rural properties to the south.

138. This "clear separation" was blurred at the outset by various urban designations designed to accommodate existing development. Additionally, an RO plant sits on property south of the subject parcel, further blurring the clear separation. The most conservative estimate based on Lee County statistics indicates a need for an additional 27 acres of commercial development on Pine Island, and even some opponents of the amendment agree that this is a suitable site for such development, if any such development is to occur.

139. The Lee County Plan has been found to be consistent with the goal of the State Comprehensive Plan directing development to areas able to accommodate growth in an environmentally acceptable manner. Section 187.201(16)(a), Florida Statutes.

140. PAM 98-01 has not been shown to be inconsistent with this element of the State Comprehensive Plan. Petitioners failed to demonstrate that any unacceptable environmental impacts will result from the development contemplated by PAM 98-01.

141. The Lee County Plan includes a coastal management element consistent with Section 163.3177(6)(g), Florida Statutes. As required by Section 163.3178(2)(d), Florida Statutes, the Lee County Plan also accounts for the capability to safely evacuate

the coastal population in the event of an impending natural disaster. The Lee County Plan is also consistent with the State Comprehensive Plan requirement that Lee County, in cooperation with regional and state agencies, adopt plans and policies to prepare for coastal evacuation and to protect property and human life from the effects of natural disasters. Section 187.201(7)(b)22 and 23, Florida Statutes.

142. Policy 5.1.2 of the Lee County Plan provides that where physical constraints or hazards exist, residential development must be prohibited or density and design must be adjusted to account for the constraints or hazards. Policy 75.1.2 prohibits rezonings to allow higher densities on barrier and coastal islands if the capacity of critical evacuation routes would be exceeded. Policy 75.1.4 provides that undeveloped lands in coastal high-hazard areas will be considered for reduced density categories to limit future population exposed to coastal flooding.

143. PAM 98-01 has not been shown to be inconsistent with these coastal evacuation and development provisions of the Lee County Plan. All the pertinent witnesses agreed that commercial development has no effect on evacuation times. Petitioners failed to demonstrate that the contemplated residential development will cause evacuation route capacities to be exceeded, even if this small-scale development proceeding is likened to a rezoning and Policy 75.1.2 applies. Policy 75.1.4

would arguably apply to this undeveloped property, but does not mandate the adoption of reduced density categories. No evidence was presented that any subsequent development would be exempt from the density and design adjustments mandated by Policy 5.1.2.

144. Policy 14.2.2 of the Lee County Plan, set out in full above, establishes traffic thresholds for Pine Island Road between Burnt Store and Stringfellow Roads. Petitioners offered competent evidence showing that the first threshold of 810 peak hour, annual average two-way trips, is already being exceeded on the road in question. Intervenor presented evidence distinguishing these thresholds from the actual capacity of the road, but did not seriously question Petitioners conclusion that the 810 trip threshold has been crossed.

145. From the fact that the 810 trip threshold has been exceeded, Petitioner derives the conclusion that PAM 98-01 is in violation of the policy. However, Policy 14.2.2 requires only that Lee County "consider for adoption development regulations" when the thresholds are reached. The evidence established that the county has yet to consider any such regulations under the policy, which in any event appears not to contemplate outright prohibitions on development approvals. Thus, while PAM 98-01 may push the county nearer the point where it must consider measures to limit future development approvals on Pine Island, PAM 98-01 does not contravene Policy 14.2.2.

146. The Lee County Plan includes a conservation element setting forth policies related to conservation, use and protection of natural resources, pursuant to Section 163.3177(6)(d), Florida Statutes. The Lee County Plan is consistent with the State Comprehensive Plan's goal of protecting unique natural habitats, and its policy of prohibiting the destruction of endangered species and protecting their habitat. Section 187.201(10)(a) and (b)3, Florida Statutes.

147. Objective 77.2 of the Lee County Plan provides that the county will maintain an inventory of native plant communities and protect remnant tracts of all important and representative plant communities. Policy 77.2.6 provides that needless destruction of upland vegetation communities will be avoided through consideration during site plan review of alternate layouts of permitted uses.

148. Objective 77.4 of the Lee County Plan states that the county will continue to protect habitats of endangered and threatened species and species of special concern. Policy 77.4.4 requires that new developments shall protect remnants of viable habitats when listed vegetative and wildlife species inhabit a tract slated for development, except where equivalent mitigation is provided.

149. Policy 77.8.1 of the Lee County Plan states that the county's policy is to protect gopher tortoise burrows wherever

they are found. However, if unavoidable conflicts make on-site protection infeasible, then off-site mitigation may be provided.

150. PAM 98-01 has not been shown to be inconsistent with these natural resources and species protection provisions of the Lee County Plan. PAM 98-01 by its terms does not permit any development of the property. Intervenor will be required to comply with all of these habitat and species protection provisions during the development approval process.

151. Petitioners are obviously correct in their implied argument that the best way to ensure the continued health of the gopher tortoise population, if not the long term viability of the beautiful pawpaws, is to permit no development on the subject parcel. However, the Lee County Plan does not contain such outright prohibitions on development, and is not required by state law or the State Comprehensive Plan to do so.

152. All elements of a local government comprehensive plan must be based upon data appropriate to the element. Section 163.3177(8), Florida Statutes.

153. As found above, PAM 98-01 is consistent with data appropriate to the relevant elements.

154. In conclusion, Petitioners have failed to establish by a preponderance of the evidence that PAM 98-01 is inconsistent with, or renders the Lee County Plan inconsistent with, the requirements of Chapter 163, Part II, Florida Statutes, Rule 9J-5, Florida Administrative Code, or the State Comprehensive Plan,

Chapter 187, Florida Statutes. Petitioners have failed to establish by a preponderance of the evidence that PAM 98-01 renders the Lee County Plan internally inconsistent.

155. Section 163.3187(3)(a), Florida Statutes, cloaks the local government's decision to approve a small scale development amendment with a presumption of correctness. Petitioners well articulated their concerns with the contemplated development, but did not offer sufficient competent substantial evidence to overcome that presumption by the required preponderance of the evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered finding small scale development amendment PAM 98-01 to be in compliance.

DONE AND ENTERED this 27th day of December, 1999, in Tallahassee, Leon County, Florida.

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Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.