

**R A L F B R O O K E S, A T T O R N E Y**

***Board Certified in City, County and Local Government Law***

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October 5, 2023

**REQUEST FOR ADVERSELY AFFECTED PARTY STATUS.** Case Number DOS2023-E010 – Brooks Town Center Apartments; a/k/a Coconut Pointe Residences.

Mr. Eschenfelder:

**My qualifications and my clients.** I am an attorney who is certified in City, County, and Local Government Law by the Florida Bar. On behalf of my client Kathy Wyrofsky, whose principal residence is at 10089 Magnolia Bend in Estero Florida 34135, I am requesting Adversely Affected Party status to allow my client additional time in which to present expert testimony and legal argument in opposition to the Development Order to redevelop a portion of the existing Brooks Town Center into a 4-story, 137-unit residential apartment complex on a 9.95 acre parcel located at 10010-28 Coconut Road. Ms. Wyrofsky requests recognition of Affected Party Status in future hearings in the above-entitled case DOS2023-E010. I have attached a copy of our Expert Planner Daryl Max Forgey (AICP) as well as my resume as a Florida Bar Board Certified City, County Local Government Attorney.

**Adversely Affected Party Status.** Kathy Wyrofsky, resides in her principal residence at 10089 Magnolia Bend in Estero Florida 34135 is an affected party because she owns and uses the property and shares a common Conservation Area located directly between her property and the subject development site at The Brooks Town Center, and both her property and the subject property are within the same DRI, i.e., The Brooks DRI. The proposed use would cause adverse impacts to the Conservation Area adjacent and between Kathy's property and the subject property, construction and post-construction noise, dust, vibrations, traffic, lighting, and other impacts at a level far in excess of that which will be endured by the public at large.

As an Adversely Affected party, Ms. Wyrofsky has a due process right under the First and Fourteenth Amendments to participate fully in the upcoming October 10 hearings, any and all future hearings regarding the subject property and must be afforded an opportunity to offer testimony and to raise issues concerning the impact of the proposed action on her use and enjoyment of her own property.

Expert Planner Max Forgey, a member in good standing of the American Institute of Certified Planners (AICP), will present expert planning opinion testimony. To achieve their goal of full and positive participation, and in light of past actions injurious to their participation, they request that the Village of Estero grant them Affected Party Status and allotted a bloc of thirty (30) minutes of time for them as individuals, and for me as their attorney, and Mr. Forgey as their expert planner, to present competent substantial evidence concerning case number **DOS2023-E010**, and that we be allowed an amount of time for rebuttal equal in length to that of the applicant's representatives.

I look forward to your timely response.

Respectfully yours,

*/s Ralf Brookes, Attorney*

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cc. Kathy Wyrofsky  
Max Forgey AICP

**DARYL MAX FORGEY AICP**  
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Max Forgey is an experienced land use planner with more than three decades of professional experience and exceptional success in administration of local government comprehensive planning strategies, land development and regulatory controls, governmental relations, and public policy communications. Primary clients are governmental organizations and private property owners.

His professional knowledge encompasses creating and developing community and small-area plans, urban design and architectural standards, land development entitlements, project management, and expert witness testimony. Max has worked on more than 30 cases across 25 Florida counties and municipalities, appearing before local planning agencies, city and county elected bodies, hearing examiners, administrative law judges, and circuit court proceedings.

Max also actively participates in and leads speaking engagements at professional development conferences and symposia through the Promised Lands section of the American Planning Association Florida chapter, with the American Institute of Certified Planners, with 1000 Friends of Florida and other organizations.

### ***Qualifications***

- FORGEY PLANNING. Owner of an urban planning and land-use consulting practice.
- Master of Public Affairs (MPA) in Urban and Regional Planning, Indiana University.
- Member American Institute of Certified Planners (AICP).
- Qualified as an expert witness in Lee County Hearing Examiner proceedings.
- Former Planning and Community Development Director in Charlotte County.
- Former Planning Commissioner (LPA), City of Cape Coral, Florida.

### ***Accomplishments***

- Established FORGEY PLANNING, an urban planning and land use consulting practice.
- Developed a template for auditing the effectiveness of existing local governments comprehensive plans and zoning code for internal consistency of plan policy framework.
- Authored “The Platted Lands Challenge” report for the six-county area of Southwest Florida offering policy guidance for platted, scattered-lot properties.

- Development of implementation strategies which employ automation to create linked mixed media tools for restructuring and updating local government planning and zoning regulations.

## **Certification**

**AICP (American Institute of Certified Planners) Certification #051,330** Florida Chapter, APA Member in good standing since 1993. A national professional certification maintained by the American Planning Association. AICPs must first meet educational standards and then pass an examination covering all aspects of professional planning practice, and are expected to maintain their membership through a self-directed program of study that is monitored by the national organization, which includes regular training in law and ethics.

## **Professional Experience**

### **Forgey Planning**

Cape Coral, FL

*Owner. 2008-present.* A solo planning practice concentrating comprehensive planning work for Lee and Sarasota Counties, the City of North Port, and the Captiva Community Panel. Developed a template for auditing the effectiveness of existing local governments comprehensive plans which has been applied in Sarasota County and the City of North Port. An expert witness since 2013, working on more than 30 cases in 25 Florida counties and municipalities, appearing before planning commissions, city councils, county commissions, hearing examiners, administrative law judges, and circuit court. Qualified as an expert witness in Lee County Hearing Examiner proceedings.

### **Zoning Technologies**

Cape Coral, FL

*President. 2011-2017.* A start-up subsection 'S' corporation that specialized in restructuring and updating local government comprehensive plans and developing implementation strategies which employ automation to create linked tools (e.g. application forms, automated worksheets, case reports, and adopting resolutions). The Zoning Technologies expert system prototype products were marketed statewide and were demonstrated at the American Planning Association (APA) national conference in Atlanta in 2014.

### **Osceola County, Florida**

Kissimmee, FL

*Planning Coordinator. 2005-2008.* Authored key elements of the Osceola County Comprehensive Plan and most of the County's 2008 Evaluation and Appraisal Report.

### **Clay County, Florida**

Green Cove Springs, FL

*Senior Planner. 2003-2005.* Authored the county's Interlocal Service Delivery Agreement Report (ISDAR) mandated by the Florida legislature, identifying all service overlaps between and among all local governments within Clay County.

### **Lake County, Florida**

Tavares, FL

*Planning Director. 2001-2003.* Staff liaison to the Environmental Lands Management Advisory Committee, a citizen organization created by the Board of County Commissioners to study the creation of an environmental land program. Recommended policies were ratified in November 2002,

when Lake County voters approved a one-third mil assessment for the acquisition of environmental lands.

**Southwest Florida Regional Planning Council**

Fort Myers, FL

*Planner. 1997-1998.* Reviewed local government plan amendments throughout the six-county area and authored “The Platted Lands Challenge” report.

**Charlotte County, Florida**

Port Charlotte, FL

*Community Development Director 1995-1997; Planning Director 1990-1995.* Early in my tenure, Gulf Development Corporation (GDC), the County’s largest land subdivider, declared bankruptcy, shifting responsibility for completion of roads, bridges, drainage works, and utilities, to the public sector and forcing a host of development decisions upon the local government and public agencies. I had three memorable achievements during these seven years:

- Managed the research, preparation, and adoption of the County’s Evaluation and Appraisal Report (EAR) and Comprehensive Plan. Aggressively negotiated with the Florida Department of Community Affairs (DCA) to remove the Plan’s not-in-compliance finding.
- Led the staff team that rewrote the Charlotte County Comprehensive Plan and was the point person in the successful four-year effort to negotiate a stipulated settlement agreement between the Board of County Commissioners and the Florida Department of Community Affairs to find Charlotte County’s Comprehensive Plan in compliance with Florida’s Growth Management Act.
- Advocated against the rezoning of 42 parks (illustrated as such on GDC sales maps and the County’s Future Land Use Maps) to residential uses. The Company’s receivers eventually relented on their policy position and donated 41 parcels to the people of Charlotte County.

**City of Cape Coral**

Cape Coral, FL

*Deputy Planning Director. 1985-1990.* Authored and supervised preparation of key elements of the 1988 Comprehensive Plan (the City’s first plan under the 1985 Growth Management Act) and the City’s 1989 Land Development Code.

**Education**

**Indiana University**

Bloomington, IN

*Master of Public Affairs (MPA) from the O’Neil School of Public and Environmental Affairs, 1982.* Concentration in Urban and Regional Planning.

*Bachelor of Arts (BA). 1976.* Undergraduate degree in English Literature and History.

## ***Important Cases, Continuing Education, Writing & Teaching***

- Leading continuing education program for Cape Coral Planning & Zoning Commission/ Local Planning Agency September 25<sup>th</sup>.
- Attending and participating in American Planning Association, Florida chapter annual conference Jacksonville September 5<sup>th</sup> - 9<sup>th</sup>.
- Attending and participating in *23<sup>rd</sup> Annual Florida Land Use Law conference* Tampa August 28<sup>th</sup>-29<sup>th</sup>.
- Program chair for APA Florida/ FPZA *“The Perfect Storm Eight Months Out: A Symposium for Professional Planners, Design Professionals, Plan Commissioners & Regular People”* at Charlotte County Event & Conference Center Punta Gorda May 12, 2023.
- Presenting a panel *“Incorporation, Annexation, and Disincorporation”* with Jim Studiale, AICP, and Luke Lirot, Esq. at APA Florida state conference on Orlando September 7, 2022.
- Co-presented a panel *“Legislative and Quasi-judicial: What Every Planner Needs to Know”* with Attorney Andrew Dickman, AICP, at annual conference of Florida Planning and Zoning Association on Captiva Island June 3, 2022.
- Program Chair for *“The Swamp Peddlers”*, an APA Florida/ Florida Planning & Zoning Association symposium conducted on August 6, 2021 in Punta Gorda. Keynote speaker Jason Vuic and other presenters explored the legacy of land sales scams in Southwest Florida on the twentieth anniversary of the General Development Corporation bankruptcy.
- Designed and co-presented *“Land Use 101”*, a seminar for planning commissioners, elected officials, and new planners, hosted by the City of Cape Coral on June 16 and July 14, 2021 with co-presenters Vince Cautero, AICP, the City’s Community Development Director, and Attorney Ralf Brookes.
- Expert witness for client West Villagers for Responsible Government (WV4RG), a citizen organization which challenged the annexation of the 8730-acre non-contiguous West Villages subdivisions into the City of North Port. The City Commission rejected the Villagers’ challenge by a unanimous vote, but following appeal presented by attorney Luke Lirot, the Twelfth District overturned the City’s order denying petition for contraction in *West Villagers for Responsible Government v. City of North Port*.
- Moderated a panel for law credit at the September 9, 2020 Zoom-facilitated American Planning Association’s Florida state conference. Co-presenters were attorneys Karen Consalo, Thomas

Hawkins, and Andrew Dickman. *“The Rules are Very Different Here: How to Reform Florida’s Land Use Decision-making Process”* surveyed the inconsistencies among local governments’ handling of land use decision-making and proposed a new Environmental Land Management Study (ELMS) to improve those processes.

- Attended and participated in American Planning Association Florida chapter’s 18<sup>th</sup> annual *Public Policy Workshop* at Florida State University, Tallahassee February 2020.
- Drafted update of Town of *Fort Myers Beach Sign Ordinance* to reflect SCOTUS *Reed v. Gilbert* opinion for Weiler Engineering Fall 2019-Winter 2020.
- Program chair for *“Planners in Peril: Law, Legislation, and Ethics for Design Professionals,”* an APA Florida Promised Lands section symposium December 6, 2019 at Bonita Springs City Hall.
- Program chair for *“How High is the Water, Ma?: Rising Sea Level on the Florida Gulf Coast and what we can do about it,”* sponsored by Friends of Boca Grande Community Center, March 22, 2019 at the Boca Grande Community Center Auditorium.
- Member, *Faith Presbyterian Affordable Housing Board*, a not-for-profit corporation which aspires to offer quality housing for low- and moderate-income persons in Cape Coral. Appointed 2018; appointment ended December 2020.
- Received 2018 American Planning Association Florida Chapter, Promised Lands section’s first-ever *Wayne Daltry Award for Planning Programs* for developing professional education symposia.
- Prepared *policy audit of Town of Fort Myers Beach Comprehensive Plan* for Weiler Engineering, Summer 2018.
- Program chair for American Planning Association symposium *“Warped Tour ’18: Land Use Law for Planners”* March 23, 2018 in Punta Gorda.
- Attended and participated in the hurricane-shortened APA Florida chapter annual conference in Daytona Beach September 4-6, 2017. Led panel with Greg Beliveau, AICP and Jane West Esq. entitled *“How to Build a Better Client.”*
- Program chair for Captiva Community Panel/ Florida APA symposium *“Now in My Back Yard: Rising Sea Level on Florida’s Gulf Coast and what can be done about it”* January 13, 2017 at South Seas Resort on Captiva Island.
- Co-authored article with Karen Consalo, Esq. *“Best Practices for Local Government Land Use Decision-making”* in Summer 2016 edition of *Florida Planning*.

- Speaker at American Planning Association Florida Chapter Annual Conference in Tampa, September 9, 2016. *“A Pre-tirement Guide for Perplexed Planners: Making the Transition to Solo Practitioner.”*
- Attended and participated in CLE International’s annual *Land Use Law symposium* in Tampa, August 18-19, 2016, and August 6-7, 2015.
- Speaker at University of Central Florida 2016 Public Administration Research Conference April 8, 2016. Topic: *“What’s the Big Idea: New Software that Aids Land Use Decisions.”*
- Attended and participated in *APA Florida chapter annual conference* in Hollywood, Florida September 10-13, 2015.
- Coordinator and presenter for daylong FAPA-sponsored symposium *“Everything You Ever Wanted to Know about Florida Land Use”* in Cape Coral May 16, 2014.

### ***Jurisdictions - Expert Witness Opinion Testimony***

Bonita Springs	Miramar
Bradenton	Monroe Co (ALJ)
Cape Coral (5)	North Port
Charlotte County (2)	Orange County
Collier County (2)	Ormond Beach
DeSoto County	Pasco County (2)
Fort Myers Beach (2)	Palm Beach County (ALJ)
Hardee County	Polk County (C court)
Hendry County (C Court)	Punta Gorda (2)
Hernando County	St. Johns County (4)
Highlands County	Sarasota County
Hillsborough County (3)	Sumter County
Hillsboro Beach	Suwannee County
Lantana	Venice
Lee County (8)	



# Case for Denial

## Case Number DOS2023-E010 – Brooks Town Center Apartments a/k/a Coconut Pointe Residences

ESTERO VILLAGE COUNCIL

OCTOBER 10, 2023

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Presented by: Max Forgey, AICP



# Presentation Outline

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1. Qualifications of Expert Planner
2. Comprehensive Plan—FLUE & FLUM
3. Statutory definition of “Compatibility”
4. Community Development District free riders
5. Recommended findings of fact
6. Summary & Closing

# Section 1

Kathy Wyrofsky, Client

Case for Denial

# Qualifications of Expert



# Qualifications of Max Forgey AICP

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- Master of Public Affairs (MPA) in Urban & Regional Planning from the O'Neil School of Public & Environmental Affairs, Indiana University, Bloomington.
- Member in good standing of American Institute of Certified Planners (AICP) since 1993.
- 30+ years of experience in State of Florida, including Planning and Community Development Director in Charlotte County.
- Resume provided to Clerk.


## Preparation for this case

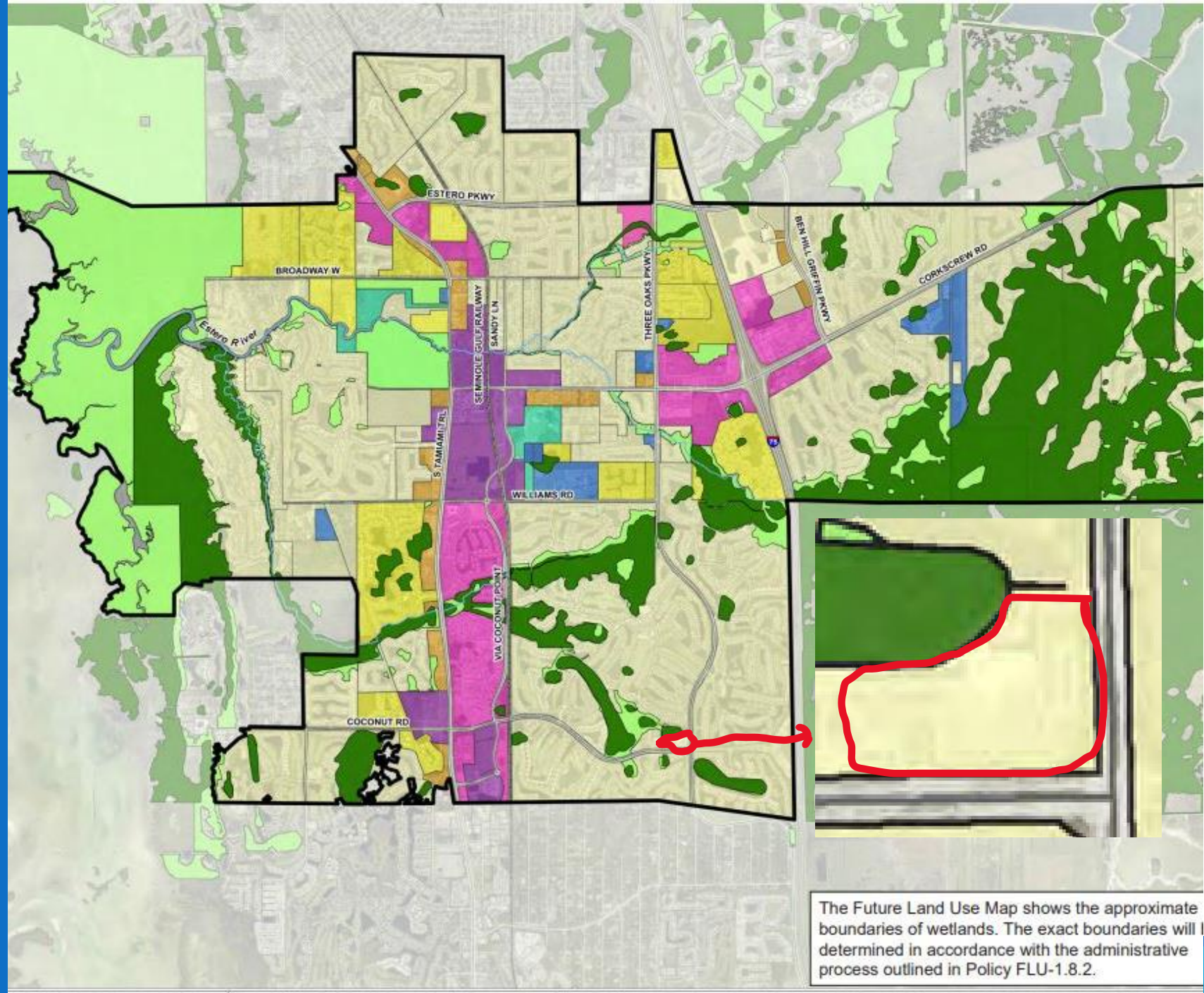
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- Consultation with Client and Attorney October 2023.
- Site visit October 7, 2023.
- Researched staff report and Comprehensive Plan October 2023.

# Estero Comprehensive Plan FLUM (Map)

## Legend

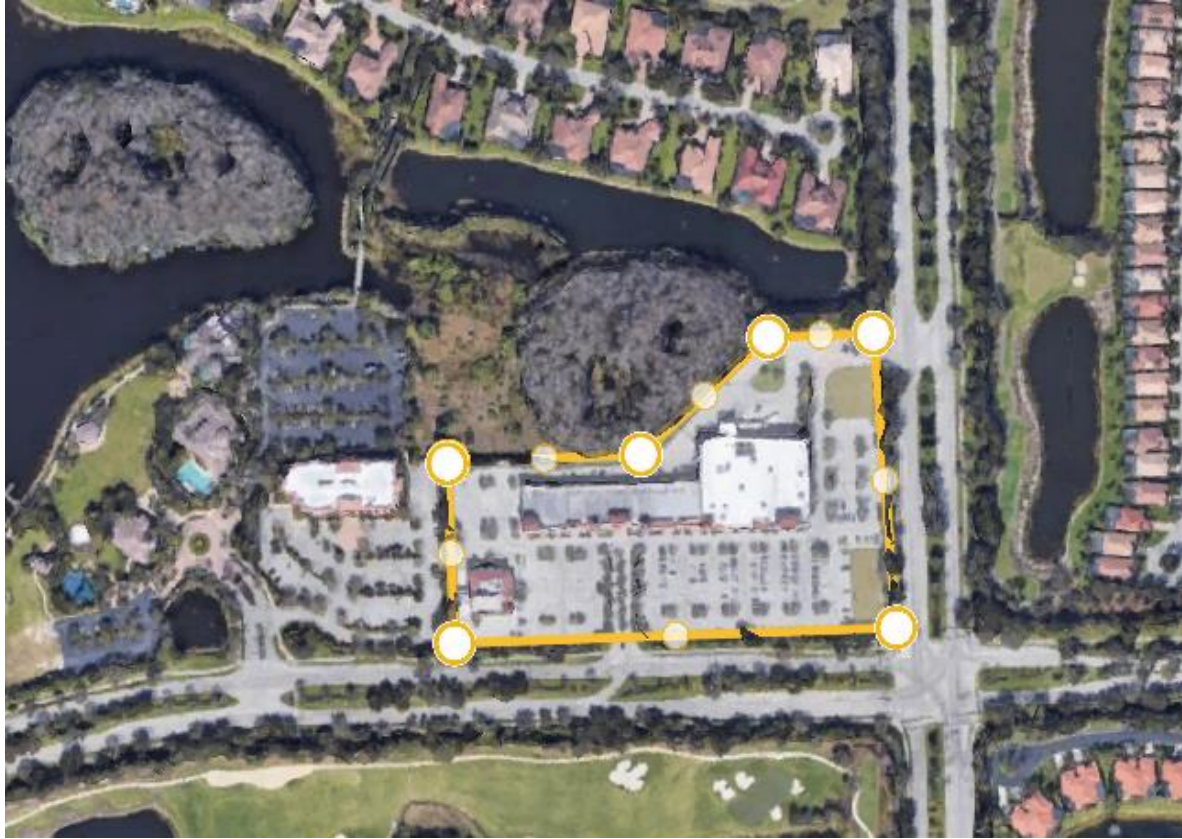
-  Village of Estero
-  Wetlands
-  Conservation
-  Urban Commercial
-  Transitional Mixed Use
-  Public Parks and Recreation
-  Public Facilities
-  Village Center
-  Village Neighborhood 2
-  Village Neighborhood 1
-  Rivers and Creeks
-  Major Roads
-  Railway



The Future Land Use Map shows the approximate boundaries of wetlands. The exact boundaries will be determined in accordance with the administrative process outlined in Policy FLU-1.8.2.

## Aerial of Site (Yellow perimeter)

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# Estero Comprehensive Plan

## FLUM definition (1/4)

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FLU 1.2.6 VILLAGE NEIGHBORHOOD 1. The Village Neighborhood 1 areas are characterized by **predominantly residential uses of lower densities** with the potential for commercial uses of a minor commercial or neighborhood center scale. Some, but not all, of the requisite infrastructure needed for development is generally planned or in place. These areas were generally designated Rural, Sub-Outlying Suburban, Outlying Suburban, or Suburban in the Village's Transitional Comprehensive Plan. These areas have been developed or planned with existing or emerging residential neighborhoods. Golf courses constitute the predominant open space in many of these neighborhoods, and **gross densities range from one dwelling unit per acre (1 du/acre) to four dwelling units per acre (4 du/acre).**



# Estero Comprehensive Plan

## FLUM definition (2/4)

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Village Neighborhood 1 designated areas are either on the fringe of natural resources, or in proximity to urban commercial or transitional mixed-use areas. **Examples include** Wildcat Run, West Bay Club, The Estates at Estero River, **the Brooks** and Pelican Landing.

A. Uses: Predominant land uses in Village Neighborhood 1 will be **lower density residential uses** with the potential to allow minor commercial or limited neighborhood center scale commercial, assisted living facilities, public and quasi-public uses, in each case through a public hearing process. **Higher densities greater than 4 du/ac**, commercial development greater than neighborhood centers, and industrial land uses **are not permitted**.

## Estero Comprehensive Plan FLUM definition (3/4)

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B. Development type: Future development in this category is encouraged to be developed in a way that maintains and enhances a **limited mix of residential unit types** (multifamily, townhome, mid-rise, villas, and single family) while **accommodating neighborhood oriented commercial uses** such as eating places, personal and convenience services, and limited office when approved through a public hearing process. Such commercial uses may be developed as single use buildings or centers or as mixed-use, subject to compatibility standards described in the Community Design Sub-Element.

## Estero Comprehensive Plan FLUM definition (4/4)

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C. Density/Intensity: The standard density range is from one dwelling unit per acre (1 du/acre) **to four dwelling units per acre (4 du/acre)**. **Bonus densities are not allowed.** Commercial development must not exceed 1 FAR and must not exceed neighborhood center criteria of 30,000 – 100,000 square feet as described in Objective FLU-1.5.

## FLUE Allowable Uses & Densities

<b>Village Neighborhood 1</b>	Schools	n/a	Traffic shall not travel through significantly lower density or intensity areas
	Churches	1 FAR	
	Public and quasi-public uses	1 FAR	
	Assisted living facilities	1-4 du/ac, subject to conversion standards in the LDC	Mixed use or single use commercial allowed subject to compatibility standards and public hearing
	Residential	1 – 4 du / gross residential acre	
	Minor commercial	1 FAR or up to 30,000 s.f., whichever is less	
Neighborhood commercial	30,000 – 100,000 s.f.  Per FLU-1.5		

## Proposed findings of fact based upon Estero Comprehensive Plan

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1. The Future Land Use Map (FLUM) designation for the subject property is “Village Neighborhood 1” (VN1) per Future Land Use Policy 1.2.6.
2. VN1 areas are characterized by predominantly residential uses of lower densities. “Minor commercial uses,” such as the existing bank and strip center, and the former supermarket, are also permitted uses contemplated in Policy 1.2.6.
3. Gross densities within the subject parcel range from one dwelling unit per acre (1 du/acre) to four dwelling units per acre (4 du/acre).

## Proposed findings of fact based upon Estero Comprehensive Plan

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1. In calculating the appropriate number of multifamily units on the site, Council is not obligated to assume the highest density of 4 du/ ac, and may begin at the median of 2.5 du/ ac.
2. In calculating the appropriate number of multifamily units on the site, Council should not rely upon the entire 9.55 acre mass of the site, and should net out the portion of the tract which is occupied by a bank, a commercial center, and their ancillary parking.
3. The remaining portion of the tract, ca 5 acres, may be developed with 12 multifamily units if developed at the middle of the range or 20 units at the top of the range.

## Section 2

Kathy Wyrofsky, Client

Case for Denial

# Statutory definition Of “Compatibility”



## Chapter 163.3164(9) Florida Statutes

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(9) “Compatibility” means a condition in which land uses or conditions can **coexist in relative proximity to each other in a stable fashion over time** such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.



## Proposed finding of fact based upon FS Sec. 163.3164(9)

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1. The proposed introduction of 134 multifamily units in an existing commercial district designed to serve the shopping needs of residents of the Brooks neighborhoods would be inconsistent with Sec. 163.3164(9) because it would conflict with prevailing densities of residential use and would create an island of 4 story units in a one- and two-story neighborhood.

## Section 3

Kathy Wyrofsky

Case for Denial



# Community Development

## District free riders

## Section 4

Kathy Wyrofski, Client

Case for denial

# Summary of Findings



# End of Presentation

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