



May 26, 2008

Re: City of Bonita Springs – Local denial of Bald Eagle Buffer Reduction.

Bonita Bay Group, Inc. v City of Bonita Springs DOAH Case No. 07-4843

Dear Governor, Cabinet and Cabinet Aides:

In this case, the City is attempting to protect one of the two remaining eagles' nests located in the City (T 307). The City of Bonita Springs comprehensive plan expressly retains the City's ability to protect the City's Bald Eagle population under the City's own guidelines, which can be more stringent (but should not be less stringent) than federal and state guidelines.

Nest LE-005 is one of only two remaining bald eagle's nests in the City. The nest was first documented by the Florida Game and Freshwater Fish Commission (the predecessor to FWCC) in 1977. The nest has been continuously occupied for the past 30 years. Currently, the closest residences to the nest are approximately 900 feet to the south in Baywoods Phase I.

Effectively what happened in this case because, as discussed below, USFWS approved a 330-foot buffer around nest LE-005, even though a 660-foot buffer was recommended under the national guidelines. The reduced buffer will enable Petitioners to construct 15 single-family residences in the vicinity of the nest, along with a road to serve the residences. Unlike the statutory and regulatory directives of the USFWS and FFWCC, the City of Bonita Springs Comprehensive Plan and City Council is not just concerned with survival of the Southern Bald Eagle as a species, but with maintaining one of only TWO bald eagle nesting sites within the City of Bonita Springs.

The Governor and Cabinet should not be allowed to usurp the City's own more protective goals, objectives and policies and the City's interpretation of its own Comprehensive Plan simply because the USFWS and FFWCC (concerned with survival of the species rather than individual nests) are less protective of an individual bald eagle nest. The City of Bonita Springs determined that proposed bald eagle management plan had not been demonstrated to be "an optimal management plan" protective of Southern bald eagle nesting sites as required by the City of Bonita Springs Comprehensive Plan Policy 7.6.1.

The right of the city to protect *habitat* is vital because that habitat contains future nesting trees for this eagle. Trees live 90-100 years, and take decades to reach sufficient size to support a bald eagle's nest. When this eagle nest tree falls, other large trees are needed to provide location for future nests. Reducing the buffer may provide adequate nesting for this eagle at this time; it does not, however, assure future viable habitat for eagles occupying this habitat.

Objective 7.6 Southern Bald Eagles -- The City shall use its bald eagle habitat regulations to protect Southern bald eagle nesting sites and request the County to monitor Southern bald eagle nesting activities.

Policy 7.6.1 "The City shall maintain a policy of negotiations with owners of land surrounding eagle nests **to provide an optimal management plan** within which all development within critical eagle nesting habitat and buffer areas must be consistent...

d. The size and shape of the buffer area;

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

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

The proposed change will result in a significant modification of the habitat currently being used by the diverse wildlife on the subject property, not just Bald Eagles. The City's Comprehensive Plan also recognizes the importance of habitat for wildlife **diversity and distribution within the City.**

Objective 7.3 provides:

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

The subject buffer also includes extensive gopher tortoise habitat and gophers will have to be relocated out of the buffer to make room for additional houses placed in the previously-agreed preserved buffer. A November 2006 survey identified 62 active gopher tortoise burrows and 12 inactive burrows on the subject property. Contrary to the delisting of the Southern Bald Eagle, the gopher tortoise was recently up-listed.

The City should first be allowed to require a larger buffer, i.e., to say "no" to development, under its own comprehensive plan and land development regulations, before it is subject to DRI review. DRI review is not meant to replace or supplant local control of land use and zoning issues. It was never intended that the DRI would allow the Governor and Cabinet the ability to approve what the local government has denied. If an applicant disagrees with a decision to deny a development by the local government, it should go to circuit court to seek judicial review¹, not to the Governor and Cabinet.

¹ By petition for writ of certiorari or under F.S. 163.3215.

As mentioned above, Nest LE-005 is one of only two remaining bald eagle's nests in the City. Therefore, it is of exceptional importance to the City of Bonita Springs. On or about February 15, 2007, the City staff (with the help of Lee County staff) prepared a report recommending approval of the NOPC, subject to various conditions. The conditions included:

- the elimination of 5 of the 15 proposed residences in order to reduce the visual impacts associated with the proposed development and
- to create a "fly zone" for the eagles to the northwest of the nest.
- incorporated the "best management practices" recommended by the City's Eagle Technical Advisory Committee (ETAC), which included phasing and other restrictions on construction of the proposed residences.

A larger buffer is more protective of the existing eagles and nest.⁴ (T 309, 318; R Ex. 15, pp. 190-91, 247-48; R Ex. 18, p. 33-34; see also, R Ex. 11, p. 25, R Ex. 13, p. 1018) and both Ms. Trebatoski and Ms. Sweigert identified two examples, in Lee County, of where an eagles' nest was lost due to the encroachment of development. (T 346-48; R Ex. 15, p. 243).

Even the USFWS Southern Bald Eagle Guidelines recommend 660 feet and do not support 330 feet where the activities are visible and the closest existing residences are over 900 feet away from the nest :

	<i>If there is no similar activity within 1 mile of the nest</i>	<i>If there is similar activity closer than 1 mile from the nest</i>
<i>If the activity will be visible from the nest</i>	660 feet. Landscape buffers are recommended.	660 feet, or as close as existing tolerated activity of similar scope. Landscape buffers are recommended.
<i>If the activity will not be visible from the nest</i>	Category A: 330 feet. Clearing, external construction, and landscaping between 330 feet and 660 feet should be done outside breeding season. Category B: 660 feet.	330 feet, or as close as existing tolerated activity of similar scope. Clearing, external construction and landscaping within 660 feet should be done outside breeding season.

The numerical distances shown in the table are the closest the activity should be conducted relative to the nest.

(Joint Ex. 9, p. 12).

It was not disputed that the activity would be visible from the nest.(T 151). Currently, the closest residences to the nest are approximately 900 feet to the south in Baywoods Phase I. The closest **any** existing activity to the nest is approximately 750 feet. Either way, the Guidelines recommend new activity occur no closer than 660 feet from the nest.(Joint Ex. 9, p. 12).

Of the two examples the applicant's expert, Mr. Logan, offered to support his position that 330 feet is supportable, one nest SE 047 existed prior to development occurring within 660 feet. (T 238-39). However, the success of that nest is unclear. While Mr. Logan testified that he was told that the nest was occupied last year, the Florida Fish and Wildlife Conservation Commission's Eagle Nest Locator Database indicates that it was not. (R Ex. 14, p. 7).

While the existence or disappearance of one nest may not make a difference to the survival of the species as a whole, each and every nest is important within the City of Bonita Springs to maintain and enhance its population of Bald Eagles.

This nest is one of only two nests within the City. This nest has not only been extremely productive, but the eagles who nest there are a source of civic pride to the City of Bonita Springs residents and tourists. Why should the state deny the City of Bonita Springs the ability to be more protective of its two bald eagle nests than the federal or state government? All the City of Bonita Springs wishes to do is protect the nest and be consistent with its comprehensive plan by setting an "optimal" distance for reduction of a buffer that has been proven to be effective during the last 30 years this nest has been in existence?

Regardless of the USFWS letter issued under the USFWS statutory and regulatory goal of survival of the Bald Eagle as a SPECIES, the City should be allowed to utilize an "optimal" distance that ensures the survival of an individual nest – one of two within the City.

State review of local decisions under section 380.06, Florida Statutes, were to be limited to regional and statewide issues, not to usurp or replace local denials of land uses, such as the one present in this case. The City's optimal plan would result in the denial of 5 of the 15 homes sought by the applicant. This is hardly an instance where the State of Florida should deny the City the ability to say no under its own Comprehensive Plan.

The Court held in Bay Point Club, Inc. v. Bay County, 890 So. 2d 256 (Fla. 1st DCA 2004) that Section 380.06(19)(f)6, recognizes local government's authority to review and approve proposed changes to previously approved DRIs. The court in Bay Point Club expressly held that proposed changes to previously-authorized DRIs are still subject to LOCAL APPROVAL and must "comply with the [local] comprehensive plan." The Court noted that the "and is otherwise approved" language in Section 380.06(19)(f)6., Florida Statutes, "clearly and unambiguously requires a proposed change be subjected to,

rather than exempted from, additional local approval even when no further DRI review is necessary." Bay Point Club, 890 So. 2d at 259-60.²

The City of Bonita Springs should be empowered under local authority to be more restrictive and protective of its bald eagle nests (which is a rare natural resource within the City). The City should be allowed to determine that the proposed bald eagle management plan has not been demonstrated to be "an optimal management plan" protective of Southern bald eagle nesting sites within the City of Bonita Springs.

Certainly, as long as the City is more restrictive and not less restrictive than the state, it should be allowed to increase the protection given to individual bald eagle nesting sites.

Given that the site plan could be rearranged to reduce the impacts to the high quality habitat and the potential for adverse impacts to the bald eagles, the evidence establishes and it is concluded that Petitioners' application is inconsistent with City of Bonita Springs Comprehensive Plan.

The Courts faced with a similar issue in Franklin County v. S.G.I. Limited, 728 So. 2d 1210 (Fla. 1st DCA 1999) held that: "Franklin County's comprehensive plan is a lawfully adopted ordinance. As such, the **county is empowered by statute to disapprove an application for site approval if it finds that a proposed development is inconsistent with any of the objectives in the comprehensive plan.** The circuit court's statement that the county commission could not deny S.G.I.'s site plan approval based on "general objectives and policies" in the comprehensive plan is in direct opposition to the language and requirements of the Comprehensive Planning Act, and is not supported by relevant law applying the act. See, e.g., City of Jacksonville Beach v. Marisol Land Dev., Inc., 706 So. 2d 354 (Fla. 1st DCA 1998). The comprehensive plan applicable to Franklin County contains objectives which mandate the county to "support the conservation and protection of ecological communities ... to the extent that ... [the county] will prohibit development which can be proved to damage natural resources" and to "maintain the estuarine water quality surrounding coastal resources so that there shall be no loss of any approved shellfish harvesting classifications through the year 2000." These objectives are specific enough that they may be taken into consideration and utilized in reviewing

² Developer's vested rights in previously approved development of regional impact (DRI) did not include proposed changes to a small portion of the DRI that did not have regional impact, and thus developer did not have a right, without approval by local county board of commissioners, to increase such portion of the DRI; developer's only vested right was in completing development authorized by the original DRI, receding from Edgewater Beach Owners Ass'n v. Walton County, 833 So.2d 215. West's F.S.A. §§ 163.3167(8), 163.3194(1)(a), 380.06(19)(f). Development of regional impacts (DRIs) previously authorized may be completed, but changes must obtain approval, and must comply with the comprehensive plan of the local government. WOLF, C.J., ERVIN, BOOTH, ALLEN, WEBSTER, DAVIS, BENTON, VAN NORTWICK, PADOVANO, BROWNING, And POLSTON, JJ., Concur.

applications for site plan approval. There was also competent substantial evidence in the record that the proposed golf course development could harm the most productive oyster bed in Apalachicola Bay and was, therefore, inconsistent with the adopted comprehensive plan. Id. at 1211 (emphasis added).”

As originally and eloquently explained long ago by current Department of Community Affairs Secretary, Tom Pelham: A guiding purpose of both the Environmental Land Act (1972 Florida Legislation that created the DRI program) and the Model Code is that state land management policies, "**to the maximum possible extent, be implemented by the local governments through existing processes for the guidance of growth and development.**" See Thomas G. Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. Fla. L. Rev. 789, 814 (1977).

Sincerely yours,

Eleanor Boyd

President, Responsible Growth Management Coalition
www.rgmcswf.org