

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ARGO CORKSCREW CROSSING, LP, )  
ARGO US, LLC, ARGO LAND US, LLC, )  
and TEMPLETON FAMILY TRUST, )

Petitioners, )

DOAH Case No.: 18-003613

v. )

VILLAGE OF ESTERO, )

Respondent. )

---

**AMENDED PETITION FOR ADMINISTRATIVE HEARING**

Petitioners, ARGO CORKSCREW CROSSING, LP, ARGO US, LLC, ARGO LAND US, LLC, (hereinafter collectively referred to as “ARGO”), and the TEMPLETON FAMILY TRUST (hereinafter, “TEMPLETON”), by and through their undersigned counsel, and pursuant to Sections 163.3184(5), 120.569, and 120.57, Florida Statutes (2018), and Florida Administrative Code Rule 28-106.201, hereby file this Amended Petition for Administrative Hearing challenging the VILLAGE OF ESTERO’S (hereinafter “VILLAGE”) adoption of its Comprehensive Plan pursuant to Ordinance No. 2018-01, (hereinafter the “Plan”) as not in compliance as defined in Section 163.3184(b), Florida Statutes (2018), and in support thereof states:

**AFFECTED AGENCIES**

The Plan that is the subject of this proceeding was adopted by the Village on June 13, 2018. The Village’s address is Village of Estero, 9401 Corkscrew Palms Circle, Estero, FL 33928. For purposes of this Petition, the mailing address of the Village will be c/o City Attorney Burt Sanders, GrayRobinson, 8889 Pelican Bay Blvd., Suite 400 Naples, Florida 34108. The file or identification

number is Ordinance No. 2018-01, a copy of which is attached hereto as part of **Composite Exhibit “A.”**

**PETITIONERS HAVE STANDING**

1. Petitioner TEMPLETON, whose address is P.O. Box 731, Traverse City, MI 49685, is the owner and Petitioners collectively referred to as ARGO, whose collective address is 21141 Bella Terra Boulevard, Estero, FL 33928, are the contract purchasers of real property located in the Village. Petitioners are “affected person[s]” within the meaning of Section 163.3184(1), Florida Statutes (2018), as Templeton is the owner of undeveloped property within the geographic area of the Plan and Argo have both an ownership interest in the property and own and operate a business within the geographic area of the Plan, all of which are subject to the Plan’s provisions.

2. Prior to the Village of Estero’s incorporation, Petitioners obtained a zoning resolution from Lee County that authorized a planned development on the property with a mixture of single-family and multi-family homes.

3. As explained in more detail below, Petitioners contend that the Plan is not in compliance with the requirements of the Community Planning Act, Section 163.3164, Florida Statutes (2018). The lack of compliance with statutory requirements governing growth management is, in and of itself, a harm that substantially and adversely affects Petitioners.

4. Moreover, the Plan purports to decrease the density for potential development on Petitioners’ property that exists both under the Village’s Transitional Comprehensive Plan and under the development approval granted to Petitioners by Lee County, without providing meaningful and predictable standards to govern the application of such density reductions and

without adequate data and analysis to support said reductions. Thus, the Plan's failure to meet statutory requirements substantially and adversely affects the Petitioners in a manner that exceeds the general degree of harm suffered by the general population.

5. Petitioners, through the undersigned, submitted multiple written letters of objection to the Village prior to the adoption of the Plan. A composite copy of the letters of objection is attached as **Composite Exhibit "B."**

6. Petitioners are represented by the undersigned counsel. The representatives' address shall be the undersigned counsel's address for purposes of service of all pleadings, papers, notices, and correspondence during the course of this proceeding.

### **PROCEDURAL BACKGROUND**

1. The Village is a municipality within Lee County, Florida, that is subject to the Community Planning Act pursuant to Section 163.3167(3), Florida Statutes (2018).

2. The Village was incorporated on December 31, 2014. Pursuant to Section 163.3167(3), Florida Statutes (2018), the Lee County Comprehensive Plan is deemed controlling until the Village adopts a comprehensive plan in accord with the requirements of the Community Planning Act, Section 163.3164, *et seq.*, Florida Statutes (2018).

3. Section 163.3167(3), Florida Statutes (2018), requires the Village to adopt its own comprehensive plan within three years of the Village's incorporation. Because it is entirely new, the Village's comprehensive plan must be adopted pursuant to the State Coordinated Review Process. §163.3184(4), Fla. Stat. (2018).

4. On December 19, 2017, the Village of Estero Planning and Zoning Board held a public hearing and voted to recommend transmittal of the Village's draft comprehensive plan, with modifications, to the Department of Economic Opportunity (hereinafter "Department) for review.

5. On January 10, 2018, the Village of Estero Council held a public hearing wherein it approved the transmittal of the proposed comprehensive plan for review by the State.

6. On January 17, 2018, the Village of Estero transmitted the proposed comprehensive plan to the following state and local entities: the Department, the City of Bonita Springs, the Department of Education, the Department of Environmental Protection, the Department of State, the Department of Transportation, Lee County, the South Florida Water Management District, and the Southwest Florida Regional Planning Council.

7. On March 16, 2018, the Department issued its Objections, Recommendations and Comments report (hereinafter "ORC Report") to the Village, identifying nine (9) objections, 12 comments, and related recommendations regarding the Plan as transmitted. The ORC Report included correspondence from the Florida Department of Transportation, Lee County, the South Florida Water Management District and the Department of Environmental Protection. A copy of the Department's ORC Report is attached hereto as **Exhibit "C."**

8. On June 13, 2018, the Village of Estero Council held a public hearing wherein it adopted the Plan, with revisions, pursuant to Ordinance No. 2018-01. Representatives of the Petitioners were in attendance at the June 13, 2018, hearing and were advised of the Village's decision at that time. The adopted Plan was transmitted to the Department on June 20, 2018. A copy of the Plan and the accompanying documents transmitted to the Department from the Village is attached hereto as Composite **Exhibit "A."**

9. Pursuant to Section 163.3184(4)(e), Florida Statutes (2018), the Department has 45 days after it receives the Plan and deems it complete to determine if the Plan is in compliance with the requirements of the Community Planning Act, Sections 163.3161–163.3217, Florida Statutes (2018).

**DISPUTED ISSUES OF MATERIAL FACT**

10. Petitioners allege the following issues of material fact for determining whether the Plan is in compliance as that term is defined in Section 163.3184(1), Florida Statutes (2018):

- a. Whether the Plan complies with the provisions of Sections 163.3177, 163.3178, and 163.3180, Florida Statutes (2018);
- b. Whether the Plan provides for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the County as required by Section 163.3177(1), Florida Statutes (2018);
- c. Whether the Plan establishes meaningful and predictable standards for the use and development of land within the Village and provides meaningful guidelines for the content of more detailed land development and use regulations as required by Section 163.3177(1), Florida Statutes (2018);
- d. Whether the Plan improperly incorporates other documents by reference, in violation of Section 163.3177(1)(b), Florida Statutes (2018);
- e. Whether the Plan is based on relevant, appropriate, and professionally acceptable data and analysis as required by Section 163.3177(1)(f), Florida Statutes (2018);
- f. Whether the Plan reacts to available data in an appropriate way, or to the extent necessary as required by Section 163.3177(1)(f), Florida Statutes (2018);

- g. Whether the elements of the Plan are internally consistent as required by Section 163.3177(2), Florida Statutes (2018);
- h. Whether the data and analysis supporting the various elements of the Plan are internally consistent as required by Section 163.3177(2), Florida Statutes (2018);
- i. Whether each map within the Plan reflects the principles, guidelines and standards within all elements of the Plan as required by Section 163.3177(2), Florida Statutes (2018);
- j. Whether the Plan coordinates with the comprehensive plans of adjacent municipalities and counties, the water supply plans of the appropriate water management district, the adopted rules pertaining to designated areas of critical state concern, and the region as a whole as required by Section 163.3177(4)(a), Florida Statutes (2018);
- k. Whether the Plan includes a policy statement indicating the relationship of the proposed development of the Village to the comprehensive plans of adjacent municipalities, the county, adjacent counties, or the region, as required by Section 163.3177(4)(a), Florida Statutes (2018);
- l. Whether the Capital Improvement Element of the Plan is consistent with the requirements of Sections 163.3177(3) and 163.3180, Florida Statutes (2018);
- m. Whether the Future Land Use Element of the Plan is consistent with the requirements of Section 163.3177(6)(a), Florida Statutes (2018);
- n. Whether the Transportation Element of the Plan is consistent with the requirements of Sections 163.3177(6)(b) and 163.3180, Florida Statutes (2018);

- o. Whether the Infrastructure Element of the Plan is consistent with the requirements of Sections 163.3177(6)(c) and 163.3180, Florida Statutes (2018);
- p. Whether the Conservation and Coastal Management Element of the Plan is consistent with the requirements of Sections 163.3177(6)(d), 163.3177(g) and 163.3178, Florida Statutes (2018);
- q. Whether the Recreation and Open Space Element of the Plan is consistent with the requirements of Section 163.3177(6)(e), Florida Statutes (2018);
- r. Whether the Housing Element of the Plan is consistent with the requirements of Section 163.3177(6)(f), Florida Statutes (2018);
- s. Whether the Intergovernmental Element of the Plan is consistent with the requirements of Section 163.3177(6)(h), Florida Statutes (2018).

**STATEMENT OF ULTIMATE FACTS**

11. The Plan is not in compliance with the provisions of Chapter 163, Florida Statutes, including Sections 163.3177, 163.3178, 163.3180. As a whole, the Plan fails to provide for orderly and balanced development as required by Sections 163.3177(1), and 163.3177(6)(a), Florida Statutes (2018), because it does not contain clear standards in any element of the Plan to ensure that future decisions regarding the development of land are made in a consistent manner.

12. The specific compliance issues in the Plan can be characterized as follows: 1) failures for the Plan to be based on and react appropriately to data and analysis; 2) failure of the Plan to provide meaningful and predictable standards and guidelines; 3) inclusion of self-amending provisions and improper attempts to incorporate documents by reference, including documents that do not yet exist; 4) internal inconsistencies; 5) failures relating to the concurrency

requirements in Section 163.3180, Florida Statutes (2018); and 6) failure to include or address specific items required by the statutory provisions governing each required and optional plan element. Each one will be addressed in turn.

**Policies Unsupported by Data and Analysis**

13. The Plan is not supported by or based on relevant, appropriate, or professionally acceptable data and analysis as required by Section 163.3177(1)(f) and 163.3177(6), Florida Statutes (2018), and fails to react appropriately to data and analysis, regarding population projections, the amount of land required to accommodate future growth allowing for the operation of markets to provide adequate choices for permanent and seasonal residents and business, the availability of and need for public facilities and services, the need for job creation and economic development, the extent of natural and historic resources within the Village, the existing housing stock within the Village, and the minimum housing stock needed for current and future residents, including low income residents.

14. The Plan is not “based on at least the minimum amount of land required to accommodate the medium projections as published by the Office of Economic and Demographic Research for at least a 10-year planning period.” Section 163.3177(1)(f), Florida Statutes (2018).

15. Likewise, the Future Land Use Map ("FLUM") fails to meet the criteria set forth in Section 163.3177(6)(a), Florida Statutes (2018), because it is not based on acceptable data and analysis, including data regarding population, the extent of natural resources, and the amount of land required to accommodate growth.

16. Similarly, the adopted Capital Improvement Element (“CIE”) Schedule is not supported by sufficient data and analysis indicating that the improvements contained in the



schedule are sufficient to ensure that level-of-service standards for required services are achieved and maintained for the five-year planning period as required by Section 163.3177(3)(a), Florida Statutes (2018).

17. Based on the definition for the Wetlands future land use category, the FLUM designation of “wetlands” is unsupported by data and analysis.

18. Where data and analysis does exist, the Plan does not react appropriately to available data and analysis, and the data and analysis supporting the various elements of the Plan are inconsistent. *See* Section 163.3177(1)(f) & 163.3177(2), Florida Statutes (2018). For example,

- a. The transmitted Plan was not based on appropriate planning periods as noted in the Department’s ORC Report. While the Village included new planning periods in the adopted Plan, the data and analysis supporting the Plan was not updated accordingly.
- b. Plan policies limiting development opportunities for both residential and nonresidential development based on environmental and design limitations do not recognize the requirement that the Plan accommodate the projected population.
- c. The need for a variety of types of housing to serve residents at every age and income level has not been addressed appropriately in light of the Plan’s recognition that the majority of available dwelling units in the Village are relatively new, owner-occupied, single family units.
- d. Policies relating to traffic calming techniques and devices do not result in “better traffic flow and functioning,” as outlined in Transportation Element (“TRA”) Policy TRA-10.8.3. Moreover, there is no data and analysis reflecting the impact

of these traffic reduction techniques on the ability to meet established levels of service, as required in TRA-10.8.1. Thus, the traffic-related design requirements set forth in FLU-1.9.1 and FLU-1.9.2, and the requirement that the Village encourage traffic calming devices in TRA-1.1.3, are internally inconsistent with the remainder of the Plan and are unsupported by data and analysis.

- e. Similarly, there is no data to support Policies TRA-1.3.4 and TRA-1.9.6, which call for opposing new roads and discouraging development along Corkscrew Road in the DR/GR area, as designated in the Lee County Future Land Use Map series.
- f. TRA-1.3.1 is unsupported by data and analysis and, indeed conflicts with existing data and analysis, because it requires the Village to encourage the reduction of truck traffic on a road that is classified as a type of road expressly intended for freight travel. Similarly, TRA 1.1.1 and FLU 1.12.1 reference road classifications that conflict with the road classifications contained within the TRA Data and Analysis section.
- g. Several policies in the Infrastructure Element (“INF”), including INF-1.1.2, INF-1.1.3, INF- 1.1.6, and INF-1.1.7, as well as Coastal and Conservation Management Element (“CCM”) Policy CCM-1.3.11, refer to a yet-to-be adopted Stormwater Master Plan as the means of analyzing and addressing watershed management, flood prevention and water quality issues. Because this Stormwater Master Plan has not been adopted, it is not appropriate data and analysis to support the INF and it cannot serve to meet the requirements for a compliant plan pursuant to Chapter 163, Florida Statutes. Additionally, INF relies on an as-yet unadopted water supply plan.

Obviously, it is inappropriate to rely on documents that do not yet exist to fulfill statutory requirements regarding data and analysis.

- h. The HOU is not based on appropriate data and analysis and fails to provide meaningful and predictable guidelines to ensure sufficient housing is available for all existing and future residents of the Village, including affordable and workforce housing and housing for low-income, very low-income, and moderate-income families.

**Lack of Meaningful and Predictable Standards and Guidelines**

19. Throughout, the Plan fails to provide meaningful and predictable standards for the use and development of land within the Village as required by Section 163.3177(1), Florida Statutes (2018), because, rather than provide clear guidelines, the Plan’s policies rely on vague language, circular references, or defer to yet-to-be adopted land development regulations. Delegating statutorily required provisions of the Plan to unincorporated documents that can be amended outside of the processes set forth in Chapter 163, Florida Statutes, is contrary to law. Thus, as a whole, the Plan fails to provide sufficient guidance to ensure that future land use decisions are not based on “political vagary,” contrary to the requirements of law. *Machado v. Musgrove*, 519 So. 2d 629, 635 (Fla. 3d DCA 1987).

20. Specific examples of policies that fail to provide meaningful and predictable standards because of vague language include the following:

- a. The future land use categories set forth in the FLUE lack meaningful and predictable standards regarding the uses within each category and the permissible density and intensity ranges for those uses.

- b. In addition, Plan policies relating to mixed use categories do not comply with the requirements of Section 163.3177(6)(a), Florida Statutes (2018), because they do not provide meaningful and predictable guidelines regarding the types of uses allowed, the percentage distribution among the mix of uses, and the density and intensity of each use.
- c. Policies FLU-1.2.1, FLU-1.2.2, FLU-1.2.3, FLU-1.2.4, FLU-1.2.5, FLU-1.2.6, FLU-1.2.7, FLU-1.2.8, FLU-1.2.9, and FLU-1.2.10, establish “Conservation,” “Wetlands,” “Public Parks and Recreation,” “Public Facilities,” “Village Neighborhood 1,” “Village Neighborhood 2,” “Transitional Mixed Use,” “Urban Commercial,” and “Village Center,” future land use categories and contain the standards governing each. All of the future land use categories lack clear guidelines to determine what uses are permitted in each category and at what density or intensity.
- d. Similarly, Plan policies seeking to achieve mixed-use development, connectivity, and efficient development patterns are too vague to be enforced.
- e. TRA-1.5.6 requires that new and expanded transportation facilities be designed to protect existing residential neighborhoods with no explanation for what protection means in the context of the policy. Therefore, the policy fails to provide meaningful and predictable standards and guidelines.
- f. The INF fails to provide meaningful and predictable guidelines to ensure coordination of the provision of potable water, drainage, sanitary sewer, and solid waste services, and aquifer recharge protection with the principles and guidelines

governing future land use within the Village. The language of the INF polices is either too ambiguous, general or vague to provide sufficient guidance.

- g. CCM-1.2.5 provides that the “Village will develop strategies for increasing public water access which may include development review, regulations, incentives, and acquisition,” while CCM-1.4.2 uses similar language regarding the conservation of “habit of native and non-invasive plant and animal species through development review, regulation, incentives and acquisition.” The lack of detail in these policies fails to provide meaningful predictable standards and guidelines for the development of said regulations and development review standards.
- h. Similarly CCM-1.3.9, provides that the Village will “continue to regulate and encourage proper coastal management techniques through site plan review and zoning mechanisms.” This Policy provides no standards from which land development regulations could be drafted or against which such regulations could be tested for substantive consistency.
- i. CCM-1.4.6 uses mandatory language in requiring the Village to “require that the integrity of sloughs be maintained and restored, as opportunities arise so that natural flow ways are functionally preserved.” However, the sloughs are not identified or defined, either within the Conservation and Coastal Management Element or in the Map series. Moreover, the concept of a “natural flow way” is so broadly defined in the definitions section as to make the application of this provision virtually meaningless.
- j. CCM-1.5.1 requires the establishment of standards in the Land Development Code

for the retention and preservation of “Rare and Unique” upland habitats. In the data and analysis, Rare and Unique – which is an undefined term in the Plan, is reflected by general reference on a map to areas mapped by the South Florida Water Management District in 2009. Neither the Plan policy incorporates the data set or the map, as required by Section 163.3177(1)(b), Florida Statutes (2018). The data and analysis also expressly provides that the data upon which the graphic is based was not field-verified, may be outdated, and may reflect areas governed by the state or on private preserves. Without an adequate incorporation by reference or a definition within the Plan itself, the term “Rare and Unique” within the context of upland habitat fails to provide meaningful and predictable guidelines and standards.

- k. CCM-1.5.3, requires development applicants to provide inventories of and assessments of impacts to “sensitive” or “high-quality” natural plant communities within developments, with no explanation of what either term means in that context.
- l. CCM-1.6.1 requires the preservation of heritage, champion, and historic trees. The term “champion” trees is defined by reference to a designation through the State of Florida Forest Service Champion Tree program that does not meet the requirements for incorporation by reference. Further, “historic” trees are defined by reference to the term “historic resources” which does not explain what characteristics would make a tree “historic.” Further, the “historic resources” definition refers to a state statute that also does not include the concept of “tree” in the definition. It is also worth noting that the historic resources map in the Data and Analysis for the Future Land Use Map contains no reference to “historic trees.” Likewise the Data and

Analysis for the Coastal and Conservation management element is silent on the issue of historic trees. Therefore, the policy is unsupported by data and analysis, in addition to being vague.

- m. Multiple policies, such as CCM-1.7.3, CCM-1.7.4., and 1.7.6, require the Village to “protect wildlife habitat” and/or the “upland habitat of threatened and endangered species and species of special concern” consistent with the requirements of other policies. It is unclear whether these policies intend for the Village to adopt new policies that are consistent with the other policies referenced, or whether the Village is simply required to enforce the referenced policies for the purpose of wildlife habitat protection, which is already referenced as a purpose in the other policies. If the intent is the former, there are no meaningful and predictable guidelines or standards for what the new protection actions should be. If the intent is the latter, the language is meaningless as surplusage. Similarly, CCM-1.7.5 makes a circular reference that provides no meaningful and predictable guidance or standard, stating that the Village must “[p]rotect wetland wildlife habitats *located outside areas designated as Wetlands. . .*” (emphasis added).
- n. The REC policies are entirely vague, such as REC-1.3.1, REC-1.3.2 and REC-1.3.3, which exhort the Village to “consider implementing policies to increase safety” and to look for opportunities for facilities “in appropriate areas” and “appropriate waterways.”
- o. The HOU contains policies with such vague terms that they fail to provide meaningful and predictable standards for the development of land development

regulations. For example, HOU-1.1.1 requires the Village to “[r]ecognize the value of strong and stable neighborhoods by encouraging neighborhood identified and a sense of community in the Village.” Similarly, HOU-1.2.2, requires adult living and continuing care in “appropriate areas and should be convenient to services.”

This language provides no guidance.

21. Policies within the Plan also fail to provide meaningful and predictable guidelines where the policies call for ad hoc decision-making outside of the comprehensive plan amendment process without substantive standards to guide the future decisions. The policies are a clear attempt by the Village to retain virtually unfettered discretion in land use decisions on a case-by-case basis, which is contrary to the entire purpose of a comprehensive plan. Examples of such provisions include the following:

- a. Pursuant to policy FLU-1.2.5, the allowable uses within the Public Facilities future land use category “are determined by the entity owning each parcel in coordination with the Village’s zoning and permitting provisions for these facilities.” This policy fails to provide the measureable objectives required by Section 163.3177(6)(a), Florida Statutes (2018).
- b. Policy FLU-1.5.1 may be the best example of the Plan’s failure to provide meaningful and predictable standards. After paragraphs of vague language attempting to create various intensity levels for commercial uses, the last paragraph of the Policy states:

Proposed rezonings to commercial or mixed use zoning districts may be found consistent with the comprehensive plan by the Village Council even if the subject parcel does not comply with the applicable location standard and floor



area; provided, however, that all such development orders must be consistent with the level of service requirements of this Plan.

(emphasis added).

- c. Additionally, FLU-1.5.1, contains the following language, which fails to provide meaningful and predictable standards:

Standards specified in Subsections A-D for location and floor area will serve as guidelines during the rezoning process (allowing discretion by the Village Council in special cases in which retail uses are the only reasonable use of the parcel in light of its size, proximity to arterials and collectors, and the nature of the existing and projected surrounding uses, including but not limited to environmental factors) but are strict requirements during the development order process.

- d. FLU-1.8.2 creates an administrative process related to wetlands designation that allows for the Future Land Use Map boundaries of lands designated with a wetlands future land use to be altered without complying with the procedural requirements for a comprehensive plan amendment. The administrative process is not described and does not require a separate amendment to the Future Land Use Map but, instead, states that the administrative process shall be used to establish the precise boundary on the Future Land Use Map or in cases where a clear error has been made as to a wetlands future land use designation. Therefore, the administrative process is both vague such that it fails to provide meaningful and predictable standards and creates a process for the FLUM to be amended or altered and the wetlands future land use designation of a particular property to be altered or amended through a process that is inconsistent with the procedural requirements

for comprehensive plan amendments set forth in Chapter 163, Florida Statutes.

- e. INF-1.1.1, provides for an analysis of minimum levels of service standards for partially development permitted projects or subdivisions on a “case-by-case basis,” without any provisions guiding such case-specific decision-making. This violates the requirements of Section 163.3180, Florida Statutes (2018), and fails to provide meaningful and predictable guidelines and standards.

22. Another aspect of the Plan’s failure to provide meaningful and predictable guidelines and standards is attempts throughout the Plan to incorporate documents by reference without meeting the requirements for such incorporation, which are set forth in Section 163.3177(1)(b), Florida Statutes (2018). Some of the documents that are improperly incorporated do not even exist yet. Examples of provisions that either create opportunities for the Plan to be self-amending or improperly rely on or incorporate documents include the following:

- a. FLU Policy 1.2.10.D.4.d contains an improper reference to existing land development code language, in violation of Section 163.3177(1)(b), Florida Statutes (2018). Similarly, undefined terms which are incapable of being understood without reference to documents that have not been properly identified as adopted by reference are used in the FLU Element, in violation of Section 163.3177(1)(b), Florida Statutes (2018). Examples are “detrimental use,” used in FLU-1.3.2; “Group III Restaurant,” used in FLU-1.3.3; “Estero planned development” and “Compact planned development,” used in FLU-1.5.1; and “Green Building” and “Crime Prevention Through Environmental Design,” used in FLU-1.9.2.

- b. INF-1.1.3, provides that “The Village *shall* implement its Stormwater Master Plan. . . .” Similarly, INF-1.1.6, requires the Village to use the Stormwater Master Plan to rank water management projects. INF-1.1.7 requires the land development code to be consistent with criteria adopted as part of the Stormwater Master Plan process. Thus, the Plan improperly incorporates a yet-to-be created document into the substantive requirements of the Plan, in violation of Section 163.3177(1)(b), Florida Statutes (2018), rendering the Plan self-amending and lacking in meaningful and predictable standards and guidelines.
- c. CCM-1.1.6 improperly incorporates Lee County’s standards for prohibited and permitted plat species in violation of Section 163.3177(1)(b), Florida Statutes (2018).
- d. As in the Transportation element, CCM-1.4.5 makes reference to the “Density Reduction/Groundwater Resource Area (DR/GR), which is an improper reference to a concept in the Lee County Plan, without the details required for incorporation by reference pursuant to Section 163.3177(1)(b), Florida Statutes (2018).
- e. The REC policies defer virtually all substantive policy development to the Recreation and Open Space Master Plan, which does not exist and for which the Plan provides no substantive guidance. Additionally, REC-1.4.7, requires that new development redevelopment in areas containing a component of the greenways trail system, as identified by the Recreation and Open Space Master Plan, should incorporate the greenway trail into their development design, which may count towards the projects’ general open space requirements. Thus, Policy REC-1.4.7

requires compliance with and reference to a document that does not exist yet and which can be amended without compliance with procedural requirements for comprehensive plan provisions.

- f. HOU-1.3.2 improperly incorporates by reference to the Secretary of the Interior's standards for rehabilitating historic buildings.
- g. Policy TRA-1.8.5 expressly fails to provide standards to ensure that level of service standards are met over the long and short term planning periods, deferring the process instead to the development of a future document not part of the Plan itself.

The Policy reads as follows:

Develop an official Trafficways Map that will depict estimated ultimate right-of-way needs to provide for adequate level of service for the Village based on the development capacities of the Future Land Use Element.

Section 163.3177(6)(b)1, Florida Statutes (2018), requires the Plan to include such an analysis in the current Plan. It is not sufficient to delay compliance with this statutory requirement by Policy.

23. For some provisions, the lack of meaningful and predictable standards and guidelines stems from the Village's failure to provide statutorily required information. For example, the CIE fails to provide any meaningful and predictable standards outlining the principles for the prioritization of the construction, extension, or increase in the capacity of public facilities necessary to maintain level of service standards. Further, the Plan fails to include meaningful and predictable standards to ensure the availability of public facilities and the adequacy of those facilities to meet established levels of service.

24. As a result of vague language throughout the Plan, many of the goals, objectives and policies within the Plan are inconsistent pursuant to Section 163.3177(2), Florida Statutes (2018), including, for example, policies FLU-1.1.1, FLU-1.3.7, and FLU-1.3.8; INF-1.4.3, INF-1.4.4, and INF-1.4.5; INF-1.5.3 and INF-1.5.4; and CIE-1.3.4 and CIE-1.3.7.

**Internal Inconsistency**

25. With so many vague Plan provisions and so many provisions that do not react appropriately to data and analysis, it is perhaps unsurprising that internal inconsistencies exist within the Plan, in violation of the requirement in Section 163.3177(2), Florida Statutes (2018), that the various provisions of the Plan be internally consistent. The following are examples of internal inconsistency within the Plan:

- a. Policies relating to traffic calming techniques and devices do not result in “better traffic flow and functioning,” creating an inconsistency between the traffic-related design requirements set forth in FLU-1.9.1 and FLU-1.9.2, the requirement that the Village encourage traffic calming devices in TRA-1.1.3, and the traffic flow and level of service requirements in TRA-10.8.3 and TRA-10.8.1.
- b. FLU-1.2.7 is internally inconsistent with FLU-1.2.1 and FLU-1.5.1, because it allows the development of office while at the same time limiting uses to “minor commercial” and “neighborhood center scale commercial,” which are forms of commercial that do not include office.
- c. FLU-1.2.6, FLU-1.2.7, and FLU-1.2.8, are internally inconsistent in their usage of the concept of “low to moderate residential,” which is further reflective of the lack

of relationship between the low densities provided therein and the corresponding Future Land Use Data and Analysis.

- d. FLU-1.2.6, FLU-1.2.7, and FLU-1.2.9, are internally inconsistent insofar as they refer to compatibility standards within objectives that do not contain any such standards.
- e. FLU-1.2.10 is internally inconsistent, as it states that Tiers 2 and 3 allow for higher levels of non-residential than Tier 1, but all tiers allow the same Floor Area Ratio.
- f. FLU-1.3.8 is internally inconsistent, because it describes public uses that are “allowed in all FLU categories,” and includes in the list “public uses, public buildings, public utilities, and public recreation uses.” However, there is already a FLU designation for “public facilities,” which includes public buildings and public utilities, and a FLU designation for “public parks and recreation,” which governs “publicly owned or publicly accessible land for current or future active or passive recreational uses” and, therefore, necessary subsumes the concept of “public recreation uses.”
- g. FLU-1.5.1(A)(3) creates internally inconsistency by authorizing deviations from square footage maximums that are expressed elsewhere in the FLU element as mandatory maximums, with no provisions explaining when or under what circumstances deviation is authorized.
- h. FLU-1.5.1(C) and (D), are internally inconsistent in their description of non-retail uses governed by location standards.
- i. HOU-1.5.1, states that the will FLU Map “will include a variety of residential land

use categories to accommodate varying housing densities and housing types...mobile homes and manufactured homes.” HOU-1.5.4 and HOU1.5.5 required the Village to allow such uses and designate zoning categories for such uses. However, nothing on the FLU Map or in any of the FLUs that accommodate residential use are there any allowances for mobile or manufactured homes. Moreover, the substantive design requirements of such FLU categories would prevent the development of mobile home and manufactured home communities, in practice. Therefore, HOU-1.5.1, HOU-1.5.4, and HOU-1.5.5, are internally inconsistent with the policies governing residential uses in the FLU Element.

- j. Similarly, HOU-1.5.1 and HOU-1.5.2 evince an intent to encourage mixed-use housing. However, the densities provided for in the FLU categories where mixed-use is ostensibly encouraged are too low to accommodate a mix of housing types. Thus, there is internal inconsistency, as well as the aforementioned lack of data regarding a mix of housing types in mixed-use areas.

**Failure to Meet Concurrency-Related Mandatory Plan Elements**

26. Section 163.3180, Florida Statutes (2018), requires local governments to provide the principles, guidelines, standards, and strategies, including adopted levels of service, to guide the application of the local government's concurrency program. While the Village of Estero undisputedly has a concurrency program and references concurrency concepts in various places in the Plan, the Plan fails to meet this requirement. The Plan is also inconsistent with the provisions of Section 163.3180(5), Florida Statutes (2018), regarding the attribution of cost for facilities necessary to address existing transportation deficiencies, the rights of developers to proceed to

development under proportionate share agreements irrespective of the timing for the transportation facilities' construction, and the rights of persons who have paid alternative funding mobility fees to proceed regardless of the timing of facility construction. Plan provisions specifically in conflict with these concurrency-related requirements include CIE-1.3.4 and CIE-1.3.7. Specific examples of concurrency-related compliance issues are as follows:

- a. TRA fails to establish a level of service for local roads, which both violates the express provisions of Section 163.3177(6)(b), Florida Statutes (2018), and fails to provide meaningful and predictable standards regarding the application of public facilities requirements for local roads. ITRA simply provides that local roads will be maintained in good repair.
- b. Policy TRA-1.8.5 expressly fails to provide standards to ensure that level of service standards are met over the long and short term planning periods. The Policy reads as follows:

Develop an official Trafficways Map that will depict estimated ultimate right-of-way needs to provide for adequate level of service for the Village based on the development capacities of the Future Land Use Element.

- c. Section 163.3177(6)(b)1, Florida Statutes (2018), requires the Plan to include such an analysis in the current Plan. It is not sufficient to delay compliance with this statutory requirement by Policy
- d. Several INF policies require the apportionment of costs for new stormwater, potable water, and wastewater facilities to either “those who benefit,” or to “new development,” without providing the required principles, guidelines, and strategies



required for concurrency systems. These policies, INF-1.4.7, INF-1.4.8, INF-1.5.6, and INF-1.5.7, violate Section 163.3180, Florida Statutes (2018).

**Missing Policies or Policy Language**

27. Some of the compliance issues in the Plan stem from the Plan’s failure to contain specifically required policies. For example, the Plan is not consistent with the requirements of Section 163.3177(4)(a), Florida Statutes (2018), because it does not include a policy statement indicating the relationship of the proposed development of the Village to the comprehensive plans of adjacent municipalities, the county, adjacent counties, or the region, as expressly required by the statute.

28. As well, the CIE Schedule does not prioritize listed improvements, as required by Section 163.3177(3)(a), Florida Statutes (2018).

**Challenged Plan Provisions**

29. Based on the foregoing, the following Plan policies fail to meet the statutory requirements of Sections 163.3177, 163.3178, 163.3180, Florida Statutes (2018), and are thus not “in compliance”:

- a. FLU Policies: FLU-1.1.1, FLU-1.2.1, FLU-1.2.2, FLU-1.2.3, FLU-1.2.4, FLU-1.2.5, FLU-1.2.6, FLU-1.2.7, FLU-1.2.8, FLU-1.2.9, FLU-1.2.10, FLU-1.3.1, FLU-1.3.2, FLU-1.3.3, FLU-1.3.4, FLU-1.3.5, FLU-1.3.7, FLU-1.3.8, FLU-1.3.9, FLU-1.4.1, FLU-1.5.1, FLU-1.7.3, FLU-1.8.2, FLU-1.9.1, FLU-1.9.2, FLU-1.10.1, and FLU-1.10.2
- b. CIE Policies: CIE-1.1.1-CIE-1.4.3
- c. TRA Policies: TRA-1.1.1, TRA-1.3.1, TRA-1.3.2, TRA-1.3.4, TRA-1.4.1, TRA-

- 1.4.2., TRA-1.5.6. TRA-1.8.1, TRA-1.8.3, TRA-1.8.4, TRA-1.8.5, TRA-1.9.1, TRA-1.9.6, TRA-1.10.2, TRA-1.10.3, and TRA-1.10.4.
- d. CCM Policies: CCM-1.1.6, CCM-1.2.1, CCM-1.2.5, CCM-1.3.4, CCM-1.3.5, CCM-1.3.9, CCM-1.3.10, CCM-1.3.11, CCM-1.3.13, CCM-1.4.1, CCM-1.4.2, CCM-1.4.3, CCM-1.4.5, CCM-1.4.6, CCM-1.4.7, CCM-1.5.1, CCM-1.5.2, CCM-1.5.3, CCM-1.5.4, CCM-1.5.5, CCM-1.6.1, CCM-1.6.2, CCM-1.7.3, CCM-1.7.4, CCM-1.7.5, CCM-1.7.6, CCM-1.7.7, CCM-1.8.1, CCM-1.8.2, CCM-1.8.3, CCM-1.9.1, CCM-1.9.2, CCM-1.10.1, CCM-1.10.3, and CCM-1.12.1.
- e. INF Policies: INF-1.1.1, INF-1.1.2, INF-1.1.3, INF-1.1.4, INF-1.1.5, INF-1.1.6, INF-1.1.7, INF-1.3.1, INF-1.3.2, INF-1.3.4, INF-1.4.3, INF-1.4.4, INF-1.4.5, INF-1.4.7, INF-1.4.8, INF-1.5.3, INF-1.5.6, and INF-1.5.7.
- f. REC Policies: REC Policies REC-1.1.1, REC-1.1.2, REC-1.1.3, REC-1.1.4, REC-1.1.5, REC-1.3.1, REC-1.3.2, REC-1.3.3, REC-1.4.1, REC-1.4.4, REC-1.4.6, REC-1.4.7, REC-1.6.1, REC-1.6.4, REC-1.8.1, REC-1.8.2, REC-1.9.2, and REC-1.9.3.
- g. HOU Policies: HOU-1.1.1, HOU-1.1.2, HOU-1.1.5, HOU-1.2.2-2.4, HOU-1.3.2, HOU-1.5.1, HOU-1.5.4, HOU-1.5.5.
- h. Intergovernmental Element (“ICE”).

**STATUTES ENTITLING PETITIONERS TO RELIEF**

30. The specific statutes the Petitioners contends entitle them to relief are in Chapter 163, Part II, Florida Statutes. Petitioners specifically re-incorporate all references to sections and subsections within Chapter 163, Florida Statutes, made in Paragraphs 10-29, as though fully set

forth herein. Additionally, Petitioners are entitled to relief, pursuant to Sections 120.569 and 120.57, Florida Statutes (2018).

**RELIEF SOUGHT**

31. For the reasons stated above, Petitioners request the following relief pursuant to Section 163.3184, Florida Statutes (2018):

- a. Petitioners requests a Formal Administrative Hearing to determine the non-compliance of the Plan with Part II, Chapter 163, Florida Statutes (2018).
- b. Petitioners requests that the Administrative Law Judge enter a recommended order finding that the Plan is “Not in Compliance,” for all the reasons stated herein, and recommending that the Plan not become effective.
- c. Petitioners requests that the Administration Commission enter a Final Order finding that Plan “Not In Compliance,” recommending that the Plan not become effective and identifying all sanctions allowed by law.

Dated:

Respectfully submitted,

Lewis, Longman & Walker, P.A.

/s/ Tara W. Duhy  
\_\_\_\_\_  
TARA W. DUHY  
Florida Bar No. 0796891  
[tduhy@llw-law.com](mailto:tduhy@llw-law.com)  
[mlozada@llw-law.com](mailto:mlozada@llw-law.com)  
ROBERT P. DIFFENDERFER  
Florida Bar No. 434906  
[rdiffenderfer@llw-law.com](mailto:rdiffenderfer@llw-law.com)  
[lburnaford@llw-law.com](mailto:lburnaford@llw-law.com)  
CHRISTOPHER D. JOHNS  
Florida Bar No. 120107

[cjohns@llw-law.com](mailto:cjohns@llw-law.com)  
[nlewis@llw-law.com](mailto:nlewis@llw-law.com)  
515 North Flagler Drive, Suite 1500  
West Palm Beach, FL 33401  
Telephone: (561) 640-0820  
Facsimile: (561) 640-8202

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service on this 15th day of November, 2018 to: *Nancy Stroud, Esq*, [nstroud@lsdlaw.net](mailto:nstroud@lsdlaw.net); [twolosh@lsdlaw.net](mailto:twolosh@lsdlaw.net); *Gary Oldehoff, Esq*, [goldehoff@lsdlaw.net](mailto:goldehoff@lsdlaw.net), [twolosh@lsdlaw.net](mailto:twolosh@lsdlaw.net), Lewis Stroud & Deutsch, 1900 Glades Road, Suite 251, Boca Raton FL, 33431; *Burt Sanders, Esq*, [burt.saunders@gray-robinson.com](mailto:burt.saunders@gray-robinson.com), GrayRobinson, 8889 Pelican Bay Blvd., Suite 400, Naples, Florida 34108, *Attorneys for Respondent*.

/s/ Tara W. Duhy  
\_\_\_\_\_  
TARA W. DUHY  
Florida Bar No. 0796891

## **Table of Contents**

### Adoption Comp Plan Package (6/13/18)

1. June 20, 2018 Adoption Submittal Letter to DEO
2. Ordinance 2018-01
3. ORC
4. Comprehensive Plan
  - a. Cover Page
  - b. Future Land Use
  - c. Transportation
  - d. Housing
  - e. Infrastructure
  - f. Conservation Coastal Mgmt.
  - g. Recreation and Open Space
  - h. Intergovernmental Coordination
  - i. Capital Improvements
  - j. Public School Facilities
  - k. Monitor, Evaluate, Appraise
  - l. Definitions
  - m. Map Series
5. Data Analysis
6. Staff Report
7. Affidavit of Public Hearing Notice (Ordinance 2018-01)
8. Certificate of Mailing