

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA**

**In Re: LEE COUNTY, FLORIDA
and CORKSCREW GROVE LIMITED
PARTNERSHIP, a limited liability company,
Joint Petitioners**

CASE NO.: 22-CA-002743

v.

**KEVIN HILL and JEFFREY KLEEGER,
Proposed Intervenor Respondents**

**MOTION TO INTERVENE & RESPONSE TO JOINT PETITION TO APPROVE
SETTLEMENT AGREEMENT**

Kevin Hill and Jeffrey Kleeger, pursuant to Florida Rules of Civil Procedure 1.230 and 1.210(a), each hereby move the Court for an order permitting them to participate, object, and intervene as Respondent parties in this action, with full and complete rights to object to and oppose the judicial validation of departures from state law contained in the proposed *Bert Harris Act* settlement agreement sought in this proceeding by Lee County, Florida and Corkscrew Grove Limited Partnership to defend their substantial interests in the subject matter of this action.

Introduction

The Joint Petitioners have filed this action with no Respondents – in essence a one sided proceeding before the court – seeking judicial approval of a settlement that approves additional density and intensity in the environmentally sensitive Density Reduction/Groundwater Resource (DRGR) area 6,676 acres allowing up to 10,000 dwelling units, and approving 700,000 sq ft of non-residential use including an additional 2,474 acres outside there area of land that was the subject of the actual Bert Harris Act claim. The proposed development will put additional density and intensity in this rural environmentally sensitive DRGR area that will be detrimental to the

public interest and without the participation of the Intervenors as Respondents there would be no party before the Court to present argument counter to that of the joint petitioners.

This unique judicial proceeding was filed jointly by Lee County and Corkscrew Grove Limited Partnership, as required by §70.001(4)(d)(2), Fla. Stat. to obtain judicial validation of a settlement of a Harris Act claim.

The Settlement Agreement purports to utilize the authority of § 70.001 (4)(d)1 of the Harris Act to allow the County to grant to Corkscrew “a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property....” Under the Harris Act, this settlement must be submitted to a circuit court judge “for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.” §70.001 (4) (d)2, Fla. Stat. and otherwise meet the standards established in the Act.

The real property that was the subject of the Bert Harris claim was only 4,202 acres of land, but the proposed settlement is for 6,676 acres in the rural, environmentally sensitive DRGR area exceeding the acreage that was the subject of the Harris Act claim by 2,474 acres. The subject proposed settlement, which includes this 2,474 acres land beyond the “real property” contained in the Harris Act claim, would allow residential density for up to 10,000 dwelling units urbanizing this environmentally sensitive DRGR rural area that currently has limited urban services.

Allowing 10,000 homes would burden the DRGR with a future population of more than 20,000 people and would leapfrog available services to create a very large development exceeding the size of many Florida cities located in the middle of the rural, environmentally sensitive DRGR.

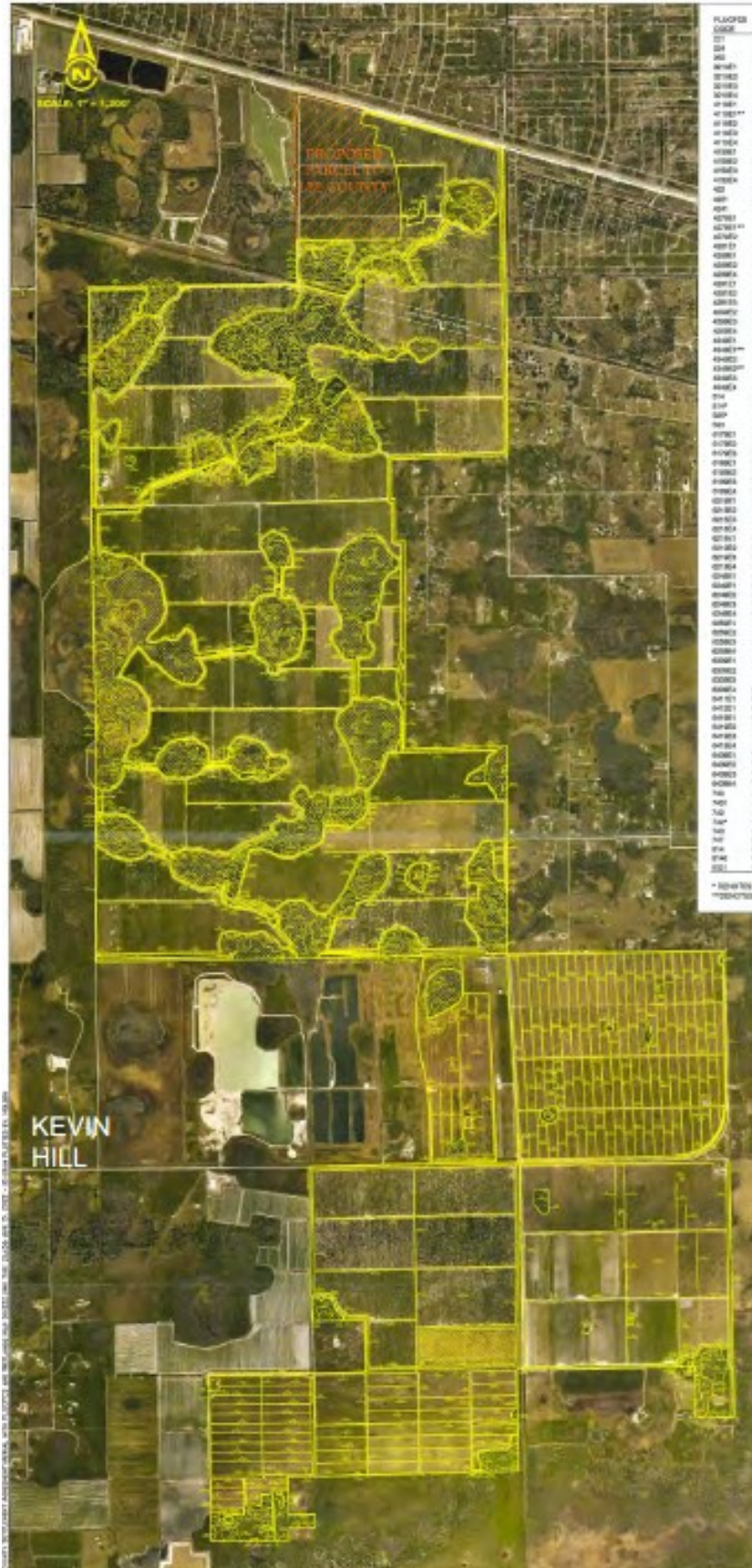
Conferral

Counsel has conferred with opposing counsel prior to filing this motion. Counsel for Corkscrew opposes the motion. Counsel for Lee County was unable to confirm the position of the County prior to the filing on this motion.

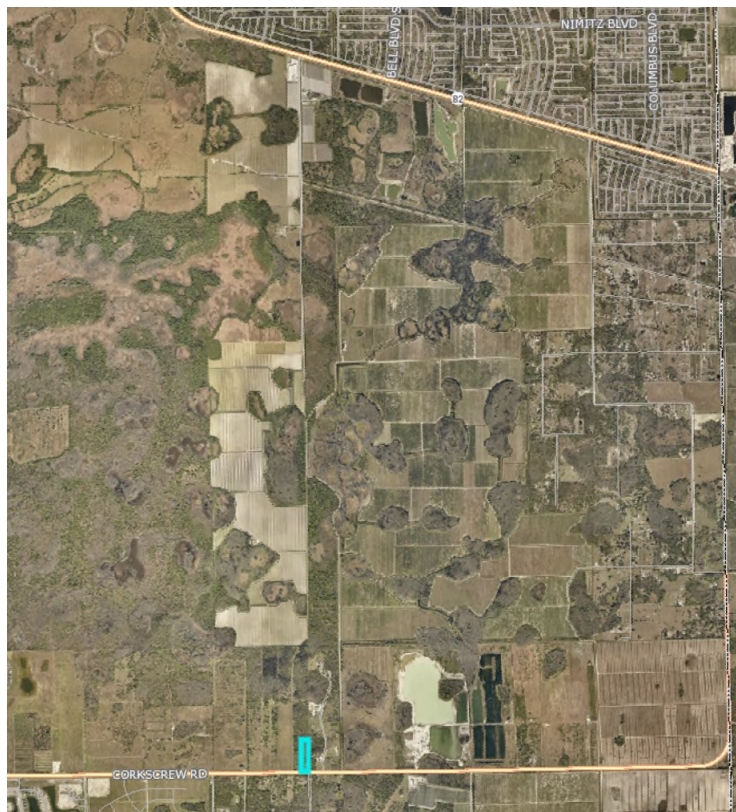
Factual Allegations

The Intervenors' Interests

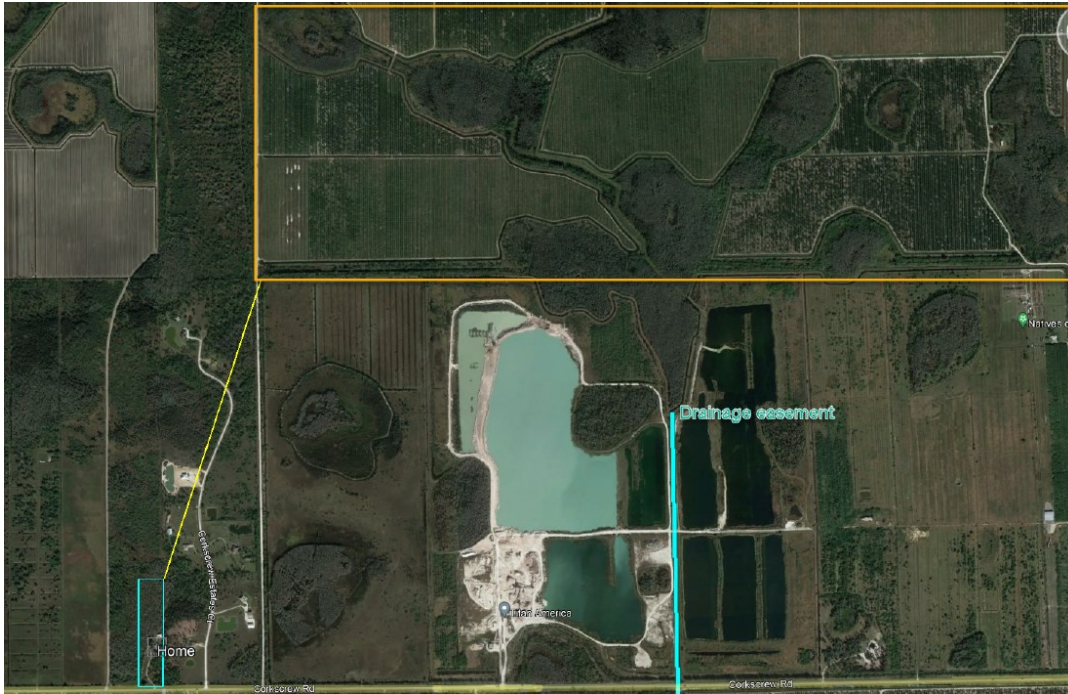
1. The Intervenor Respondents, Jeffrey Kleeger and Kevin Hill, own property which is near and proximate to the subject property that is the subject of the Settlement Agreement.
2. The Settlement Agreement would adversely affect Intervenor Respondents rural and agricultural way of life, and their use and enjoyment of their homes and property, and increase safety and traffic problems they he would experience regularly, because it would allow a substantial increase in the amount of urban or suburban development that would be allowed on 6,676 acres of land proximate to his home and property, in violation of the development limits and standards that would otherwise apply in the absence of the Settlement Agreement.
3. The proposed settlement would allow development of the real property (called "Kingston") in the area shown in the aerial below as the area within the yellow boundaries (with wetlands depicted), and KEVIN HILL's property is shown in the area where his name is typed in white font:



4. The Intervenor Respondent KEVIN HILL owns property at 20731 CORKSCREW RD, which is within the area that will be impacted and affected by the proposed approval of development of the property that is the subject of the Bert Harris Act Settlement Agreement, because the increased density and intensity of development approved in the Settlement Agreement will adversely affect his rural and agricultural way of life, and increase address safety and traffic problems that he would experience regularly. He will thus be adversely affected by the Settlement Agreement, which authorizes the County to grant development approvals to Corkscrew that violate the County's Comprehensive Plan and Land Development Regulations to an extent greater than is authorized by statute to avoid violating a landowner's *Harris Act* rights. He seeks to intervene as a Respondent in this matter to provide evidence and legal argument in opposition to judicial approval of the Settlement Agreement in this matter.

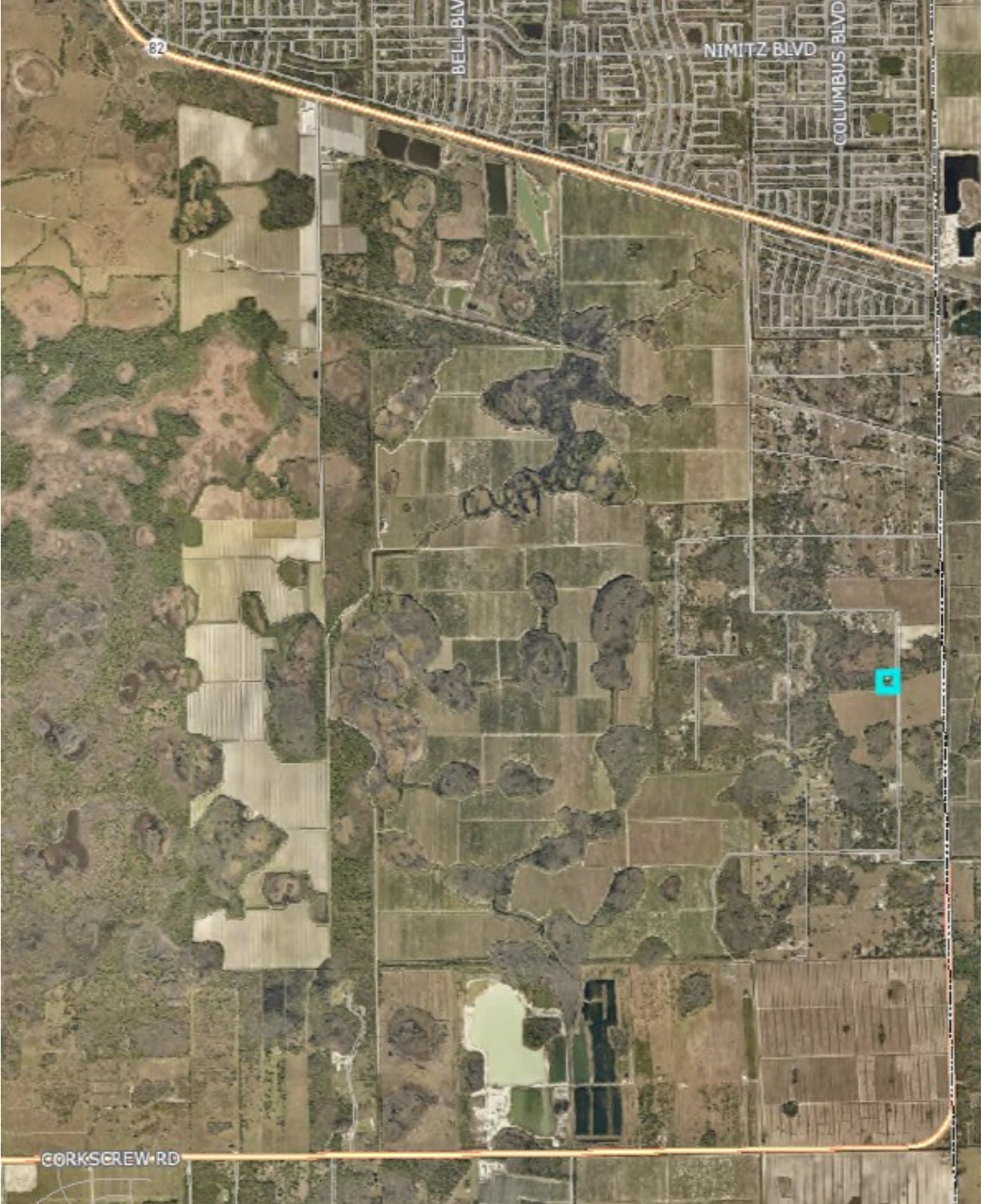


Kevin Hill property location



Kevin Hill property shown in blue rectangle on left lower side of photo
(with line drawn to closest portion of the proposed development area)

5. The Intervenor Respondent JEFFREY KLEEGER lives, owns property and raises livestock, at 17680 WILDCAT DRIVE, which is within the area that will be impacted and affected by the proposed approval of development of the property that is the subject of the Bert Harris Act Settlement Agreement, because the increase in density exceeds that allowed by the Lee County Comprehensive Plan and Land Development Code and the increased density and intensity of development approved in the Settlement Agreement will adversely affect his rural and agricultural way of life, and increase address safety and traffic problems that he would experience regularly. He will thus be adversely affected by the Settlement Agreement, which authorizes the County to grant development approvals to Corkscrew that violate the County's Comprehensive Plan and Land Development Regulations to an extent greater than is authorized by statute to avoid violating a landowner's *Harris Act* rights. He seeks to intervene as a Respondent in this matter to question witnesses and provide legal argument in opposition to judicial approval of the Settlement Agreement.
6. Jeffrey Kleeger's property location is also near and proximate to the proposed new development of Kingston shown at the highlighted square on rights side of image below:



The Underlying Harris Act Claim and County Hearing Examiner Findings

7. Through a letter dated September 11, 2020, Corkscrew served upon the County a pre-claim under the *Harris Act* based upon the County's denial of a rezoning application and a General Mining Permit for 4,202.3 acres of land. This rezoning application and *Harris Act* claim concerned, as alleged in the Jt. Petition, "a *portion* of the subject property". (Jt. Petition, ¶3) (emphasis added).
8. The Subject Property of the Settlement Agreement" is 6,676 acres. (Jt. Petition, ¶ 6)
9. The Settlement Agreement allows Corkscrew to develop up to 10,000 dwelling units, 700,000 s.f. of commercial development, 240 hotels rooms and other uses on the property that it either owns or is being granted by the County. (Jt. Petition, ¶ 11)
10. The Settlement Agreement would grant development rights and waivers of compliance with County Land Development Regulation and Comprehensive Plan for 2,473.7 acres of property that are not the subject of the *Harris Act* claim.
11. The Settlement Agreement purports to utilize the authority of § 70.001 (4)(d)1 of the Harris Act to allow the County to grant to Corkscrew "a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property...."
12. As explained in the Lee County Hearing Examiner's (HEX) Report concerning the proposed Settlement Agreement, dated 5.26.22, the Proposed Settlement Agreement "is not consistent with the Lee Plan because the property does not lie within Environmental Enhancement and Preservation Communities Overlay. Development proposed along SR 82 exceeds development parameters established for commercial uses within Southeast Lee County's Mixed Use Communities." (HEX Report, p. 5.)
HEX REPORT, attached Exhibit A.

13. As explained in the Lee County Hearing Examiner's (HEX) Report, the "The Agreement confers development rights greater than those permitted in the Environmental Enhancement and Preservation Communities Overlay." (HEX Report, p. 3.)
14. As a result, the Settlement allows development that contravenes Comprehensive Plan Policies 33.2.4 and 33.2.4.1. (Id.)
15. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policy 33.2.4.2, because it allows development authorized only in a Planned Development zoning category, but the property is not within that zoning category. (HEX Report, p. 6)
16. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policy 33.2.4.2(e), because it requires Conservation Easements for less than the 55% of the property, as required by the Policy. (HEX Report, p. 6)
17. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policy 33.2.4.2 (i), because the development approval will not require the elimination of agricultural irrigation and fertilizer use at the time of the first development order approval. (HEX Report, p. 7)
18. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policy 33.2.4.3 (c), because it allows the construction of residential densities of 1.5 units per acre in Tiers 3, 5 and 6, which exceeds the one unit per three acre maximum density in the policy. (HEX Report, p. 8)
19. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policies 33.2.4.4.d, 33.2.4.e and 33.2.5 because the amount of commercial and residential development it allows 700,000 s.f. of commercial development

on the site, which exceeds the Plan’s limitation of 300,000 s.f. of commercial development.
(HEX Report, p. 8)

20. The HEX Report also identified eight “deviations” from the Land Development Code, including LDC Section 10-296(e)(3), Section 10-329(d)(3)a.2, Section 10-416(a), Section 10-291(3), Section 10-416(d)(1), Section 10-384(c)(1), Section 10-285. (HEX Report, pp. 10-12)

21. As explained in the HEX Report, the approval of development that is inconsistent with the Lee County Comprehensive Plan is inconsistent with §§163.3161(5), 163.3161(6), 163.3194(1) & (3), and §163.3215, Fla. Stat. (HEX Report, p. 12)

22. The HEX Report explains that a determination of whether “the relief [granted by the Settlement Agreement] is necessary to prevent an inordinate burden to the property owner from the regulation” is “outside the scope of the Hearing Examiner’s authority.” (Ex. 2, p. 3, footnote 11).

23. Whether the Settlement Agreement complies with the standards established in the *Harris Act* for the granting of relief from the application of comprehensive plan and land development regulations as necessary to avoid a violation of the Act is now squarely before this Court by way of the Joint Petition to Approve Settlement Agreement filed in this matter by Lee County, Florida and Corkscrew Grove Limited Partnership on July 23, 2022.

Legal Standard for Intervention

Florida Rule of Civil Procedure 1.230 provides that “[a]nyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.” In other words, as confirmed

by the Author's Comment to the Rule, "the court has full discretion over intervention, including the extent thereof." The Author's Comment to the Rule provides that "[t]he intervener becomes a party to the action; he has the right to litigate on the merits the claim or defense for which he intervenes. In view of the aim of the rules to allow liberal joinder of parties and claims, the intervener should be permitted to counter-claim, cross-claim, and implead third parties" (emphasis supplied).

An intervenor "may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties." *Williams v. Nussbaum*, 419 So.2d 715, 717 n.1 (Fla. 1st DCA 1982). In that sense, "an intervenor is a party for all purposes with the same rights of other parties to the cause." *Greenhut Const. Co. v. Henry A. Knott, Inc.*, 247 So. 2d 517, 519–20 (Fla. 1st DCA 1971). The intervention rule should be liberally construed. *Grimes v. Walton County*, 591 So. 2d 1091, 1093–94 (Fla. 1st DCA 1992).

A person is *entitled* to intervene when such person has an interest in the litigation that is of "such a direct and immediate character that the Intervener will either gain or lose by the direct legal operation and effect of the judgment." *Morgareidge v. Howey*, 78 So. 14, 15 (Fla. 1918); *Harbor Specialty Ins. Co. v. Schwartz*, 932 So. 2d 383, 386 (Fla. 2^d DCA 2006).

When a party seeks declaratory relief, "all persons may be made parties who have or claim any interest which would be affected by the declaration," and "no declaration shall prejudice the rights of persons not parties to the proceedings." § 86.091, Fla. Stat.

Florida Rule of Civil Procedure 1.210(a) provides, "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and *any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may*

at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause" (emphasis supplied). The Court has broad discretion in adding parties to the case to ensure parties' interests are protected and a complete adjudication of the action.

As a landowner proximate to the subject property, the Intervenors would have legal standing to challenge any development orders issue by Lee County for the subject property on the basis that they violate the Lee County Comprehensive Plan. § 163.3215 (3), Fla. Stat. The statutory cause of action authorizes any aggrieved person to challenge the validity of development orders that are not consistent with comprehensive plans:

"Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order ... which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part."

§ 163.3215 (3), Fla. Stat.

An "aggrieved or adversely affected party" is defined as:

"any person or local government that will suffer an **adverse effect to an interest protected or furthered by the local government comprehensive plan**, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The **alleged adverse interest may be shared in common with other members of the community at large** but must **exceed in degree the general interest in community good shared by all persons**. The term includes the owner, developer, or applicant for a development order." §163.3215(2), Fla. Stat. (emphasis added)

Section 163.3215 grants "**significantly enhanced standing to challenge the consistency of development decisions with the Comprehensive Plan**" compared with prior standing law.

Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 1st DCA 2001) (emphasis added). "As a remedial statute, section 163.3215, Florida Statutes, should be **liberally construed** to ensure standing for a party with a protected interest under the comprehensive plan who will be adversely

affected by the local government's actions." *Bay County v. Harrison*, 13 So.3d 115 (Fla. 1st DCA 2009) (emphasis added). "There is no doubt that the purpose of the adoption of section 163.3215 was to **liberalize standing** in this context." *Save the Homosassa River Alliance, Inc., et al v. Citrus County*, 2 So.3d 329 (5th DCA 2008) (citing *City of Ft. Myers v. Splitt*, 988 So. 2d 28 (Fla. 2d DCA 2008)) (emphasis added).

The Court in *Save the Homosassa River Alliance, Inc., et al v. Citrus County*, 2 So.3d 329 (5th DCA 2008) explained:

"The statute is not designed to redress damage to particular plaintiffs. To engraft such a 'unique harm' limitation onto the statute would make it impossible in most cases to establish standing and would leave counties free to ignore the plan because each violation of the plan in isolation usually does not uniquely harm the individual plaintiff. **Rather, the statute simply requires a citizen/plaintiff to have a particularized interest of the kind contemplated by the statute**, not a legally protectable right." 2 So.3d at 340 (emphasis added).

The Intervenor's rights will be affected by the Court's ruling in this proceeding because judicial approval of the Settlement Agreement would entitle Corkscrew to received approval of the development right granted by the Agreement, notwithstanding their lack of consistency with the Lee County Comprehensive Plan and Land Development Code. Under the authority of the *Harris* Act provisions explained below, the rights the Intervenors would otherwise possess to enforce the County's Comprehensive Plan (and its Land Development Code) would be foreclosed.

Finally, **the unique nature of this proceeding supports granting intervenor status to the Intervenor.** Unlike most cases, **the only two parties currently before the Court are not adverse to each other** but have jointly sought the Court's approval of a Settlement Agreement which both support. The granting of this Petition to Intervene is appropriate to ensure that there is a party in the proceeding who would present to the Court the points and arguments that counsel against judicial approval requested by both existing parties.

The HEX CGLP Settlement Agreement Project Description that was presented as part of the County Hearing Examiner process included the following statement:

"From a procedural standpoint, the public interest in requiring public hearings as part of the plan amendment process is being preserved by the procedural requirements of the settlement agreement that mandate one public hearing before the Lee County Hearing Examiner, two public hearings before the Board of County Commissioners, and a final public hearing before the circuit court – all of which will permit the consideration of public testimony. (Ex. 3, p. 10)

While the intervenors seek to represent their personal interests, they point out this statement simply to highlight the elevated public interest in this matter, and thus the importance of granting Intervenor status so that Intervenor may question witnesses, bring out facts and make legal argument that, while presented on their own behalf, would be in the public interest for the Court to have before it before rendering its decision in this case.

Legal Argument

1. The proposed Settlement Agreement improperly purports to grant waivers from development restrictions to property that was not the subject of the *Harris Act* claim.

A *Harris Act* settlement cannot go beyond restoring any property rights that have been allegedly burdened by the subject government action to development rights and waivers of otherwise applicable development restrictions for additional property that was not the subject of the *Harris Act* claim. A *Harris Act* settlement cannot go beyond restoring any property rights that have been burdened and used as an excuse to grant more development rights than had ever existed on the property.

The *Harris Act* authorizes relief to a landowner “[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property” §70.001 (2), Fla. Stat. In turn, the statute defines the term “real property” to mean:

“land and includes any surface, subsurface, or mineral estates and any appurtenances and improvements to the land, including any other relevant interest in the real property in which the property owner has a relevant interest. **The term**

includes only parcels that are the subject of and directly impacted by the action of a governmental entity.

§70.001 (3) (g), Fla. Stat. See also §70.001 (2), Fla. Stat. (emphasis added)

The Settlement Agreement submitted to the Court for approval in this proceeding would improperly authorize relief in the form of waivers from compliance with County regulations and comprehensive plan limitations for over 2,200 acres of land that were not the subject of and directly impacted by the government action that gave rise to the *Harris Act* claim.

2. The “relief” granted by the County to Corkscrew under the Settlement Agreement exceeds that which is necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

Under Florida law, a local government may not violate its land development code or comprehensive plan based on a conclusion that the resulting approval will be in the public interest. Instead, they must deny applications that violate the code or the plan. *Realty Assocs. Fund v. Town of Cutler Bay*, 208 So.3d 735 (Fla. 3d DCA 2016). The only exception is the section of the *Harris Act* which authorizes deviations from the plan or code only to the extent the Act’s standards are shown to have been met.

In this case, the “relief” the Settlement would grant Corkscrew violates §70.001 (4) (d)1, Fla. Stat, which requires that “the relief granted shall protect the public interest served by the regulations at issue **and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.**” (emphasis added). The “relief” the Settlement would grant Corkscrew violates §70.001 (4) (d)1 and 2, Fla. Stat. because the relief granted exceeds the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

The Act allows limited waivers of existing comprehensive plan and code requirements, but only to the extent necessary to avoid an "inordinate burden" on the landowner, as defined in the Act, which defines the terms "inordinate burden" and "inordinately burdened" to mean:

"an action ...[which] has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. "§70.001 (3) (e) (1), Fla. Stat. (emphasis added)

The development rights the Settlement Agreement purports to grant Corkscrew exceed the *Harris Act's* protection of "vested rights" to "existing uses" §70.001(3) (a) and (b), Fla. Stat.

Even in consideration of "inordinate burden" standard notwithstanding judicial precedent interpreting federal and Florida constitutional "property rights" protections and "takings" claims, the "Agreement" and Stipulated Settlement Agreement exceed what the known precedent would support as the minimal waiver of law to prevent an undue burden. The *Harris Act's* definition of "inordinate burden" is similar to case law interpreting the takings clause, which requires compensation when regulation (1) prevents an owner from attaining her "reasonable, investment - backed expectation",¹ (2) limits a vested right,² or (3) has such an adverse impact on the landowner that "justness and fairness require the burden to be borne by the public at large."³ Thus, while the express legislative intent is to "provide more protection," the statutory definitions and

¹ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

² See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); also see *Monroe County v. Ambrose*, 866 So. 2d 707 (Fla. 3d D.C.A. 2003) (the purchase of land is a subjective expectation and not a vested right to develop property).

³ *Penn Central*, 438 U.S. at 124; see also *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304, 319 (1987); *Dolan v. City of Tigard*, 512 US 374 (1994); *Nollan et ux v. California Coastal Commission*, 483 U.S. 825 (1987).

decision factors track closely those used by courts under the “takings” clause. For this reason, the Act is likely to be interpreted as granting rights not greatly in excess of those given by the Constitution. Because the Act uses the same terms of art as federal takings case law to flesh out the meaning of “inordinate burden”

Courts have rejected “takings” claims against regulations that have substantially reduced the value of property. Susan Trevarthen, “Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims,” 78 Fla. Bar J.61, 61 (2004). See e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), at 1019); *Hodel v. Virginia Surface Mining and Reclamation Act*, 452 U.S. 264 (1981); *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 830 F.2d 977 (9th Cir.1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)(in some cases regulations may result in a 95% loss without justifying compensation as a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (reducing property value by over 90%). In *Palazzolo v. Rhode Island*, 533 U.S. 606, 630–631, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001), the U.S. Supreme Court explained that, to prove a total regulatory taking, a plaintiff must show that the challenged regulation leaves “the property ‘economically idle’ ” and that the plaintiff retains no more than “a token interest.” The plaintiff in *Palazzolo* failed to prove a total taking where an eighteen-acre property appraised for \$3,150,000 had been limited as a result of the challenged regulation to a value of \$200,000. *Id.* at 616, 631, 121 S. Ct. 2448.

In Florida, leading cases are *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981) (holding 75% reduction of value not a taking), *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. 1st D.C.A. 1990), *rev. den.*, 570 So.2d (Fla. 1990), and *Lee County v. Morales*, 557 So.2d 652, 655 (Fla. 2d D.C.A. 1990), *rev. den.*, 564 So.2d 1086 (Fla. 1990) (which found a very

substantial reduction in property value based on a Lee County regulation was not a taking). A Florida Keys case, of *Beyer v. City of Marathon*, 197 So.3d 563 (Fla. 3rd DCA 2016) and all ‘takings’ decisions, held that, absent extreme circumstances, any remaining reasonable economic use of the property will preclude a ‘takings’ claim.

The *Harris*” Act entitles landowners to compensation only where they can prove that a regulation “has inordinately burdened an existing use of real property or a vested right to a specific use of real property....” §70.001 (2), Fla. Stat. An “inordinate” burden is required. Not just any “burden” requires compensation or justifies relief in the form of the waiver of otherwise applicable development standards. . **Even given the undefined lower threshold for a property rights violation under Florida’s *Harris Act*, the County and Corkscrew must demonstrate that granting approval for less than a development of up to 10,000 dwelling units, 700,000 s.f. of commercial development, 240 hotels rooms and other uses would be an “inordinate burden” upon Corkscrew.** The code and comprehensive plan waivers granted by the *Harris Act* must be “necessary” to avoid a violation. To go gratuitously beyond that would exceed the *Harris Act*’s protection of “vested rights” to “existing uses” §70.001(3) (a) and (b), Fla. Stat.

A meritorious claim requires “the relief granted shall protect the public interest served by the regulations at issue” and be the appropriate relief to prevent the governmental regulatory effort from inordinately burdening the real property. The Joint Petitioners must show that the relief granted by the “Agreement” and Stipulated Settlement” does not exceed what is “necessary” and appropriate.

Conclusion

The Court must ensure that the Settlement Agreement is not a misuse of the *Harris Act*, which allows a local government to agree to contravene its comprehensive plan and land

development regulations only to the extent i) necessary to resolve a *bona fide* claim and prevent demonstrated violation of statutory property rights; and ii) that is limited to the property that is the subject of the *Harris Act* claim; and iii) and that is narrowly limited to allow a waiver of the code or comprehensive plan no greater than necessary to prevent the property rights violation.

In this regard, the case of *Chisholm v City of Miami Beach*, 830 So.2d 842 (Fla. 3rd DCA 2002) is relevant. In *Chisolm*, the court reversed a settlement of a *Harris Act* claim purporting to approve a development project without meeting City Code requirements as “unjustified and illegal”. A concurring opinion by Judge Schwartz noted that the trial judge in the case “rejected an attempt by a hotel owner and the City of Miami Beach to grant totally unjustified and illegal height variances through the device of a ‘sweetheart settlement’ of a spurious action by the hotel owner against the City under the [Harris Act]. (citing *Chisholm Properties South Beach, Inc. v. City of Miami Beach*, 8 Fla. L. Weekly Supp. 689 (Fla. 11th Cir. Ct. August 9, 2001).

WHEREFORE, Intervenors Jeffrey Kleeger and Kevin Hill respectfully request that the Court enter an Order granting this Motion, as follows:

- (a) allowing Kleeger and Hill to intervene as a party Respondent;
- (b) providing that Kleeger and Hill have the ability to examine witnesses and assert legal argument at the evidentiary hearing scheduled in this matter for Aug. 31, 2022; and
- (c) granting such other relief as the Court considers just.

Respectfully submitted this 17th day of August, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy hereof has been filed electronically with the Clerk of Court using the E – filing portal system which will send a notice of electronic filing on this 17th day of August 2022 to the following counsel of record:

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Hearing Examiner Recommendation
Stipulation of Settlement
Corkscrew Grove Limited Partnership
v.
Lee County, Florida

I. Question Presented

Does the proposed Agreement pursuant to Stipulation of Settlement¹ protect the public interest served by the County's land development regulations?

II. Brief Answer

The Agreement serves the public interest notwithstanding its contravention of Lee Plan policies that require inclusion in the Environmental Enhancement and Preservation Communities Overlay and planned development zoning to achieve the proposed development parameters.

While the Agreement may not meet the "letter" of certain Lee Plan provisions, it accomplishes Plan objectives by conditioning development to protect the public interest served by contravened regulations.

III. Hearing Examiner Recommendation

Approve the Agreement.

IV. Discussion

A. History

Corkscrew Grove Limited Partnership owns approximately 6,676 acres in Southeast Lee County.² The property is zoned for agriculture with a future land use designation of Density Reduction/Groundwater Resource and Wetlands.³ The property is zoned for agriculture.⁴ Agricultural operations consisting of sod farming, row crops, and citrus groves have been ongoing for several decades.

CGLP filed an application to rezone 4,202 acres to Industrial Planned Development (IPD) in 2011 to approve lime rock mining. While the application was in the midst of sufficiency review, the County amended the Lee Plan. The

¹ Agreement Pursuant to Stipulation of Settlement under Section 70.001, Florida Statutes, the draft dated May 2, 2022. Hereinafter "Agreement".

² Exhibit A. Corkscrew Grove Limited Partnership is abbreviated as CGLP for the remainder of this recommendation.

³ Lee Plan Policy 1.4.5. Density Reduction/Groundwater Resource will be abbreviated as DR/GR for the remainder of the recommendation.

⁴ Zoning districts include AG-1 and AG-2.

amendment precludes mining on the property. The Board subsequently denied an Industrial Planned Development zoning request in 2019.⁵

CGLP filed suit in circuit court claiming violation of the Bert J. Harris, Jr. Private Property Rights Protection Act.⁶ Settlement discussions resulted in a proposed Agreement pursuant to Stipulation of Settlement to resolve the controversy.

B. Cause of Action

The settlement arises out of a cause of action under the Bert J. Harris, Jr. Private Property Rights Protection Act (The Act). The Act provides relief to property owners whose property rights are inordinately burdened by a new regulation. The cause of action is separate and distinct from the law of takings, yet provides relief or compensation when new regulations unfairly affect real property.

The Act authorizes settlement using permit approvals. The proposed settlement must protect the public interest served by the regulations, and provide the relief necessary to prevent an inordinate burden on the property.⁷ If the settlement contravenes a statute, the circuit court must ensure the relief:

- (1) protects the public interest served by the contravened statute, and
- (2) is necessary to prevent an inordinate burden to the property.⁸

The proposed settlement provides CGLP with development rights *in lieu* of mining and *in lieu* of damages for the County's denial of the IPD zoning request.⁹ However, the terms of the Agreement contravene certain state and local regulations.

The Act requires CGLP to identify specific regulations contravened by the settlement and offer conditions to protect the public interest served by those regulations.

C. Proposed Settlement

The Agreement contravenes certain Lee Plan Policies and Land Development Code provisions.¹⁰ Inconsistency with the Lee Plan also contravenes state statutes that require development approvals to be consistent with the local comprehensive plan.

⁵ Resolution Z-18-008 adopted on November 6, 2019.

⁶ See s. 70.001, F.S.

⁷ See s. 70.001(4)(d)1, F.S.

⁸ The latter standard will be determined by the Board of County Commissioners. See s. 70.001(4)(d)2, F.S.

⁹ The settlement terms authorize CGLP to develop the property with uses associated with a mixed use planned development. In exchange, CGLP must relinquish mining rights on the property.

¹⁰ The Land Development Code will be referenced as the LDC for the remainder of the recommendation.

The sole purpose of the hearing before the Hearing Examiner is to obtain a finding on whether the relief granted by the Agreement protects the public interest served by contravened regulations.¹¹ If the Hearing Examiner concludes the public interest is not protected, she may offer additional requirements/conditions to ensure protection.

Following the Hearing Examiner's recommendation, the Board will conduct two public hearings. If the Board accepts the recommendation, the parties may submit the settlement agreement to the circuit court for approval. Circuit court approval is a precursor to dismissing the lawsuit.

D. Relevant Terms of Agreement

The Agreement confers development rights greater than those permitted in the Environmental Enhancement and Preservation Communities Overlay.¹² The Board adopted the Overlay to encourage private partnerships to achieve DR/GR goals in the Southeast Lee County Planning Community. The Overlay identifies critical restoration areas, imposes enhanced development standards, and offers density incentives to further those goals.¹³

The Overlay uses a multidimensional approach to incentivize restoration and conservation of critical natural resources.¹⁴ The Overlay:

- Identifies strategic areas that provide critical connections to land areas serving as the foundation for water resource management and wildlife movement,¹⁵
- Balances development with natural resource protection,¹⁶ and
- Awards density to incentivize and defray the cost of restoration.¹⁷

¹¹ The second required finding, that "the relief is necessary to prevent an inordinate burden to the property owner from the regulation" is outside the scope of the Hearing Examiner's authority. This finding must be made by the Board.

¹² The Environmental Enhancement and Preservation Communities Overlay will be referred to as the "Overlay" for the remainder of this recommendation.

¹³ Lee Plan Policy 33.1.2

¹⁴ Resources include flow ways, groundwater, wetlands, flora and fauna.

¹⁵ Lee Plan Goals 33, 123, 124, 125, 126, Objective 123.1 (long term protection and enhancement of wetland/uplands to improve functionality of hydro-ecological systems) Policy 33.1.1 (large scale ecosystem integrity) Policy 33.1.2 (connecting existing corridors and conservation areas), Policy 33.1.3 (provide critical connections to conservation lands), Policy 33.1.8 (restoration and protection of natural systems), Policy 123.1.1 (development design that protects and integrates wetlands), Policy 123.2.4 (encourage protection of viable tracts of sensitive and high quality natural plant communities within developments), Policy 123.2.15 (protect rare and unique upland habitats through conservation and site design), Policy 123.3.1 (preserve uplands around wetlands to provide habitat diversity and balanced ecological system), Policy 123.11.4 (expand the Corkscrew Regional Ecosystem Watershed Greenway through incentive programs to preserve and restore habitats) Cf. Policy 123.1.2 (expands benefits of adjacent Conservation 20/20 Lands creating regional greenway system that includes a mix of flow ways, areas subject to flooding, native habitats, recreational trails and wildlife corridors).

¹⁶ Lee Plan Goals 33, 123, 124, 126, 158, Objectives 33.1, 33.2.

¹⁷ Lee Plan Goal 33, Policies 33.1.2, 33.1.3 (unique development incentives), 33.2.2, 33.2.4. *Compare* Lee Plan policies encouraging incentives for conservation and maintenance of environmentally sensitive natural

The Board approved four projects consistent with Overlay criteria.¹⁸ Similar to the CGLP property, the projects: (1) are classified as priorities for conservation, (2) are contiguous to conservation lands, (3) offer opportunities for flow way restoration, and (4) offer opportunities to expand wildlife corridors/habitats.

The Agreement is consistent with Lee Plan goals for restoration, conservation, and long term maintenance of environmentally sensitive land.¹⁹ Proposed development parameters include:

- Residential densities of 1.5 units per acre,
- 700,000 square feet of commercial use,*
- 240 hotel rooms
- 61% open space,²⁰
- 3,287 acres devoted to restoration/conservation,
- Public infrastructure, wireless communication facilities, essential services, public and private schools, and uses typical of mixed use planned developments in Lee County.
- Comprehensive conditioning to ensure restoration and protection of natural resources,²¹ and

resources: Policy 1.1.13 (Additional retail square footage award in Tradeport for preservation of upland habitat), Policy 13.5.3 (incentives to conserve critical habitat), Policy 15.1.12 (incentives to protect wildlife habitat in the University Community), Policy 60.4.5 (incentives for implementing regional surface water management systems addressing flood protection, water quality, environmental enhancement and water conservation), Policy 60.4.6 (incentives for private participation in reconstruction and maintenance of flow ways), Policy 123.2.2 (provide incentives to prevent incompatible development in and around environmentally sensitive lands), Policy 123.2.9 (incentives for preserving and planting native plant species and for controlling invasive exotic plants within environmentally sensitive areas), Policy 123.4.2 (incentives to conserve habitat of plant and animal species), Policy 123.11.4 (incentives to protect/expand Corkscrew Regional Ecosystem Watershed Greenway by preserving and restoring habitat) Also Policy 158.1.10 (directing County to evaluate land development regulations to identify and remove unwanted impediments to ensuring development is fiscally beneficial when appropriate).

¹⁸ Wild Blue RPD, Verdana Villages MPD, Corkscrew Farms RPD, known as "The Place," and most recently, FFD – through a process similar to the current action. Wild Blue, Verdana Villages, Corkscrew Farms are located within the Overlay. FFD is not, but is subject to conditions consistent with Overlay criteria.

¹⁹ Lee Plan Goals 33, 54, 59, 60, 61, 63, 123, 124, 125, 126; Objective 33.1.

²⁰ Lee Plan Policy 33.2.4 requires planned developments in the Overlay to provide a minimum of 60% open space. The Agreement requires 61% of the land area to be devoted to open space. This includes 3,287 acres of restoration and roughly 715 acres of open space within development pods.

²¹ Lee Plan Policy 33.2.4 requires planned developments in the Overlay to record a conservation easement over a minimum of 55% of the project. The Agreement requires restoration of 3,287 acres (over 49% of the site). Restored areas will be maintained in perpetuity by maintenance entities such as: Homeowners Association or Community Development District. Conditions address mitigation of transportation, fire, and EMS impacts, restoration of upland and wetland areas, conversion of farm fields to native conservation areas, restoration and enhancement of flow ways, preservation 3,287 acres, requires 61% of the land area to be devoted to open space, human wildlife coexistence plans, protected species management, phase out of agricultural operations, modeling of impacts to water resources, surface water management, monitoring of surface water for contamination, onsite flow ways, and urban services/infrastructure necessary to provide property with potable water, sanitary sewer, solid waste collection, and fire/EMS services.

- Enhanced mitigation of impacts to the county road network.²²

*The 700,000 square feet of commercial use will be limited as follows: up to 150,000 square feet directly fronting Corkscrew Road, 50,000 square feet internal to development (unused commercial square footage fronting on Corkscrew may be reassigned interior to development), and up to 500,000 square feet fronting State Road 82.

E. Inconsistencies with Adopted Regulations

1. Lee Plan.

The Agreement is not consistent with the Lee Plan because the property does not lie within the Environmental Enhancement and Preservation Communities Overlay.²³ Development proposed along SR 82 exceeds development parameters established for commercial uses within Southeast Lee County's Mixed Use Communities.²⁴ However, the Agreement imposes development criteria similar to the Overlay, furthering County goals of protecting/enhancing ecological and water resources.²⁵

Contravened policies:

Policy 33.2.4 and 33.2.4.1.

The property is not within the Overlay. Evidence demonstrates the property possesses the characteristics and potential to provide significant regional hydrological and wildlife connections. These connections would improve, preserve and restore regional surface and groundwater resources and indigenous wildlife habitats.²⁶

²² In addition to road impact fees, the Developer must pay a proportionate share contribution toward road improvements.

²³ The property is not within the Overlay reflected in Lee Plan Map 2-D.

²⁴ Lee Plan Policy 33.2.2. Note, the reference to Policy 33.3.5 within the policy should be to Policy 33.2.5. Policy 33.2.5 limits commercial uses to Mixed Use Communities, Environmental Enhancement and Preservation Communities or Rural Golf Course Communities depicted on Map 2-D. The maximum commercial floor allowed in SE Lee County may not exceed 300,000 square feet. See *also* Policy 1.6.10

²⁵ The proposed plan of development is consistent with the regulatory criteria for development in the Overlay as well as Lee Plan Objective 123.10, and Policies 1.4.5.1, 1.4.5.2, 1.5.1, 33.1.1, 33.1.7, 33.1.8, 33.2.4.2 (12 of the 14 criteria), 33.2.4.4.c, 33.2.4.4.e, 33.2.4.4.f, 60.1.1, 61.1.1, 123.3.3, 123.4.1, 123.4.4, 123.10.1, 123.10.2, and 123.10.3.

²⁶ Lee Plan Policies 1.4.5, 33.1.2, 33.1.3 (critical connections to conservation lands serve as foundation of water resource management and wildlife movement within the DR/GR). Map 1-D, Special Treatment Areas (Tiers 3, 5, 6); Note that although the property is not within the Overlay, it meets the aspirations set forth in the introductory paragraph of Policy 33.2.4 (land with the potential to improve, preserve, and restore regional surface and groundwater resources and indigenous wildlife habitats, land that can provide important wildlife habitat connections between CREW and Lee County properties) See *also* Lee Plan Policy 123.11.3 (*encourage regional approach to wildlife movement*).

The property is contiguous to the Audubon Corkscrew Swamp Sanctuary and Corkscrew Regional Ecosystem Watershed. Development will be subject to conditions crafted to enhance the value and function of both ecosystems, and advance the public interest in restoring regionally significant natural resources.²⁷ Overlay development standards promote the public interest in expanding wildlife corridors and improving regional hydrology.²⁸

Policy 33.2.4.2

Policy requires planned development zoning for property developed in the Overlay. Planned developments allow conditioning of development approvals. Rezoning to planned development also affords the opportunity for public participation in the hearing process.

The Agreement does not rezone the property to planned development, but authorizes development consistent with LDC Mixed Use Planned Development standards.²⁹ The process affords the opportunity for public participation at three hearings.

Policy 33.2.4.2.e

Policy requires conservation easements over 55% of the property within five years of the first development order. The Agreement requires conservation easements over 50% of the property.³⁰ Conditions phase restoration and conservation in tandem with development.³¹

The property size affords opportunities to create contiguous restoration areas far exceeding those created by other projects in the Overlay.³² In addition, there will be substantial benefit to the public by improvements to water quality on receiving offsite lands. The Agreement assures protection

²⁷ The Agreement ensures the property provides the strategic regional environmental benefits anticipated from properties designated within the Overlay.

²⁸ Lee Plan Goal 33, Objective 33.1, Policies 33.1.1, 33.1.2, 33.1.3, 33.1.8, 123.3.1, 123.11.4; See also Objective 61.2, Policy 61.2.1. The plan of development/restoration will significantly improve water quality on the property as well as offsite. Improvements to offsite lands will be evidenced by greater control of the quantity of water discharging from the site to improve hydro-periods and health of wetland systems downstream.

²⁹ The Agreement includes a Master Concept Plan, Schedule of Uses, Conditions of Development and Deviations, Property Development Regulations and Environmental Restoration Phase Plan similar to resolutions approving a planned development in the Overlay. The plan of development devotes 50% of the site to conservation and 61% to open space. The public interest is served by a master concept plan that meets/exceeds conservation and restoration requirements of Overlay communities.

³⁰ Approximately 3,287 acres will be subject to a conservation or flow way easement.

³¹ Conditions imposed on development ensure restoration/conservation acreage will be equal to the size of the developed pod or commensurate with the number of dwelling units within each pod, whichever yields the greater acreage. See Lee Plan Goal 77, Objective 77.3.

³² CGLP's proposed restoration acreage (3,287) exceeds the acreage proposed for restoration in Wild Blue (1,329), Corkscrew Farms (748.55), and Verdana (2,138.6). It also exceeds acreage proposed for restoration in FFD (2,916) by more than 300 acres.

of wildlife habitat and water resources with conservation and flow way easements, maintained in perpetuity.³³

Currently this acreage has little ecological benefit due to hydrological alterations. Much of the site is cleared and traversed by irrigation ditches necessary to support ongoing agricultural endeavors. Berms have disrupted historical sheet flow. Remaining indigenous vegetation is limited to isolated wetland areas. Acreage slated for restoration will require backfilling, regrading, removal of exotic vegetation, and planting of indigenous plant materials. A required maintenance entity ensures long term management of natural areas at no cost to the county.

Although the policy contemplates recorded easements within the first five years of development, a phased approach serves the public interest in protecting valuable environmental resources and allows a measured approach to restoring significant land areas.³⁴

Policy 33.2.4.2.i.

Policy requires elimination of agricultural irrigation and fertilizer use at first development order approval on parcels growing row crops and within five years of development order approval in areas growing citrus.³⁵ The public interest protected by this policy is conservation of potable water resources. The policy also protects groundwater resources from contamination.³⁶

The Agreement contemplates termination of agricultural operations in phases, to ensure cost effective land management. Phased elimination of agricultural operations contains the spread of exotic vegetation on vast expanses of fallow land.³⁷ The phasing plan achieves the ultimate goal of replenishing groundwater resources and reducing potential sources of contamination.

Data shows eliminating agricultural uses on the property will reduce water use by 77%, allowing for substantial aquifer recharge consistent with goals for the DRGR.³⁸ Analysis of pre and post development nutrient loading demonstrates average estimated reductions of 49% in total nitrogen and 80% in total phosphorus.³⁹ Together, these improvements reduce stress to

³³ Lee Plan Policies 33.1.3, 33.2.4, 60.1.1, 60.1.2, 60.1.3, 123.1.7.

³⁴ Phased restoration of critical lands in SE Lee County contemplated by Lee Plan Policy 33.1.4.

³⁵ Specifically, immediately upon development order approval for row crops and within five years of development order approval for citrus groves.

³⁶ Lee Plan Goal 125, Objective 63.2, Policy 1.4.5.

³⁷ The costs associated with restoring nearly 3,000 acres at once would be prohibitive, resulting in fallow lands that would populate with exotic vegetation. The public has an interest in limiting the spread of exotic vegetation. See Lee Plan Policy 33.1.4.

³⁸ Hydrologic Restoration Narrative Kingston Property dated May 2022 prepared by JR Evans Engineering. Lee Plan Policy 1.4.5; see also Goal 33.

³⁹ Hydrologic Restoration Narrative Kingston Property.

the Water Table and Sandstone aquifers consistent with water resource goals in SE Lee County.⁴⁰

Policy 33.2.4.3.c

Policy allows densities on Tiers 3, 5, and 6 properties to one unit per three acres. The public interest served by the policy is the use of density incentives to motivate private landowners to improve/restore regional surface and groundwater resources and wildlife habitats.

The DR/GR Priority Restoration Overlay depicts land areas where protection and restoration are *most critical* to restore historic surface and groundwater levels and connect existing wildlife corridors/conservation areas.⁴¹

The Agreement permits residential densities at 1.5 units per acre. This density incentive offers opportunities for large scale ecological benefits through restoration, preservation, and management of natural resources on nearly 3,287 acres.⁴²

Policies 33.2.4.4.d, 33.2.4.e and 33.2.5. (Related policies)

Policies limit commercial development in Southeast Lee County Planning Community to 300,000 square feet.⁴³ The County established the limit based on approved residential development in the service area. In addition, the Policy restricts certain commercial land uses to protect groundwater quality in the DG/GR.

The public purpose served by commercial uses in the Overlay is to meet the needs of the projected population without creating a regional attraction. In addition, restrictions on some commercial land uses protect County wellfields from potential contamination.

The Agreement authorizes development of up to 10,000 dwelling units. Additional commercial square footage is necessary to meet the needs of

⁴⁰ Further, post development water demand for landscape irrigation will be managed through the use of drought tolerant vegetation consistent with Florida Friendly Landscaping guidelines. Lee Plan Policies 33.2.3.2, 33.2.4.2.g, 54.1.1, 53.1.3, 60.4.1, 126.2.1. Onsite storm water management lakes will supply irrigation water for landscape areas via a centrally operated irrigation system. The Water Table Aquifer will potentially serve to supplement if necessary during dry season.

⁴¹ Lee Plan Policy 33.1.2.

⁴² Conditions imposed on development require restoration and enhancement of historic flow ways improving regional surface water flows and ground water levels. Pursuant to the Agreement, Developer must remove impediments to storm water flows, including exotic vegetation, roads, ditches, berms, and dikes. Then grade the property to restore the health of existing wetland areas and create new wetland systems. Monitoring conditions ensure development does not degrade the quality of surface and groundwater. See Policies 33.2.4(introductory paragraph), 123.2.2, 123.11.4.

⁴³ As of May 2022 the County approved 240,000 square feet of commercial use through rezoning. An additional 100,000 square feet is allowed by the FFD Settlement Agreement for a total of 340,000 square feet of commercial use. See Joint Memorandum of Lee County and Corkscrew Grove, LP.

future residents.⁴⁴ Commercial uses proximate to residential development in Southeast Lee County and nearby Lehigh Acres reduces the likelihood residents will travel further distances to obtain necessary goods and services. The proposed 700,000 square feet of commercial use will capture trips destined for commercial centers to the west, reducing trip lengths and impacts to roadways.⁴⁵

The Kingston development is not within the County's wellfield protection zone. Commercial areas interior to the project and along Corkscrew Road comply with Policy use restrictions. The plan of development only allows restricted commercial uses along the SR 82 corridor. The Agreement protects the public interest served by the Policy through its required use of integrated surface and groundwater models to analyze potential impacts to water resources and natural systems from ground disturbances.

Map 4A - Future Water Service Area

The County may object to the expansion of potable water service to areas not included on Map 4-A.⁴⁶ The intent of the policy is to encourage development in future urban areas. However, the Lee Plan permits potable water service to properties outside the Map's future water service areas when potable water service benefits public health, safety, and welfare, *including protecting the County's natural resources.*⁴⁷

The proposed settlement eliminates over 67 on-site wells used for agricultural irrigation. Plugging on-site wells reduces groundwater withdrawals from the Sandstone Aquifer, an aquifer that provides the best future water supply for the County.⁴⁸ Potable water service to the property protects the public interest by reducing demand on the aquifer, allowing for groundwater recharge, a recurring directive of the Lee Plan.

Map 4B – Future Sewer Service Area

The County may object to the expansion of sanitary sewer service to areas not included on Map 4-B.⁴⁹ The intent of the policy is to encourage development in future urban areas. Providing central sanitary sewer service in lieu of septic tanks is in the public interest because it will reduce potential

⁴⁴ See Florida Statutes Section 163.3177.

⁴⁵ The commercial development proposed in the Agreement is necessary to minimize impacts to the SR 82 and Corkscrew Road corridors.

⁴⁶ Policy 53.1.1.

⁴⁷ Lee Plan Standard 4.1.1.7; Note Policies 53.1.8 and 53.1.9, which assigns cost of augmented potable water infrastructure to those who benefit. New development pays fair share of cost to provide potable water to the development.

⁴⁸ Elimination of irrigation wells serving on-site agricultural pursuits will reduce existing groundwater withdrawals by 9.9 million gallons per day. See Kingston Hydrologic Restoration Narrative dated May 2022 prepared by JR Evans Engineering, PA.

⁴⁹ Lee Plan Policy 56.1.1.

contamination of groundwater in the DRGR where it is critical to protect water resources.⁵⁰

2. LDC

The Agreement regulates CGLP property as if it were zoned Mixed Use Planned Development.⁵¹ The Settlement Agreement proposes eight deviations from LDC standards to accommodate the proposed development design. Planned development zoning allows deviations from technical code requirements when the deviation enhances development and promotes public health, safety, and welfare.⁵² Deviations sought by the Settlement Agreement are similar to those approved in planned developments throughout Lee County.

a. Road Design.

The Agreement authorizes suburban road design to accommodate clustered development. Clustered development patterns facilitate large scale conservation of natural resources.⁵³ The Board has found suburban road design enhances development in the Overlay without negative impacts to the public.⁵⁴ The characteristics of the CGLP site are substantially similar to approved projects within the Overlay. The deviation from the LDC standard serves the public interest in clustered development patterns to preserve natural resources.⁵⁵

b. Lake Depth.

The Agreement authorizes lake excavation depths of 35 feet or one foot above the confining layer, whichever is less. The deviation applies solely to residential development pods and is further subject to compliance with an enhanced deep lake management agreement plan for water quality and groundwater monitoring and LDC lake excavation standards⁵⁶ except the requirement for shade trees.⁵⁷ Limitations on lake depth are designed to protect water quality. However, the Agreement imposes conditions to ensure protection of

⁵⁰ Lee Plan Goals 33, 60, Objective 33.1, Policies 33.1.2. See Lee Plan Policy 56.2.1 directing County to maintain programs and regulations to abate use of septic tanks and wastewater treatment package plants. See also Goals 60, 126, Policy 126.1.1.

⁵¹ The Agreement designates and regulates the FFD property as a Mixed Use Planned Development under the LDC.

⁵² LDC 34-377(a)(9).

⁵³ Lee Plan Goal 33, Cf. Policy 13.2.3 (Private Recreation Facilities in the DR/GR), Policy 124.1.2 (avoid/minimize adverse impacts on wetlands through clustering development).

⁵⁴ Wild Blue, Corkscrew Farms, and Verdana Villages.

⁵⁵ *Id.* See Lee Plan Glossary definition of Clustering: Development design that concentrates buildings/uses to allow remaining land area to be used for... water management and protection of environmentally sensitive land.

⁵⁶ LDC 10-329(d)(3).

⁵⁷ LDC 10-329(d)(3)a.2 requires native shade trees around lake perimeters. This requirement is the subject of the following deviation.

Lee Plan water quality goals including enhanced littoral plantings, aerators, and other measures. Greater lake depths serve the public interest by allowing developers to obtain fill material onsite, reducing truck traffic on Corkscrew Road and SR 82.

c. Deep Lake Shade Trees.

The Agreement allows a 20% increase in the amount of required littoral planting in lieu of planting required native shade trees. The deviation is limited to lakes with depths of more than 12 feet measured at control elevation. Additional littoral planting serves the public interest in providing expanded foraging opportunities for wildlife.⁵⁸

d. General Tree Plantings.

General tree requirements of the LDC will be met by onsite indigenous vegetation and flow way restoration plantings. Flow way plantings will not be subject to LDC required minimum plant heights. The deviation will not apply to landscaping for parking lots and vehicle use areas. Favoring plant materials best suited to restore the function of flow ways serves the public interest in improving water quality opportunities for groundwater recharge in the DR/GR.

e. Access.

The proposed site plan *temporarily* contravenes LDC requirement for multiple access to development.⁵⁹ A single access will serve development tracts initially. Developer will provide additional access to the County road network prior to build out of each development pod. Ongoing agricultural operations will access the site from Corkscrew Road or SR 82 depending upon location.

There is a public interest in multiple access to provide alternatives in the event of emergencies. One access to each development pod will be adequate during the construction phase. The Agreement requires a second access upon completion of each development pod.

f. Buffering Adjacent Property.

The Agreement authorizes proposed preservation and restoration areas to serve as the code required perimeter landscape buffer. The Agreement to the Stipulation of Settlement includes several exhibits depicting extensive greenspace on the project perimeter.⁶⁰ The deviation will not apply to development pods abutting SR 82.

⁵⁸ See Lee Plan Policy 123.11.5.

⁵⁹ Residential development exceeding five acres must provide two means of access. Commercial development exceeding ten acres in size must provide two means of access.

⁶⁰ Master Concept Plan (Exhibit C), Kingston Protected Species Management and Human-Wildlife Coexistence Plan (Exhibit J), Indigenous Preservation, Restoration, and Management Plan (Exhibit L), and

Much of project abuts conservation lands. The MCP illustrates a seamless connection to those offsite conservations lands. The purpose of perimeter buffers is to ensure compatibility between uses. The Settlement Agreement accomplishes goal by providing sizable widths of restored open space separating development pods from adjacent land uses.

g. Water Main Installation.

The Agreement provides relief from the requirement residential buildings one and two stories in height be served by water mains in an external loop no greater than 1,500 feet. The Agreement permits external loops up to 3,700 feet so long as the water main meets required fire flows.⁶¹ The condition ensures the water lines comply with state adopted standards for fire flows.

h. Access Separation.

Agreement provides relief from LDC requirement of access separation of 660 feet along principal arterials to allow connection separations of 460 feet consistent with MCP. This deviation is mainly relevant to intersections along the Kingston Parkway arterial and Corkscrew Road. Much of Kingston Parkway abuts open space including wetlands/restoration lands.⁶² Relief from access separation standards allows flexibility in project design. Connections to SR 82 are subject to FDOT's Corridor Access Management Plan.⁶³

3. State Statutes (Contravened Statutes)

Plan inconsistencies contravene statutory provisions that require development approvals to be consistent with the local government comprehensive plan.⁶⁴ However, the public interest served by the statutes remains intact for two reasons: First, the procedure adopting the Agreement mimics the plan amendment public hearing process. Second, the Agreement implements Overlay development criteria by imposing conditions similar to projects previously approved within the Overlay.

Hydrologic Restoration Plan (Exhibit O). The Kinston Aerial with Conservation Areas and proposed location of wildlife crossings and fencing plan, depicts expansive greenspace along the project perimeter. (Part of the Human-Wildlife Coexistence Plan).

⁶¹ Lee Plan Standard 4.1.1.4 requires all waterline extensions to new development be designed to provide minimum fire flows and adequate domestic services consistent with the Florida Administrative Code.

⁶² Lee Plan Policy 77.3.3.

⁶³ Lee Plan Policy 25.8.2.

⁶⁴ Section 163.3194 Florida Statutes.

F. Hearing Examiner Remarks on Proposed Agreement

The Lee Plan's Environmental Enhancement and Preservation Communities Overlay offers a vehicle for large scale restoration and conservation of natural resources. The Agreement ensures restoration of historical flow patterns to an extent far exceeding what the County could achieve alone. The sheer size of the project offers a unique opportunity to restore wetland systems over a ten square mile area.⁶⁵ Restoration of flow ways and phased elimination of agricultural uses will dramatically improve quality of surrounding natural areas and function of ground water aquifer recharge areas.⁶⁶ Benefits to the region include enhanced water quality, aquifer recharge, flood control, habitat creation and large scale enrichment of ecosystems, *all of which are central themes of the Lee Plan.*⁶⁷

In addition to environmental benefits, there are considerable financial benefits to as well. CGLP will assume the cost of: (1) acquisition, (2) clearing crops, (3) backfilling ditches, (4) flattening dikes/berms, (5) removing agricultural structures, (6) capping 67 irrigation wells serving agriculture, (7) removing exotic vegetation (8) grading to restore historic flow patterns, (9) planting native vegetation in restored areas, and (10) perpetually maintain restored land areas free of exotics.

The Lee Plan encourages development incentives to improve water resources and natural ecosystems.⁶⁸ The proposed Agreement balances development entitlements with natural resource protection.⁶⁹

V. Conclusion

The proposed Agreement is consistent with Lee Plan directives to protect and restore water resources, wetlands, and wildlife habitat in the DR/GR. The Agreement accomplishes County goals to protect and enhance environmentally significant land contiguous to conservation areas and restore historical flow ways in Southeast Lee

⁶⁵ Planned restoration areas comprise 3,287 acres or 5.14 square miles. The land area restored by CGLP exceeds that of other projects approved pursuant to Overlay criteria.

⁶⁶ Site conditions will be improved by the proposed surface water management system, which relies on natural features to manage storm water. The design routes storm water runoff from developed areas into retention ponds for pretreatment, resulting in improved water quality entering restored flow ways and preservation areas. Together with storm water retention ponds, restored flow ways and preservation areas will trap nutrients and pollutants, improving water quality. These design features protect Water Management District and Audubon properties from adverse impacts from the project. Restored flow ways will slow storm water discharge increasing potential for aquifer recharge.

⁶⁷ Lee Plan Goals 4, 33, 54, 57, 59, 60, 61, 63, 77, 123, 125, 126, Objective 158.1, Policies 60.1.1, 60.1.2, 60.1.3.

⁶⁸ Lee Plan Goal 33, Policies 33.1.2, 33.1.3, 33.2.2, 33.2.4. Cf. Lee Plan policies encouraging incentives for conservation and maintenance of environmentally sensitive natural resources: Policy 1.1.13, Policy 13.5.3, Policy 15.1.12, Policy 60.4.5, Policy 60.4.6, Policy 123.2.2, Policy 123.2.9, Policy 123.11.4; See also Policy 158.1.10.

The Bert J. Harris, Jr. Private Property Rights Protection Act authorizes increases in density, intensity, and use of development areas to achieve settlement. S. 70.001(4)(c), F.S.

⁶⁹ Lee Plan Goal 158, Objective 158.1, Policy 158.1.7, 158.1.10.

County.⁷⁰ These statements are true notwithstanding the Agreement's contravention of certain Lee Plan and LDC requirements.

The Agreement serves the public interest in protecting natural resources in the Southeast Lee County planning community in the following ways:

- Protects natural resources benefiting water resources and natural habitats.⁷¹
- Protects and enhances regional flow-ways and natural habitat corridors.⁷²
- Restores historic surface and groundwater levels and improving wetlands and wildlife habitat.⁷³
- Maintains/restores large scale ecosystem integrity.⁷⁴
- Connects conservation areas. (Flint Pen Strand and Corkscrew Regional Ecosystem Watershed)⁷⁵
- Protects environmentally sensitive lands from mining activity.⁷⁶
- Concentrates development activity on land impacted by agriculture.⁷⁷
- Avoids introducing additional septic systems in the DR/GR by extending central potable water/sanitary sewer service.⁷⁸
- Regulates development using planned development zoning model.
- Eliminates productive agricultural uses (in phases).⁷⁹
- Protects and enhances existing onsite wetlands.⁸⁰

While the Agreement may not comply with a strict reading of the Lee Plan, it accomplishes the Lee Plan's overall objective to restore and maintain natural resources essential to protecting groundwater supplies, water quality and flooding. Comprehensive conditioning of development ensures protection of the public interest served by the contravened regulations.

⁷⁰ Lee Plan Policies 123.1.7, 123.2.8; See also Policy 61.3.4.

⁷¹ Protects Southeast Lee County's natural resources through restoration/conservation. Lee Plan Goal 33, 123, Policies 123.1.1, 123.3.1.

⁷² Lee Plan Goals 33, Policy 33.2.4 (introductory paragraph – "significant regional hydrological and wildlife connections).

⁷³ Lee Plan Objective 33.1.

⁷⁴ Lee Plan Goal 123 and Policy 33.1.1.

⁷⁵ Lee Plan Policies 33.1.1, 33.1.2.

⁷⁶ Property is classified Tiers 3, 5, and 6 property within the *DR/GR Priority Restoration Overlay*. The Priority Restoration Overlay includes lands most critical to restore/protect historic surface and groundwater levels.

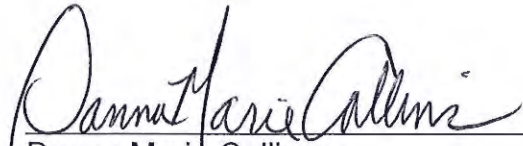
⁷⁷ Lee Plan Policy 33.1.3: Tiers 3, 5, and 6 properties qualify for unique development incentives due to their potential for natural resources benefits and wildlife connections. See also Policy 33.1.2.

⁷⁸ Lee Plan Objective 63.2. See Lee Plan Standard 4.1.1, paragraph 7 and Standard 4.1.2, paragraph 6: Lee County Utilities may provide potable water and sanitary sewer service to properties not located within future water/sewer service areas when (1) potable water/sanitary sewer service benefits public health, safety and welfare, and (2) protects the County's natural resources. See also Lee Plan Goal 135.

⁷⁹ Recognizes the importance of protecting *bona fide* agricultural activities in Future Non-Urban Areas. Lee Plan Policy 9.1.4.

⁸⁰ The plan of development impacts only 11 of approximately 1,192 acres of wetlands. Restoration of 3,287 acres of the property will enhance the function of existing wetlands. Lee Plan Goals 123, 124, 126, Objectives 1.5, 33.1, 123.1, Policies 1.5.1, 60.4.1, 124.1.1, 125.1.1, 126.1.1, 126.1.4.

Date of Recommendation: May 25, 2022.



Donna Marie Collins
Chief Hearing Examiner

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Exhibits to Recommendation

- Exhibit A: Legal Description and Vicinity Map
- Exhibit B: Exhibits Presented at Hearing
- Exhibit C: Hearing Participants
- Exhibit D: Information