

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BONITA BAY PROPERTIES, INC., )  
AND SWF PROPERTIES OF SOUTHWEST )  
FLORIDA, LTD., )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 07-4843DRI  
 )  
CITY OF BONITA SPRINGS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on February 12 and 13, 2008, in Bonita Springs, Florida.

APPEARANCES

For Petitioners: Kenneth G. Oertel, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether the proposed change to the Bonita Bay Development of Regional Impact to allow residential development

within 330 feet of an active bald eagle's nest in an area that had been set aside for preservation should be approved.

PRELIMINARY STATEMENT

On July 21, 2006, Petitioners submitted to the City of Bonita Springs (City) a proposed change to the Bonita Bay Development of Regional Impact (Bonita Bay DRI). The proposed change would allow residential development within 330 feet of an active bald eagle's nest in an area that had been set aside for preservation. On June 27, 2007, the City denied the proposed change through Resolution No. 07-02. On August 3, 2007, Petitioners "appealed" the City's decision by filing a Petition for Formal Administrative Proceeding with the Florida Land and Water Adjudicatory Commission (FLWAC) pursuant to Section 380.07, Florida Statutes.<sup>1/</sup>

On October 22, 2007, FLWAC referred this matter to the Division of Administrative Hearings (DOAH). The referral was received by DOAH on October 23, 2007.

The pleadings referred to DOAH included a Response in Opposition to Request for De Novo Hearing filed by the City and a reply to the response filed by Petitioners. FLWAC did not rule on the issue prior to referral of the matter to DOAH. On November 28, 2007, the undersigned entered an Order concluding that "[t]his case shall be conducted as a de novo proceeding under Chapter 120, Florida Statutes."

On February 6, 2008, the parties filed a comprehensive Pre-Hearing Stipulation. The stipulated facts in that document are interspersed in the Findings of Fact below.

The final hearing was held on February 12 and 13, 2008. At the hearing, Petitioners presented the testimony of Kris VanLengen, Daniel DeLisa (expert in land use planning), William Cox (expert in wildlife ecology), Kenneth Passarella (expert in ecological science), and Tom Logan (expert in wildlife ecology, with a specialty in listed species), and the deposition testimony of Pamela Houck, Dominick Amico, and Bryan Kelner; and the City presented the testimony of Becky Sweigert (expert in wildlife ecology) and the deposition testimony of Kimberly Trebatoski.<sup>2/</sup> The following exhibits were received into evidence: Joint Exhibits 1 through 4, 7 through 9 and 13; Petitioners' Exhibits 7 through 9, 21, 23, 35, 37, 39, 40, 44, 45, 54, 56 through 59, 63A, 63F, 63J and 64; and the City's Exhibits 2, 3, 11 through 15 and 18.

The two-volume Transcript of the final hearing was filed on February 28, 2008. The parties requested and were given 14 days from that date to file proposed recommended orders (PROs), and the parties thereby waived the deadline for this Recommended Order. See Fla. Admin. Code R. 28-106.216(2). The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

A. Parties

1. Bonita Bay Properties, Inc., is the developer of the Bonita Bay DRI.

2. SWF Properties of Southwest Florida, Inc., is the owner of the Bonita Bay DRI.

3. The City is an incorporated municipality in Southwest Lee County.

B. Relevant History of the Bonita Bay DRI

4. The Bonita Bay DRI includes 2,422 acres in the City, near the Lee County/Collier County border.

5. The City approved the original development order for the Bonita Bay DRI in November 1981. The DRI, as originally approved, included 8,250 multi-family units, 990 single-family units, 125 marina slips, 360,000 square feet of office space, 850,000 square feet of commercial space, 175 hotel rooms, and a 200-room conference center.

6. The DRI development order has been amended on four prior occasions. The most significant of the amendments was the third amendment, which occurred in 1993.

7. The 1993 amendment added a golf course, reduced the density of the DRI to 6,000 residential units, and reduced the commercial intensity of the DRI to 700,000 square feet. After the 1993 amendment, and currently, the Bonita Bay DRI includes

approximately 588 acres of preservation areas, which is approximately 24.3 percent of the acreage in the DRI.

8. The 1993 amendment also included conditions intended to protect a bald eagle's nest within the DRI known as nest LE-005. The conditions included the establishment of "primary protection zones" and "secondary protection zones" relative to the golf course and residential development in the vicinity of the nest. All activities in the protection zones were required to comply with a bald eagle management plan (BEMP) prepared by Petitioners and approved by the U.S. Fish and Wildlife Service (USFWS).

9. For the golf course, the primary protection zone was a radius of 750 feet from the nest, and the secondary protection zone was an additional 750 feet beyond the primary protection zone. For residential development, the primary protection zone was a radius of 1,000 feet from the nest, and the secondary protection zone was an additional 500 feet beyond the primary protection zone.

10. The protection zones and the original BEMP were approved in a 1993 Biological Opinion issued by USFWS under Section 7 of the Endangered Species Act (ESA). The protection zones were based upon the 1987 habitat management guidelines adopted by USFWS for the southeast United States.

11. The BEMP was modified in 1997 to reduce the primary protection zone for residential development to the south of the nest to 850 feet. USFWS approved the modification.

C. Recent Regulatory Developments Regarding Bald Eagles

12. In 2006, USFWS proposed bald eagle management guidelines to be applied throughout the United States (hereafter "the national guidelines").

13. The national guidelines were implemented in July 2007, concurrent with the formal announcement that the bald eagle had recovered and that it would be removed from the list of species protected under the ESA. The rule "de-listing" the bald eagle under the ESA took effect on August 8, 2007.

14. The national guidelines are "recommendations based on several decades of behavioral observations, science and conservation measures to avoid or minimize adverse impacts to bald eagles." USFWS "strongly encourages adherence to these [national] guidelines to ensure that bald . . . eagle populations will continue to be sustained."

15. The national guidelines recommended a single buffer zone around active eagle nests, rather than the primary and secondary protection zones recommended in the 1987 regional guidelines.

16. The width of the buffer zone recommended in the national guidelines depends on the nature of the use and its

visibility from the nest. For most activities that will be visible from the nest, the recommended buffer zone is 660 feet. For activities that will not be visible from the nest, the recommended buffer zone can be as little as 330 feet.

17. When the bald eagle was listed under the ESA, the recommended protection zones were larger. For example, the 1987 regional guidelines recommended against most activities within a 750-foot primary protection zone and included seasonal restrictions on activities within a 1,500-foot secondary protection zone.

18. The recommended buffer zone widths in the national guidelines are flexible. USFWS can approve reduced buffer zones based upon "special circumstances" that "diminish the likelihood of bald eagle disturbance."

19. That is effectively what happened in this case because, as discussed below, USFWS approved a 330-foot buffer around nest LE-005, even though a 660-foot buffer was recommended under the national guidelines.

20. The Florida Fish and Wildlife Conservation Commission (FWCC) is in the process of developing a State Bald Eagle Management Plan, patterned after the national guidelines. The goal of the State plan is "to maintain a stable or increasing population of bald eagles throughout Florida in perpetuity."

21. The most recent draft of the FWCC plan received into evidence, "Draft 4" dated December 21, 2007,<sup>3/</sup> includes buffer zone guidelines similar to those in the national guidelines-- 660 feet for activities visible from the nest and 330 feet for activities not visible from the nest.

D. The Proposed Change

(1) Generally

22. The proposed change will revise the BEMP adopted in 1993 for nest LE-005 by reducing the buffer around the nest to 330 feet.

23. The reduced buffer will enable Petitioners to construct 15 single-family residences in the vicinity of the nest, along with a road to serve the residences and an expanded stormwater pond.

24. The rationale for the proposed change was explained as follows in the Notice of Proposed Change (NOPC) submitted by Petitioners:

The proposed change is to the [BEMP] only. The third amendment to the Bonita Bay DRI [development order] incorporated an Eagle Management Plan. The [BEMP] was based upon the level of understanding at that time. There was limited knowledge about the habitats of eagles and what was needed to assure their recovery. The agencies acted with an abundance of caution. Since that time, there has been extensive study. Based on the recovery of the species and the additional study, it has been determined that a radius of 330 feet is appropriate and



adequate to protect the bird. This application is a request to amend the [BEMP] consistent with today's standards. The request does not open up any new areas for development; it simply permits the development of an area previously approved for residential development.

25. The property impacted by the proposed change is a 23-acre parcel in the northwest corner of the Bonita Bay DRI, which is referred to in the NOPC as Baywoods Phase II (hereafter "the subject property").

26. The subject property is roughly triangular in shape. It is surrounded by a marsh/slough area to the north and east, a golf course and existing single-family residences to the south, and undeveloped uplands and marsh to the west. It is the last remaining developable upland parcel in the Baywoods area of the DRI.

27. The residences proposed for the subject property will be compatible in size and design to the existing residences in the adjacent Baywoods area of the DRI. Those residences are detached, one and two-story, single-family units with densely landscaped lots.

28. The subject property is zoned R-3. All types of residential uses are permitted in that zoning category, including high-rise, multi-family, mid-rise, townhouses, zero lot line, duplexes, and single-family.

29. The proposed change meets the requirements of the City's land development code. There are no compatibility or zoning issues with the proposed change.

30. The proposed change is technically a "down-zoning" of the subject property in that it restricts the use of the property to low-density, single-family residences.

31. The proposed change will not result in any net decrease in the total acreage set aside for permanent preservation in the Bonita Bay DRI because the subject property is currently zoned for residential development. Technically, the proposed change will increase the acreage set aside for permanent preservation through the placement of a conservation easement on the revised buffer zone around nest LE-005.

32. However, as a practical matter, the proposed change is an "up zoning" in that it authorizes development in an area that none can presently occur due to the existing eagle protection zones, and it reduces the area within the DRI that is protected from present development by reducing the size of the buffer zone around the nest.

(2) Review by the City

33. In July 2006, Petitioners submitted a NOPC to the City and the Southwest Florida Regional Planning Council in accordance with Section 380.06(19), Florida Statutes.

34. On or about February 15, 2007, the City staff<sup>4/</sup> prepared a report recommending approval of the NOPC, subject to various conditions that were unacceptable to Petitioners. The conditions included the elimination of five of the proposed residences in order to reduce the visual impacts associated with the proposed development and to create a "fly zone" for the eagles to the northwest of the nest. The conditions also incorporated the "best management practices" recommended by the City's Eagle Technical Advisory Committee (ETAC), which included phasing and other restrictions on construction of the proposed residences.

35. On April 6, 2007, the City's Board for Land Use Hearings and Zoning Board of Appeals (Board) held a seven-hour quasi-judicial hearing on the NOPC. The hearing included "[a] lengthy Applicant presentation . . . followed by Staff's presentation" and public comment.

36. Petitioners had a full and complete opportunity to present evidence in support of the proposed change at the Board hearing. The testimony and evidence presented to the Board was, for the most part, the same as that presented at the final hearing in this case.

37. At the conclusion of the hearing, the Board recommended the approval of the NOPC, as proposed by Petitioners. The Board considered, but rejected the City

staff's recommendation to eliminate five of the proposed residences and to implement the ETAC recommendations.

38. On June 25, 2007, the City Council held a hearing on the NOPC and rejected, by voice vote, a motion to approve "the advice of the zoning committee, which was basically to approve the development as it's presented . . . ." <sup>5/</sup>

39. The City Council's denial of the NOPC was memorialized in Resolution No. 07-02, which was rendered on June 27, 2007.

40. The City Council did not, in its voice vote or the Resolution, make any finding or reach any conclusion whether the proposed change required further DRI review, as required by Section 380.06(19)(f)5., Florida Statutes.

41. The "findings of fact" included in the Resolution stated in pertinent part:

5. Bonita Bay Group did not prove entitlement for the [proposed change] by demonstrating compliance with the Bonita Springs Comprehensive Plan, with the conditions referenced in this Resolution and other Bonita Springs Comprehensive Plan Goals, Objectives and Policies.

6. The [proposed change], as conditioned, was not compatible with existing or planned uses in the surrounding area; will adversely affect environmentally critical areas or natural resources, in particular, gopher tortoise and eagle habitat, both species protected by the State of Florida. City Council further found that the proposed development order amendment would have an unfavorable impact upon the environment and natural resources of the area and that this

negative impact would override the positive value of the [proposed change].

7. The proposed use is not appropriate at the subject location in the DRI.

8. The recommended conditions considered for the eagle management plan, gopher tortoises and other applicable regulations did not provide sufficient safeguards to the public interest. . . .

### (3) Potential Impacts on Nest LE-005

42. Nest LE-005 is located in a live pine tree within an undeveloped area of pine flatwoods on the subject property. The nest-tree is located just to the west of a marsh/slough area that flows into Estero Bay.

43. The eagles using nest LE-005 do not forage in the area immediately around the nest-tree. They primarily forage in Estero Bay, which is to the northwest of the subject property.

44. Nest LE-005 is one of only two remaining bald eagle's nests in the City.

45. The nest was first documented by the Florida Game and Freshwater Fish Commission (the predecessor to FWCC) in 1977, which is four years prior to approval of the original development order for the Bonita Bay DRI and prior to any construction in the DRI.

46. The nest has been continuously occupied for the past 30 years, except for two short periods in which the eagles were

displaced by great horned owls. The nest has produced 31 eaglets over the period that it has been monitored.

47. The eagles have continued to return to the nest despite the ongoing development in the Bonita Bay DRI over the past 25 years. The development has not disrupted the eagles from using the nest or successfully fledging eaglets.

48. It is likely that the existing protection zones around nest LE-005 have helped to protect the eagles and the nest. However, it is also clear that the eagles have adapted to the development in the DRI and the associated human activities.

49. The eagles have been observed flying near the high-rise condominiums to the west of the subject property, resting and perching on roofs of residences in the areas, and resting on the golf course to the south of the subject property.

50. The existing protection zones around the nest LE-005 are not encumbered by a conservation easement, but the area cannot be developed so long as the nest remains "active." If the nest is no longer active (i.e., not used by eagles for five years), then, under the 1993 amendment to the DRI development order, Petitioners "may proceed with development of the property within the primary and secondary zones in accordance with the approved plan of development for that area."

51. In April 2006, prior to submittal of the NOPC, Petitioners met with USFWS and ETAC regarding proposed revisions

to the existing BEMP for the subject property. USFWS and ETAC recommended changes to a draft revised BEMP prepared by Petitioners' consultants. Some of the changes were incorporated into a revised BEMP that was submitted to USFWS for its formal review.

52. On October 16, 2006, USFWS issued a letter amending its 1993 Biological Opinion concerning nest LE-005.

53. The letter does not specifically state that the revised BEMP proposed by Petitioners is "approved," but that is clearly the effect of the letter. Indeed, the more persuasive evidence establishes that Petitioners need no additional authorization from USFWS (or FWCC<sup>6/</sup>) in order to proceed with the proposed development in accordance with the revised BEMP.

54. The October 2006 letter adopts the conservation measures proposed in the revised BEMP, including a 330-foot buffer area that would be protected in perpetuity through a conservation easement; preservation of the vegetative canopy in the area; limitations on the right-of-way for the road; landscaping for the residential lots to enhance the vegetative buffer; a two-story limitation on the height of the residences; limits on the timing of construction; limits on exterior lighting; installation of a fence and signage along the perimeter of the buffer zone; and a \$35,000 donation to the

Wildlife Foundation of Florida to support monitoring of bald eagles in Lee County.

55. The portion of the buffer zone that will be encumbered by a conservation easement is approximately 5.1 acres in a semi-circle shape with a 330-foot radius around the west side of nest LE-005. The area to the east of the nest is a wetland preserve that is already protected from development.

56. The proposed residences will be visible from the nest, but the visual impacts of the residences will be minimized through extensive landscaping.

57. All but one of the proposed residences will be at least 400 feet from the nest. Currently, the closest development to the nest is the golf course, which is 850 feet to the southwest and east of the nest. The closest residences to the nest are approximately 900 feet to the south in Baywoods Phase I.

58. There is no credible evidence that the proposed development will cause the abandonment of nest LE-005. The City admitted in a discovery response that it could produce no bona fide opinion from a biologist or other qualified expert that the proposed development would cause the nest to be abandoned, and the wildlife ecologist presented by the City could only testify that the proposed development "may" and "has the potential to" adversely affect the eagles using the nest.



59. The City is concerned that the proposed 330-foot buffer is not sufficient to protect the eagles using nest LE-005. That concern is based, in large part, upon the premise that all eagles "do better" with a larger protection zone than a smaller one.

60. The preponderance of the evidence is contrary to this premise. For example, a 2004 study presented by the City found no difference in nesting success of eagles in rural and suburban areas,<sup>7/</sup> and a 2007 analysis of the active eagle's nests in Lee County showed that there was no correlation between the distance of a nest from development and the success of the nest.

61. The more persuasive evidence establishes that eagles are able to adapt and acclimate to human activities in order to take advantage of suitable habitat, and that is what has happened with the eagles using nest LE-005. The eagles were using the nest before construction began in the Bonita Bay DRI; they have continued to use the nest as the project has developed around them over the past 25 years; and they have been observed flying over residences and in close proximity to high-rise buildings in the DRI and perching on roofs of residences within the DRI.

62. Likewise, the more persuasive evidence establishes that the reduction in the size of the buffer around nest LE-005

will not adversely impact the nest. Adequate protections are included in the revised BEMP, which has been approved by USFWS.

63. The proposed roadway serving the residences will not adversely impact the eagles using nest LE-005. Eagles' nests are known to co-exist with far more heavily used traffic corridors, such as interstate highways.

64. The proposed residences will not disturb the flight paths of the eagles from nest LE-005. The eagles do not have a preferred flight path; they have been observed flying to and from the nest in all directions, and they will have no problem flying over the proposed residences.

#### (4) Potential Impacts on Gopher Tortoises

65. The subject property includes gopher tortoise habitat. A November 2006 survey identified 62 active gopher tortoise burrows and 12 inactive burrows on the subject property.

66. In 1993, FWCC issued a permit authorizing Petitioners to "take" gopher tortoises, their eggs and their burrows where such taking is incidental to development activities. As a condition of the permit, Petitioners paid a mitigation fee of \$208,895.90 to FWCC as "seed money" for the Hickey Creek Mitigation Park in Lee County. FWCC confirmed in a September 2006 letter that the 1993 permit remains in effect.

67. Notwithstanding the incidental take authorization in the FWCC permit, Petitioners intend to relocate the gopher

tortoises on-site in order to comply with the City's requirements. The tortoises will be relocated to the 5.1-acre portion of the subject property around nest LE-005 that will be protected by a conservation easement and to an 11.64-acre site immediately to the west of the subject property.

68. The relocation areas will be maintained and managed in accordance with a relocation and management plan in order to enhance the habitat for the gopher tortoises.

69. No concerns with the gopher tortoise relocation and management plan were raised in the City's staff report on the proposed change.

70. The wildlife ecology expert presented by the City expressed a concern that the relocation plan is "putting tortoises into a much smaller area," but she also acknowledged that the relocation plan is consistent with the City's gopher tortoise regulations and that Petitioners did what they were required to do in relation to gopher tortoises.

(5) Consistency with the City's Comprehensive Plan

71. The resolution through which the City denied the proposed change stated that Petitioners failed to demonstrate "compliance with the Bonita Springs Comprehensive Plan . . . ."

72. The only comprehensive plan provisions specifically cited in the Resolution in support of that conclusion were

Objective 7.6 and Policy 7.6.1 of the Conservation/Coastal Management Element of the plan.<sup>8/</sup>

73. The City identified several additional provisions of the plan at the final hearing and in its PRO that it contends the proposed change is inconsistent with, namely Policy 7.2.4 and Objective 7.3.

74. The City does not contend that the proposed change is inconsistent with any provision of the Future Land Use Element of the plan.

(a) Policy 7.2.4

75. Policy 7.2.4 provides:

The City shall encourage the protection of viable tracts of sensitive or high-quality natural plant communities within developments.

76. According to the City, this provision is implicated because the subject property contains "high-quality habitat," in that it does not contain significant exotic vegetation, and it supports a diversity of wildlife species, including gopher tortoises and eagles.

77. A vegetative survey of the subject property was performed in 2006. The survey found that the majority of the subject property consists of disturbed scrubby pine flatwoods, disturbed pine flatwoods, and disturbed palmetto prairies. No protected plant species were located on the subject property.

78. There is no persuasive evidence as to the existence of any "high-quality natural plant communities" on the subject property apart from the existence of nest LE-005.

79. The proposed development would result in the removal of vegetation on the subject property to make way for the proposed residences, the road serving the proposed residence, and an expanded stormwater management pond.

80. The wildlife ecologist presented by the City was unable to testify how much of the subject property would have to be set aside for permanent preservation to comply with Policy 7.2.4, as interpreted by the City. She simply testified that it would have to be "[m]ore than the current proposal."

81. The proposed change will place a conservation easement on approximately 5.1 acres surrounding the tree in which nest LE-005 is located.

82. The eagles using the nest are likely to find the closest suitable tree in the event that the current nest-tree dies or falls. There are other mature pine trees within the 5.1 acres surrounding the current nest-tree that would be suitable for an eagle's nest.

83. Thus, to the extent that the nest-tree and the surrounding pine trees are considered to be a "high-quality natural plant communit[y]" for purposes of Policy 7.2.4, the proposed change includes adequate protection of that community.

84. Therefore, the proposed change is consistent with Policy 7.2.4.

(b) Objective 7.3

85. Objective 7.3 provides:

Wildlife -- The City shall continue to maintain and enhance the fish and wildlife diversity and distribution within the City for the benefit of a balanced ecosystem.

86. According to the City, the proposed change is inconsistent with this objective because the proposed change will result in a significant modification of the habitat currently being used by the diverse wildlife on the subject property.

87. A wildlife survey of the subject property was performed in 2006. The only protected species identified in the survey, other than the eagles, were the American alligator, gopher tortoises, and two types of heron.

88. The alligator and heron were observed in the existing stormwater pond on the southern edge of the subject property. The pond will be expanded as part of the proposed development, which will provide increased habitat for these species.

89. The gopher tortoises were observed throughout the subject property, including areas that are proposed for development. The gopher tortoises found in the areas proposed for development will be relocated, as discussed above.

90. The existing eagle's nest, and the surrounding 5.1 acres, will be protected in perpetuity through a conservation easement, as discussed above.

91. The proposed change includes adequate protections for the eagle, gopher tortoises, and other wildlife species located on the subject property, and will not adversely impact the diversity or distribution of those species.

92. Therefore, the proposed change is consistent with Objective 7.3.

(c) Objective 7.6 and Policy 7.6.1

93. Objective 7.6 provides:

Southern Bald Eagles -- The City shall use its bald eagle habitat regulations to protect Southern bald eagle nesting sites and request the County to monitor Southern bald eagle nesting activities.

94. Policy 7.6.1 provides:

The City shall maintain a policy of negotiations with owners of land surrounding eagle nests to provide an optimal management plan within which all development within critical eagle nesting habitat and buffer areas must be consistent. The management plans shall address at a minimum:

a. A description of the land around the critical eagle nesting habitat, including locations of nest tree(s) and perch tree(s), vegetation types, and a description of the type and density of understory and canopy vegetation;

b. A history and behavior patterns of the eagle pair;

c. An aerial map and a map at the scale of the development which shows the location of the eagle's nest and other critical eagle nesting habitat features as well as the proposed development;

d. The size and shape of the buffer area;

e. Measures to reduce potential adverse impacts of the development on the nesting bald eagles;

f. A critical eagle nesting habitat management plan, which shall include techniques to maintain viable nesting habitat. These techniques may include controlled burning, planting, or removal of vegetation, invasive exotic species control, maintaining hydrologic regimes, and monitoring;

g. Deed restrictions, protective covenants, easements, or other legal mechanisms, ensuring that the approved management plan will be implemented and followed.

h. A commitment to educate future owners, tenants, or other users about the specific requirements of the approved eagle management plan and the state and federal eagle protection laws.

The eagle technical advisory committee will consider the guidelines promulgated by the FFWCC and the U.S. Fish and Wildlife Service in the review of management plans and may request assistance from these agencies whenever necessary.

95. The revised BEMP addresses each of the items listed in Policy 7.6.1, which are identified in the policy as "minimum" requirements. The revised BEMP also includes additional elements, including fencing along the perimeter of the buffer



zone and a monetary donation to support eagle monitoring in Lee County.

96. The City contends that the proposed change is inconsistent with this objective and policy because the revised BEMP is not "an optimal management plan," because the 330-foot buffer is smaller than the buffer zone recommended by the national guidelines and because the project could be redesigned by reducing the size of the stormwater pond.

97. The more persuasive evidence establishes that the revised BEMP is the optimal plan for the development, as proposed, which is the appropriate inquiry under Policy 7.6.1.

98. The revised BEMP has been approved by USFWS and FWCC, and as discussed above, includes adequate protections for nest LE-005 and the eagles using the nest.

99. Therefore, the proposed change is consistent with Objective 7.6 and Policy 7.6.1.

#### E. Ultimate Findings

100. The proposed change is not a substantial deviation from the original development order for the Bonita Bay DRI.

101. The proposed change meets the conditions of Section 380.06(19)(e)2.j., Florida Statutes, in that it is a change that modifies the boundaries and configuration of the protection areas around nest LE-005 based upon science-based refinements concerning bald eagle habitat protection.

102. The more persuasive evidence establishes that the proposed change will not adversely affect nest LE-005 and that the revised BEMP includes adequate protections for the nest and the eagles using the nest. On these issues, the opinions of the wildlife ecologists presented by Petitioners were more persuasive than the opinions of the wildlife ecologists presented by the City.<sup>9/</sup>

103. The more persuasive evidence establishes that the proposed change is consistent with the City's comprehensive plan. The revised BEMP protects the environmentally sensitive plant communities on the subject property, consistent with Policy 7.2.4; protects and maintains the diverse wildlife on the subject property, consistent with Objective 7.3; and provides adequate safeguards to protect nest LE-005 from the impacts of the proposed development, consistent with Objective 7.6 and Policy 7.6.1.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction

104. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 380.07, Florida Statutes.

105. Petitioners have standing. See § 380.07(2), Fla. Stat.

B. Scope of Proceeding

106. Section 380.07, Florida Statutes, provides in pertinent part:

(2) . . . Within 45 days after the order is rendered, the owner, the developer, or the state land planning agency may appeal the order to [FLWAC] by filing a petition alleging that the development order is not consistent with the provisions of this part. . . .

\* \* \*

(6) Prior to issuing an order, [FLWAC] shall hold a hearing pursuant to the provisions of chapter 120. The commission shall encourage the submission of appeals on the record made below in cases in which the development order was issued after a full and complete hearing before the local government or an agency thereof.

(7) [FWWAC] shall issue a decision granting or denying permission to develop pursuant to the standards of this chapter and may attach conditions and restrictions to its decisions.

107. The City argued from the outset of this case that the resolution of Petitioners' appeal should be based solely upon a review of the record developed at the City. This argument was rejected in an Order entered on November 28, 2007.

108. The Order concluded that "[t]his case shall be conducted as a de novo proceeding under Chapter 120, Florida Statutes." The Order reasoned as follows:

Section 380.07(6), Florida Statutes, requires FLWAC to "hold a hearing pursuant

to the provisions of chapter 120" before deciding an appeal of a DRI development order. The statute also requires FLWAC to "encourage the submission of appeals on the record made below in cases in which the development order was issued after a full and complete hearing before the local government or an agency thereof."

Where, as here, the parties do not agree to an appeal on the record below, the decision to be made by FLWAC or the Administrative Law Judge "is not whether to conduct a de novo evidentiary hearing as opposed to a classic appellate review, but whether certain evidence [i.e., the record below] is to be admitted at the Chapter 120 hearing." Transgulf Pipeline Co. v. Gadsden County, 438 So. 2d 876, 879 (Fla. 1st DCA 1983). See also General Development Corp. v. Fla. Land and Water Adjudicatory Comm'n, 368 So. 2d 1323 (Fla. 1st DCA 1979); Cox v. Lake County, 2001 Fla. ENV LEXIS 259 (FLWAC 2001).

109. The City renewed this argument in its PRO, contending that a de novo hearing should not have been conducted because Petitioners did not present any evidence or witnesses at the final hearing that they did not present at the hearing before the City. This argument is again rejected based upon Transgulf and the other decisions cited in the November 28, 2007, Order, which make clear that the appeal under Section 380.07, Florida Statutes, is to be a de novo hearing pursuant to Chapter 120, Florida Statutes, unless the parties agree otherwise.

110. The City also argues in its PRO that state-level review of DRI development orders is "limited to regional and

statewide issues, not local issues, such as the ones present in this case." In support of this argument, the City relies primarily on a 1977 law review article describing the DRI law's respect for "the principle of localism."<sup>10/</sup>

111. This argument is rejected. First, protection of the bald eagle is an issue of statewide concern, not a "local issue." Second, Section 380.07, Florida Statutes, does not limit the issues that can be reviewed on appeal or provide for different levels of review for "local issues" as compared to state or regional issues. Third, Section 380.07(7), Florida Statutes, clearly gives FLWAC, not the local government, the ultimate authority to determine whether a challenged DRI development order should be approved. See also Bay Point Club, Inc. v. Bay County, 890 So. 2d 256, 266 (Fla. 1st DCA 2004) (Kahn, J., dissenting) ("Rather than vindicating any local government rights to control development, the majority opinion bestows that right upon the most centralized institution conceivable, the Governor and the Cabinet."). Fourth, comprehensive state-level review serves to ensure that the local government's decision on the development order complies with the requirements of the DRI law and is not based upon inappropriate parochial or political concerns.<sup>11/</sup> See Manatee County v. Estech General Chemicals Corporation, 402 So. 2d 1251, 1255 (Fla. 2d DCA 1981).

### C. Burden of Proof

112. Petitioners have the burden to prove by a preponderance of the evidence that the proposed change to the Bonita Bay DRI should be approved. See Young v. Dept. of Community Affairs, 625 So. 2d 831, 835 (Fla. 1993); Graham v. Estuary Properties, 399 So. 2d 1374, 1379 (Fla. 1981); Bay Point Club, Inc. v. Bay County, Case No. 01-4890, 2002 Fla. Div. Adm. Hear. LEXIS 1593, at ¶ 44 (DOAH Dec. 11, 2002), adopted, 2003 Fla. ENV LEXIS 49 (FLWAC Mar. 17, 2003), aff'd, 890 So. 2d 256 (Fla. 1st DCA 2004).

### D. Merits

113. Section 380.06(19), Florida Statutes, sets forth the procedure for making changes to an approved DRI.

114. Section 380.06(19)(a), Florida Statutes, provides that a proposed change that "creates a reasonable likelihood of additional regional impact, or any type of regional impact created by the change not previously reviewed by the regional planning agency, shall constitute a substantial deviation and shall cause the proposed change to be subject to further [DRI] review." (Emphasis supplied).

115. Section 380.06(19)(b), Florida Statutes, lists various changes that are substantial deviations, including:

Any change which would result in development of any area which was specifically set aside in the application for development approval

or in the development order for preservation or special protection of endangered or threatened plants or animals designated as endangered, threatened, or species of special concern and their habitat . . . .  
The refinement of the boundaries and configuration of such areas shall be considered under sub-subparagraph (e)2.j.

§ 380.06(19)(b)14., Fla. Stat. (emphasis supplied).

116. Section 380.06(19)(e), Florida Statutes, lists various changes that are not substantial deviations, including:

Changes that modify boundaries and configuration of areas described in subparagraph (b)14. due to science-based refinement of such areas by survey, by habitat evaluation, by other recognized assessment methodology, or by an environmental assessment. In order for changes to qualify under this sub-subparagraph, the survey, habitat evaluation, or assessment must occur prior to the time a conservation easement protecting such lands is recorded and must not result in any net decrease in the total acreage of the lands specifically set aside for permanent preservation in the final development order.

§ 380.06(19)(e)2.j., Fla. Stat.

117. A proposed change that is not a substantial deviation is still subject to review and approval by the local government, and in that regard, the flush-left language at the end of Section 380.06(19)(e)2., Florida Statutes, provides:

This subsection . . . shall require an application to the local government to amend the development order in accordance with the local government's procedures for amendment of a development order. In accordance with

the local government's procedures, including requirements for notice to the applicant and the public, the local government shall either deny the application for amendment or adopt an amendment to the development order which approves the application with or without conditions. . . .

118. Furthermore, Section 380.06(19)(f), Florida Statutes, provides in pertinent part:

3. [T]he local government shall give 15 days' notice and schedule a public hearing to consider the change that the developer asserts does not create a substantial deviation. . . .

\* \* \*

5. At the public hearing, the local government shall determine whether the proposed change requires further [DRI] review. . . .

6. If the local government determines that the proposed change does not require further [DRI] review and is otherwise approved . . ., the local government shall issue an amendment to the development order incorporating the approved change and conditions of approval relating to the change. The requirement that a change be otherwise approved shall not be construed to require additional local review or approval if the change is allowed by applicable local ordinances without further local review or approval. . . .

119. The parties agree that the proposed change at issue in this case is not a substantial deviation pursuant to Section 380.06(19)(e)2.j., Florida Statutes. Thus, the proposed change does not require further DRI review.



120. The parties disagree whether the proposed change is "otherwise approved" for purposes of Section 380.06(19)(f)6., Florida Statutes. Petitioners argue that the proposed change is "otherwise approved" as a matter of law because there is nothing in the City's land development code requiring additional local review or approval of the change. The City argues that the proposed change must be consistent with the City's comprehensive plan in order to be considered "otherwise approved."

121. Petitioners' argument is rejected in light of Bay Point Club, supra, in which the en banc court affirmed a final order issued by FLWAC denying a proposed change to a DRI development order on the grounds that the change was inconsistent with the local comprehensive plan. The court expressly held that proposed changes to previously-authorized DRIs must "comply with the [local] comprehensive plan," and in reaching its decision, the court explained that the "and is otherwise approved" language in Section 380.06(19)(f)6., Florida Statutes, "clearly and unambiguously requires a proposed change be subjected to, rather than exempted from, additional local approval even when no further DRI review is necessary." Bay Point Club, 890 So. 2d at 259-60.

122. To be consistent with the local comprehensive plan, a proposed change must be compatible with, and further, all of the objectives and policies in the plan. See § 163.3194(3)(a), Fla.

Stat.; Franklin County v. S.G.I. Limited, 728 So. 2d 1210, 1211 (Fla. 1st DCA 1999); Bay Point Club, 2002 Fla. Div. Adm. Hear. LEXIS 1593, at ¶ 46.

123. The City's interpretation of its comprehensive plan is entitled to deference, but the City's decision to deny the proposed change is not entitled to a presumption of correctness in this de novo proceeding. See Estech, 402 So. 2d at 1256.

124. As detailed in the Findings of Fact, the more persuasive evidence establishes that the proposed change is consistent with the City's comprehensive plan. Therefore, the proposed change should be approved.

#### RECOMMENDATION

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

RECOMMENDED that FLWAC enter a final order approving the proposed change to the Bonita Bay DRI.

DONE AND ENTERED this 17th day of April, 2008, in  
Tallahassee, Leon County, Florida.



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T. KENT WETHERELL, II  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of April, 2008.

ENDNOTES

<sup>1/</sup> All statutory references in this Recommended Order are to the 2007 version of the Florida Statutes.

<sup>2/</sup> The depositions were received into evidence as Petitioners' Exhibits 63A (Kilner), 63J (Houck), and 63F (Amico), and City Exhibit 18 (Trebatoski). Only the highlighted portions of the depositions were received.

<sup>3/</sup> A more recent draft existed at the time of the final hearing, but that draft was not offered into evidence.

<sup>4/</sup> The City relies upon Lee County staff to review environmental impacts of proposed developments, and the individuals primarily responsible for evaluating the potential impacts of the proposed change on nest LE-005 were county staff members Kimberly Trebatoski and Becky Sweigert.

<sup>5/</sup> The record from the City Council hearing was not offered into evidence. The City Attorney explained that the Board hearing was "the only time where witnesses are sworn and testify to the evidence"; that the City Council makes its decision "on the basis of [the Board hearing] transcript, along with the staff report and all the documents that are included that they receive

in a package"; that the City Council received "nonsworn testimony at the time they make their decision," but are advised by counsel that such testimony is not evidence; and that the evidence presented to the Board is what constitutes the substantial competent evidence for the City Council's decision. See Transcript, at 285-86.

<sup>6/</sup> See Petitioners' Exhibit 37, which is a letter from FWCC to the City Attorney dated April 13, 2007, in which FWCC expresses its opinion that "the required conservation measures [in the revised BEMP and amended USFWS biological opinion] are adequate to protect the eagles and their nest." This letter is hearsay, but it is corroborated by the testimony of Ken Passarella concerning the deference that FWCC gives to biological opinions issued by USFWS in determining whether proposed development will adversely impact eagle nests.

<sup>7/</sup> Despite the results of the study, the authors speculated that eagles are more likely to respond negatively to disturbance when development encroaches on the nest site than when the eagle voluntarily build nests in developed areas. See Joint Exhibit 13, at 1028. There is no credible scientific evidence on this issue, one way or the other.

<sup>8/</sup> All references to specific provisions of the City's comprehensive plan are to the Conservation/Coastal Management Element of the plan.

<sup>9/</sup> Petitioners' wildlife experts have far more extensive qualifications and experience concerning eagles than did the City's wildlife experts. For example, Petitioners' witness Tom Logan had more than 30 years of work experience with FWCC and its predecessor agency involving research and management plans for eagles and other listed species.

<sup>10/</sup> See Thomas G. Pelham, Regulating Developments of Regional Impact: Florida and the Model Code, 29 U. Fla. L. Rev. 789, 814 (1977)). The author of the article is the current Secretary of the Department of Community Affairs and a respected authority on Florida's growth management laws.

<sup>11/</sup> This last reason is particularly important in this case because the record does not reflect whether the City Commission gave any deference to the Board's recommendation to approve the proposed change even though the Board's recommendation came after an extensive quasi-judicial hearing in which the Board had

the opportunity to observe the demeanor of the witnesses as they gave sworn testimony and were subjected to cross-examination.

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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.