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August 30, 2004

Responsible Growth Management Coalition, Inc.  
c/o Mrs. Eleanor Boyd  
11880 Homestead Lane  
Ft. Myers, FL 33906-6610

Re: Legal Opinion Concerning the August 4, 2004 Hanson  
Real Estate Advisors, Inc. Report to Lee County

Dear Mrs. Boyd:

The Responsible Growth Management Coalition, Inc. (RGMC) has asked us to research and render a legal opinion on the August 4, 2004 real property appraisal consulting report prepared by Hanson Real Estate Advisors, Inc. (Hanson Report) to Lee County. Specifically, RGMC asked us to review the Pine Island real property value assumptions made by the Hanson Report, and whether the Hanson Report properly addressed the "Bert Harris, Jr. Private Property Rights Protection Act" (the Bert Harris Act"), Section 70.001 et seq., Fla. Stat.

After analysis of the Hanson Report and research of these issues, it is our legal opinion that:

- a) the Hanson Report made assumptions concerning Pine Island Coastal Rural real property values which are unsupported by available competent substantial evidence and which mislead the Lee County Commission about the future of Pine Island, and
- b) the Hanson Report does not support the County Attorney's apparent contention that Bert Harris Act claims against Lee County are likely to succeed.

**I. Hanson Report Real Property Value Assumptions**

The Hanson Report made the following six (6) erroneous real estate value assumptions.

**First**, the Hanson Report improperly equates the value of inland DR/GR lands with Coastal Rural lands on Pine Island. Pine Island Coastal Rural lands have greater land value for residential development and agricultural uses than do DR/GR lands. Pine Island's proximity to the aquatic preserves which surround Pine Island provide important and unique recreational uses which makes 10 acres of land on Pine Island more valuable for residential development than 10 acres of land in the DR/GR. Pine Island's warm microclimate supports commercial production of subtropical fruits, ornamental palms, and some vegetables (Hanson Report, Pg. 43 (last para.)). Outside of Homestead, Pine Island is the only area in Florida with a tropical fruit industry. As documented on pages 31 and 43 of the Hanson Report, agricultural use on Pine Island has had, and will continue to have, a large impact on land values on Pine Island, regardless of the Coastal Rural land use designation. The DR/GR lands in Lee County are not comparable with the real property valuation of Pine Island Coastal Rural lands for agricultural uses or for residential development.

**Second**, SFWMD stormwater management rules require agricultural lands being converted to residential development to design and install a new stormwater system. The Hanson Report ignored this existing design and permitting cost, and erroneously imposed a new and additional design and permitting costs of approximately \$20,000 per acre. This additional cost was based upon the erroneous assumption that no such design and permitting costs currently exist when agricultural land is converted to residential. This incorrect additional cost is the major "loss" cited by the Hanson Report; the Hanson Report indicates that all other restoration costs are nominal.

**Third**, the Hanson Report erroneously failed to consider the long term and permanent effect of the existing pre-1995 810/910 development restrictions of Lee Plan Policy 14.2.2 currently still in effect.<sup>1</sup> These existing restrictions restrict further rezonings which would increase traffic on Pine Island Road when the 810 threshold is reached. When the 910 threshold is reached, the currently in effect Policy 14.2.2 restrict the issuance of development orders until improvements can be made in accordance with the Lee Plan which provides that public expenditures for road improvements in the Coastal High Hazard Area (CHHA)<sup>2</sup> are limited to improvements necessary for "existing residents" on Pine Island. (Lee Plan Goal 76 and Objective 76.1).

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<sup>1</sup> The text of the currently in effect pre-1995 Lee Plan Policy 14.2.2 is attached hereto as Exhibit A.

<sup>2</sup> The Hanson Report erroneously assumes road improvements can be made. Thus, the Hanson Report assigned no effect specific effect of the yet-to-be imposed provisions of the current 810/910 thresholds. As set forth on page 6 below, virtually all Pine Island is within the CHHA as defined by the 1993 Florida Legislature and DCA's 1994 rule. The Lee Plan provides that public expenditures for road improvements in the Coastal High Hazard Area (CHHA) are limited to improvements necessary for "existing residents" on Pine Island, not new residents in new development. (Lee Plan Goal 76 and Objective 76.1).

**Fourth**, the Hanson Report failed to consider that the Lee Plan amendments loosen up the 810/910 restrictions of Policy 14.2.2.<sup>3</sup> Specifically, when the 810 threshold are exceeded, the amendments provide for a less stringent criteria by expressly providing for “exceptions for minor rezonings on infill properties surrounded by development at similar intensities and those with inconsequential or positive effects on peak traffic flows through Matlacha, and may give preference to rezonings for small enterprises that promote the nature and heritage of Greater Pine Island.” When the 910 thresholds are exceeded, the amendments provide a less stringent criteria that “the regulations will provide restrictions the further issuance of residential development orders...or other measures to maintain the adopted level of service, until improvements can be made in accordance with this plan, and [t]he effect of these restrictions on residential densities must not be more severe than restricting densities to one-third the maximum density otherwise allowed on that property.” The amendment further provides that “these development regulations may provide exceptions for legitimate ongoing developments to protect previously approved densities for final phases that have a Chapter 177 plat or site-plan approval under Ordinance 86-36.”

The Hanson Report improperly failed to provide credits for these changes to the 810/910 restrictions. Such changes will affect real property values on Pine Island and credits for such changes are necessary for a proper review of the real property values on Pine Island.

**Fifth**, the Hanson Report erroneously failed to consider the design and environmental benefits of the Lee Plan Pine Island amendment, benefits which enhance the marketability of Pine Island property and increase the market value of such properties.

**Sixth**, the Hanson Report’s survey of realtors is speculation which is inadmissible evidence in any court of law. The opinions speculation and conjecture unsupported by competent substantial evidence. Sections 90.704 and 90.705(2), Fla. Stat.; *Petticrew v. Petticrew*, 586 So.2d 508, 509 (Fla. 5<sup>th</sup> DCA 1991) (expert appraisal of property found to be inadmissible due to speculation and conjecture).

In summary, the Hanson Report made six (6) erroneous assumptions concerning Pine Island Coastal Rural real property values which are unsupported by available competent substantial evidence. These erroneous assumptions mislead the Lee County Commission about the future of Pine Island.

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<sup>3</sup> The full texts of the pre-1995 Lee Plan Policy 14.2.2 and the January 2003 Lee Plan Policy 14.2.2. are attached hereto as Exhibit A.

## II. Bert Harris Act Issues

The Bert Harris Act creates a statutory cause of action when

“a specific action of a local government inordinately burdened an existing use of real property or a vested right to a specific use of real property and the property of that real property is entitled to relief, which **may** include compensation for the actual loss to the **fair market value** of the real property caused by the action of government, as provided in this section.” (Section 70.001(2), Fla. Stat. (e.s.)  
Section 70.001(12), Fla. Stat. provides that

“[n]o cause of action exists under this section as to the application of any law enacted **on or before May 11, 1995**, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption on or before that date. A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule regulation, or ordinance being amended.” (e.s).

Section 70.001(3)(a), Fla. Stat. states that “the existence of a ‘vested right’ is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of the state.”

Section 70.001(3)(b), Fla. Stat. provides that

“The term ‘existing use’ means an actual, present use or activity on the real property, including periods of inactivity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature of type of use or activity or such reasonable foreseeable nonspeculative land uses which are suitable for the real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity of the on the property.” (e.s.).

Section 70.001(3)(e), Fla. Stat. defines the phrases “inordinate burden” and “inordinately burdened” as:

“an action of one or more government entities has directly restricted or limited use of real property such that the owner is permanently unable to obtain the reasonable, investment-backed expectation for the **existing use** of real property or a vested right to a specific use of 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 the public burden imposed for the good of the public, which in fairness should be borne by the public at large. **The terms “inordinate burden” and “inordinately burdened”**

**do not include temporary impacts to real property; impacts to real property occasioned by government abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property;** or impacts to real property caused by a governmental entity taken to grant relief to a property owner under this section.” (e.s.).

The Hanson Report did not consider the relevant Bert Harris Act factors, namely, what are the current investment backed expectations for:

- a. an existing use, or
- b. a vested right to a specific use of the property as a whole, or
- c. the owner is left with existing uses or vested uses which are unreasonable such that the property owner bears permanent a disproportionate share of the burden imposed for the good of the public. (Section 70.001(2), Fla. Stat.)

**First**, the proposed conversion of Rural and Outlying Suburban land to Coastal Rural does not destroy any existing uses of Rural and Outlying Suburban lands. The property owners can continue all of their existing uses. (Section 70.001(3)(b), Fla. Stat.). Actual, present uses and activities on the real property can continue. Furthermore, there is no evidence that “nonspeculative land uses...have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity of the on the property.” Id.

**Second**, Section 70.001(3)(a), Fla. Stat. limits “vested right” claims under the Bert Harris Act to common land “equitable estoppel” or “substantive due process” claims. Florida common law provides that vested rights may only be established if the property owner has: (1) in good faith reliance, (2) upon some act or omission of government, (3) made such a substantial change in position or has incurred such extensive obligation and expenses, and (4) that it would make it highly inequitable to interfere with the acquired right. See Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10 (Fla. 1976). **The mere purchase of land does not create a right to rely upon existing zoning or land use plan designation.** See City of Miami Beach v. 8701 Collins Ave., Inc., 77 So.2d 428 (Fla. 1954). Additionally, a successor in interest has no grandfathered right to assume authorization from prior land use and zoning designations, permits, or the equitable estoppel claims of the prior land owner. (Id.; State v. Oyster Bay Estates v. DER, 384 So.2d 891 (Fla. 1<sup>st</sup> DCA 1980); Jones v. First Virginia Mortgage & Real Estate Investment Trust, 399 So.2d 1068 (Fla. 2<sup>nd</sup> DCA 1981) (Vested development rights are not transferable); Franklin County v. Leisure Properties, Ltd., 430 So.2d 475, 480 (Fla. 1<sup>st</sup> DCA 1983)).

The Hanson Report presented no evidence of any Bert Harris Act “vested right” claim related to the January, 2003 Pine Island amendments to the Lee Plan. The Hanson Report erroneously assumed existing property owners have a legal right to the continuation of the maximum densities of the Lee Plan Rural and Outlying Suburban land use categories without proof of any personal common law “equitable estoppel” or “substantive due process” claims. The Hanson Report ignored the fact **the Bert Harris Act does not make the mere purchase of land grounds for a cause of action due to a local government’s change of the existing zoning or land use plan designation of the property.** See City of Miami Beach v. 8701 Collins Ave., Inc., 77 So.2d 428 (Fla. 1954).

**Third**, while the Hanson Report acknowledges that the 810/910 thresholds of the pre-1995 Lee Plan Policy 14.2.2 for residential development have been exceeded,<sup>4</sup> the Hanson Report did not analyze the impacts enforcement of the pre-1995 810/910 thresholds would have on land value on Pine Island. Because the Lee Plan 810/910 restrictions existed prior to May 11, 1995, enforcement of these existing 810/910 criteria is exempt from Bert Harris Act claims. (Section 70.001(12), Fla. Stat.). The Hanson Report erroneously assumed residential development would continue unabated if the plan amendments had not been adopted. Furthermore, the Hanson Report did not analyze whether Lee County improvements to maintain the adopted level of service on Pine Island Road could be implemented,<sup>5</sup> nor did it analyze the costs of such improvements.

**Fourth**, the Hanson Report ignored the fact the Lee Plan 2020 Future Land Use Map (FLUM) allocations limit residential development on Pine Island's Rural land to 1,129 acres, and Pine Island Outlying Suburban land to 466 acres. After deducting the acreage already residentially developed, that leaves only 217 acres in Rural lands and 172 acres in Outlying Suburban lands that can be developed residentially prior to 2020.<sup>6</sup> These are Lee Plan restrictions which existed prior to May 11, 1995, exempt from the Bert Harris Act, and were overlooked by the Hanson Report.

**Fifth**, in 1993 the Florida Legislature amended Section 163.3178(2)(h), Fla. Stat. by requiring comprehensive land use plans to define CHHAs as Category 1 evacuation zones, a new definition of the CHHA which includes significantly more land. In May of 1994, to implement the 1993 legislation change, DCA amended the Chapter 9J-5 definition of CHHA from known or predicted high-hazard areas to the evacuation zone for a Category 1 hurricane. DCA Rule 9J-5.002(8) mandates the Lee County amend the Lee Plan to address the new CHHA definition. (See Village of Key Biscayne v. DCA, 696 So.2d 495 (Fla. 3<sup>rd</sup> DCA 1997) (plan amendments must comply with Section 163.3177(6), Fla. Stat. criteria regardless of prior DCA actions which found the plan to be in compliance with Section 163.3177(6)).

When Lee County adopted the 1989 Lee Plan which designated large portions of Pine Island as Rural lands and Outlying Suburban lands, the CHHA definition Lee County used the old no longer valid CHHA definition which resulted in significant portions of Pine Island not being mapped as a CHHA. Under the new pre-May 1995 CHHA definition, virtually all Pine Island is within the CHHA. The adoption of the Coastal Rural land use category by Lee County's January 2003 Lee Plan amendment implemented the new pre-1995 Section 163.3178(2)(h) and Rule 9J-5.003(17) CHHA definition. The Lee County implementation the

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<sup>4</sup> Hanson Report, pg. 50, 2<sup>nd</sup> para.

<sup>5</sup> Goal 76, Objective 76.1 and underlying policies, restrict public expenditures for new facilities in CHHAs except to protect "existing residents," and prohibit new causeways to any island.

<sup>6</sup> The Lee Plan 2020 allocation lists 4,577 acres of privately owned uplands on Pine Island as vacant or farmed land through the Year 2020

new CHHA definition by creating the Coastal Rural category which directed population density away from the CHHA as required by Rule 9J-5.012(2)(b)(6) and pre-1995 Lee Plan Policy 75.1.4<sup>7</sup> and pre-1995 Lee Plan Goal 76 and the objective and policies thereunder. Lee County's implementation of these pre-Bert Harris mandates exclude the January, 2003 Pine Island amendment from Bert Harris Act claims. The Hanson Report failed to consider or discuss this pre-1995 CHHA issue.<sup>8</sup>

**Sixth**, the Hanson Report failed to recognize and address the Bert Harris Act provision which defines “inordinate burden” and “inordinately burdened” to exclude “temporary impacts to real property; impacts to real property occasioned by government abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property...”. (Section 70.001(3)(e), Fla. Stat.). Given the change in the CHHA definition and Pine Island’s susceptibility to a natural disaster hurricane, it would be a rare situation for Lee County’s new Coastal Rural land use designation to be anything but a reasonable abatement of the public nuisance presented by excessive residential development of Pine Island exempt from a Bert Harris Act claim.

In summary of the Bert Harris Act issue, the Hanson Report did not properly consider and analyze data concerning possible Bert Harris Act claims due to Lee County’s January 2003 Lee Plan amendments which relate to Pine Island.<sup>9</sup> The Hanson Report does not support the County Attorney’s apparent contention that Bert Harris Act claims against Lee County are likely to succeed.

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<sup>7</sup> “Though the Lee Plan amendment process, land use designations of undeveloped areas within coastal high hazard areas will be considered for reduced density categories (or assignment of minimum allowable densities where density ranges are permitted) in order to limit the future population exposed to coastal flooding.”

<sup>8</sup> Even if Bert Harris Act was applicable to these amendments, the owner would still have reasonable uses for such CHHA property, and the property would not be bearing an inordinate burden. Development on Pine Island would be restricted from being a common law public nuisance which adversely affected the public health, safety and welfare problem. Section 70.001(3)(e), Fla. Stat.

<sup>9</sup> When an expert appraiser based his opinion on a misconception of the law, the expert opinion should have been excluded. Williams v. State Department of Transportation, 579 So.2d 226, 229 (Fla. 1<sup>st</sup> DCA 1991).

**CONCLUSION**

The Hanson Report made assumptions which are unsupported by available data. Because the Hanson Report did not properly address the Bert Harris Act issues, it does not support a Bert Harris Act claim against Lee County concerning its January, 2003 Lee Plan amendment regarding the Greater Pine Island Community Plan (Lee County Ordinance No. 03-03) (CPA2001-18).

Very truly yours,

S/ Ralf Brookes

Ralf Brookes, Esq.

Very truly yours,

S/ Thomas W. Reese

Thomas W. Reese, Esq.

cc: Mike Andoscia, RGMC  
Matt Bixler, RGMC  
Nora Demers, RGMC  
Phil Buchanan, Esq.  
Bill Spikowski, AICP

## Exhibit A

The January 2003 Lee Plan amendments made the following changes to the pre-1995 Lee Plan Policy 14.2.2.

“In order to recognize and give priority to property rights previously granted by Lee County for about 6,800 additional dwelling units, the county will consider for adoption development regulations which address growth on Pine Island and which implement measures to gradually limit future development approvals. The effect of these regulations would be to appropriately reduce certain types of approvals at established thresholds prior to the adopted level-of-service standard being reached, as follows:

- When traffic on Pine Island Road between Burnt Store Road and Stringfellow Boulevard reaches 810 peak hour, annual average two-way trips, the regulations will provide restrictions on further rezonings which increase traffic on Pine Island Road.
- When traffic on Pine Island Road between Burnt Store Road and Stringfellow Boulevard reaches 910 peak hour, annual average two-way trips, the regulations will provide restrictions on the further issuance of residential development orders (pursuant to the Development Standards Ordinance), or other measures to maintain the adopted level of service, until improvements can be made in accordance with this plan.”

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The January, 2003 Lee Plan amendment to Policy 14.2.2 provides as follows.

“In order to recognize and give priority to property rights previously granted by Lee County for about 6,675 additional dwelling units, the county shall keep in force effective development regulations which address growth on Pine Island and which implement measures to gradually limit future development approvals. These regulations will reduce certain types of approvals at established thresholds prior to the capacity of Pine Island Road being reached, measured as follows at the permanent count station on Little Pine Island at the western end of Matlacha:

- When traffic on Pine Island Road reaches 810 peak hour, annual average two-way trips, the regulations will restrict further rezonings which increase traffic on Pine Island Road through Matlacha. These restrictions shall provide reasonable exceptions for minor rezonings on infill properties surrounded by development at similar intensities and those with inconsequential or positive effects on peak traffic flows through Matlacha, and may give preference to rezonings for small enterprises that promote the nature and heritage of Greater Pine Island.
- When traffic on Pine Island Road reaches 910 peak hour, annual average two-way trips, the regulations shall restrict the further issuance of residential development orders (pursuant to chapter 10 of the Land Development Code), or other measures to maintain the adopted level of service, until improvements can be made in accordance with this plan. The effect of these restrictions on residential densities must not be more severe than restricting densities to one-third of the maximum density otherwise allowed on that property.

The 810 and 910 threshold are based on 80% and 90% of the level-of-service “D” capacity calculated using the 1965 Highway Capacity Manual, as documented in the 2001 Greater Pine Island Community Plan Update. These development regulations may provide exceptions for legitimate ongoing developments to protect previously approved densities for final phases that have a Chapter 177 plat or site-plan approval under Ordinance 86-36.”