City of Flagler Beach

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October 5, 2020

Flagler County Board of County Commissioners
1768 E. Moody Boulevard, Building 2
Bunnell, Florida 32110

RE: Requested considerations in the review of the Gardens Development

Dear County Commissioners:

As you know, many City of Flagler Beach residents are concerned about The Gardens project. In order to ensure our residents' and the City's concerns are voiced, we have requested our attorney draft the attached letter. Our Commission has review Mr. Smith's letter and voted unanimously to transmit it to you and the letter should be viewed as the City's position on this matter. We are confident you will give these comments all due consideration.

In addition, our attorney and the City's planner will be present at your meeting on October 19 to speak on this matter. Our planner will be offered as an expert witness and we expect that he will be allowed to testify as a substantially affected party's witness. Mr. Torino's C.V. will be provided in advance of the meeting. In addition, members of the City Commission may be present and speak during the public period.

As always, thank you for your courtesies and cooperation.

Sincerely,

Linda Provencher, Mayor

Jane Mealy, Commission Chair

Eric Cooley, Vice-Chair

Rick Belhumeur, Commissioner

Ken Bryan, Commissioner

Deborah Phillips, Commissioner

1 Enclosure

SHEPARD, SMITH, KOHLMYER & HAND, P.A.
ATTORNEYS & COUNSELORS AT LAW
SHEPARDFIRM.COM

October 5, 2020

Honorable County Commissioners
Flagler County Board of County Commissioners
1769 E. Moody Boulevard
Bunnell, Florida 32110

RE: Hammock Beach River Club PUD
Application Nos. 3209 and 3210

Dear County Commissioners, Officials, and Staff:

On behalf of the City Commission of the City of Flagler Beach, I submit these comments and observations regarding the two public hearings regarding The Gardens development you have scheduled for your October 19, 2020 Commission meeting. I request that these comments be included in the agenda package for said meeting with each item and be distributed to all relevant County staff and officials. The City of Flagler Beach appreciates the close bonds it has with the County and all of the cordial intergovernmental coordination we have shared over the years. The City hopes that the comments expressed herein will open dialogue that continues that tradition of intergovernmental cooperation. In this letter I have addressed some general comments the City Commission asked me to present as well as four specific issues (the John Anderson Highway crossing, designation of areas for "future development," drainage, and water/sewer/reclaim) to which the City Commission has asked that I pay particular attention. Toward the end of each section dealing with a specific issue, I offer a suggested condition of approval. Please accept these comments and ideas as exactly what they are intended to be, helpful suggestions meant to inspire discourse; neither myself nor the City Commission claim to have any greater wisdom than yourselves on challenging matters such as these. For your convenience, should you wish to refer to those suggested conditions of approval during your deliberations they are all in ***bold italic*** font. Thank you in advance for your consideration of these items and for your faithful service to our community.

General Comments Regarding the PUD

The PUD zoning and Developer's Agreement for the project under consideration were approved and entered in 2005. As we all understand, developing pursuant to an agreement entered fifteen years ago presents challenges. Conditions change, markets change, and, in this case, developers change. While the City recognizes that the instant developer (herein referred to as the "Developer") possesses the right to proceed pursuant the original PUD and Developer's Agreement, the City requests that the County hold the Developer to the commitments its

predecessor in interest made when securing those development approvals. The City hopes the Developer will not be allowed to "cherry pick" and keep all the components of the original approval that work to its benefit but beg relief from others. If the Developer wants to make whole-cloth changes to the development, the process for that is to seek amendment of the PUD. Your Technical Review Committee has stated the same. It cuts against the very purpose of a PUD to make large scale changes to the look, feel, and development patterns of a project while insisting any review of the existing entitlements is off-limits. PUD, after all, is an acronym for "Planned Unit Development" and you cannot have a truly planned unit development when the "plan" keeps changing.

PUDs are also commonly referred to as negotiated zoning. Through the negotiation a developer usually gets to do things in ways that the straight land use codes would not allow because the overall project as a whole and as contemplated during the review of the proposed plan honors the spirit and guiding objectives that form the basis for wise planning decisions. If a developer were to go through that process promising one picture and showing how that picture will achieve the fundamental planning goals but then a year later present an entirely different picture of what the development would look like we would all be skeptical. It would feel like a shell game. After all, the jurisdiction would have only recently approved development entitlements based on the specific creative solutions the first picture represented. Only one year removed, a commission would probably feel quite empowered to ask: "What changed to make this necessary?"

Fifteen years removed, however, we may be understandably less inclined to suspect a shell game and have a tendency to be more forgiving. As time passes and properties change hands we can understand how a different developer might have a different vision. That does not mean, though, that the overall analysis should be different nor does it mean the County's vision first negotiated should be tossed out the window. The question should still be asked: "What changed to make this necessary?" Also, it is completely reasonable to ask: "And how does this honor the vision to which we agreed when these entitlements were approved?" After all, every entitlement given in a PUD is in some form matched up with a creative solution being offered by the Developer. It matters not whether we are one year or fifteen removed—successful negotiations, just like successful developments, are built upon the foundation of reciprocal commitments and honoring promises made.

By insisting its requests for modifications be reviewed in the form of amendments to the conceptual plan and a preliminary plat instead of revisiting the underlying PUD, the Developer has placed the County in an uncomfortable position and caused the community to feel like this project is being pushed through rather than mindfully considered. That is unfortunate but it is a developer's right to insist its requests be given consideration. Through this process you are providing this Developer that due consideration. During your deliberations, the City hopes you will consider the purpose of PUDs generally, the purposes, goals, and objectives of the County within this PUD specifically, and whether it is really fair to the County and its residents to approve the level of deviation proposed without reopening the PUD. The City is confident that as you mindfully engage in that process you will arrive at an appropriate and reasonable conclusion, whatever you may conclude.

Item 1: At-Grade Crossing at John Anderson Highway

One of the changes in the plan that has generated a certain degree of consternation is the now at-grade crossing at John Anderson Highway. The omission of an off-grade crossing at John Anderson Highway has spurred debate between the Developer and your Technical Review Committee staff. The Developer takes the position that the Developer's Agreement allows for such a change to the approved Conceptual Site Plan without amendment of the PUD. Members of your Technical Review Committee have taken a different view. The following passages are quoted from the Technical Review Committee Notes of the June 17, 2020 meeting; specifically, these are comments from the County's legal department:

> Land Development Code (LDC) Section 3.04.02(F) lists two findings that must be made by the County Commission in order to rezone a Property to PUD. Those findings are:
>
> 1. The proposed PUD does not adversely affect the orderly development of Flagler County and complies with the comprehensive plan adopted by the Flagler County Board of County Commissioners.
> 2. The proposed PUD will not adversely affect the health and safety of residents or workers in the area and will not be detrimental to the use of adjacent properties or the general neighborhood.
>
> In regard to the second required criterion, when the Planning and Development Board considered the rezoning of the subject Property to PUD on October 11, 2005, it explicitly based its finding as follows:
>
> > "The southerly extension of Colbert Lane will provide a controlled, signalized intersection and a grade separated crossing is proposed for John Anderson Highway."
>
> In other words, the Planning Board recommended the County Commission rezone the subject property to PUD based on the premise that the impact of traffic from the development on the neighboring community would be mitigated by the construction of an access into the development at the intersection of Colbert Lane and SR 100 and a crossing over/under John Anderson Highway.
>
> <u>County Commission Consideration of Access</u>
>
> Then, on November 7, 2005, when the County Commission gave the final approval of rezoning the Gardens to PUD, LDC Section 3.04.02(F) required the Commission to make the same finding that

the PUD would not adversely affect the neighboring community. In regard to this required finding, the County Commission minutes state in part:

> "The southerly extension of Colbert Lane will provide a controlled, signalized intersection on S.R. 100. The grade separated road crossing on John Anderson Highway results in a marginal number of trips on that segment."

The County Commission's minutes also reiterate that the Planning Board's recommendation of approval was subject to a number of conditions including the off-grade crossing of John Anderson Highway and an access point at the southern terminus of Colbert Lane at SR 100. The County Commission's rezoning of the parcel to PUD, therefore, was predicated upon an access point at SR 100 and Colbert Lane and an off-grade crossing of John Anderson Highway in order to not adversely affect the neighboring community.

* * *

The off-grade crossing was made permissible rather than mandatory because being only at a conceptual level, it was unclear how much development would be east of John Anderson Highway. The more development east of John Anderson Highway, the more the need for an off-grade crossing. The Section 4.7 of the PUD Agreement, as quoted above, allows the developer to change the location of the internal roadways depicted on the Conceptual Site Plan but not to omit them entirely. The off-grade crossing was made optional in the text of the Agreement at a time when the development was only conceptual. The current proposal depicts almost the entire development east of John Anderson Highway, making the off-grade crossing all the more imperative in keeping with the intent of the PUD Agreement to not adversely affect the neighboring community.

I agree wholeheartedly with your own staff's legal analysis. Frankly, I cannot frame the argument any more clearly than your staff has. If the Developer wants to omit the off-grade crossing at John Anderson Highway he has the option of requesting that change through an amendment to the PUD but accomplishing that change in the manner currently proposed is not consistent with the letter or intent of the 2005 PUD approval.

If you decide to proceed with consideration of the amendments to the Conceptual Site Plan as proposed, it would be only appropriate to at least apply the same level of review and consideration to that element of the new plan as it would have received if proposed during the original PUD approval process. After all, your Comprehensive Plan's mandate that a "proposed

PUD will not adversely affect the health and safety of residents or workers in the area and will not be detrimental to the use of the adjacent properties or the general neighborhood" applies as much today as it did fifteen years ago. Accordingly, the City respectfully requests the Developer be asked to provide evidence to show how conditions have changed since 2005 such that the protection the Planning Board and Commission originally found essential to protect the neighboring community is no longer needed. Until such a showing is made, the City requests the County withhold judgment on this aspect of Developer's requests for modifications.

Finally, should you determine that the developer may omit the off-grade crossing at John Anderson Highway in a manner that is permissible and consistent with the PUD, Developer's Agreement, and all conditions of approval of same, the City urges you to consider the following condition of approval: ***"Prior to permits being issued for the proposed at-grade crossing at John Anderson Highway the Developer shall establish by competent substantial evidence subject to review and verification by the County and comments from impacted neighboring jurisdictions pursuant to the Intergovernmental Coordination Element of the Comprehensive Plan that such at-grade crossing will not adversely affect the health and safety of residents or workers in the area and will not be detrimental to the use of adjacent properties or the general neighborhood."*** Such a condition will ensure that all stakeholders' interests and rights are fully considered before any impacts occur.

Item 2: Areas Designated for Future Development

County technical review staff have expressed concerns with the identification of areas for "Future Development." The City is confident that all parties involved fully understand that such designation creates no entitlements; it is nothing more than an expression of the Developer's intent. Of course, that reformulated expression of intent begs the question: "When the County approved the PUD and Developer's Agreement in 2005, was it understood that those areas were contemplated for future development and, if not, does adding those areas as potential development sites fundamentally alter the nature of the pending development?" Again, one of the primary functions of the PUD as a planning tool is to apply a comprehensive development approach to a project and, in so doing, find creative methods to deal with site and regional challenges that cookie cutter zoning codes are not always well tailored to address. When we look at a large development it will almost always present unique challenges but, often, because of the size it will also present unique opportunities. The PUD as a tool works precisely because we are able to leverage the unique opportunities against the unique challenges on a project scale basis and create a final framework in which everyone is better off. When projects start to break down into one PUD over here, another one over there, and a third back there, that fractionalization of the holistic project undermines the best parts of the PUD tool.

If you find the new plan does not meet the County's goals in the old plan, the City asks that you deny the Developer's current requests; let the Developer make the requests in a process that better honors and promotes the give and take nature of a PUD. Alternatively, if the County Commission finds the Developer could proceed with its current plan subject to a condition that would ensure additional review of this item, the City offers a condition of approval along these lines: ***"Any increase in residential density or commercial intensity beyond that approved within***

the 2005 PUD shall require amendment of said PUD or other appropriate rezoning of the property for which such increases are sought." Said condition would clearly state the legal reality of the parties' posture and give the community comfort that any increases in entitlements would receive the consideration the law requires.

Item 3. Drainage

The Developer's consultants have gone on record stating that they do not build developments that flood. We would expect no less. That response to neighbors' concerns about flooding risks is quite dismissive and unneighborly, though. Residents of Flagler County are unfortunately only too well aware of the risks and consequences of flooding. Nobody expects a developer to build a development that is going to flood. Neighbors are always concerned, however, that a developer, in making sure its development does not flood, will alter grades and historical natural water flows in such a manner that creates flooding problems for them. To express it in very simple terms: I am not allowed to build a levee system around my property to protect it from historical natural water patterns at the expense of my neighbors. I do not mean to imply that that is what the developer is proposing; rather, I am asking that we all be sensitive to what are very real and sincere concerns. Raising grades will alter historical natural water flow patterns and raises the risk that neighboring properties will suffer adverse consequences. If this matter had come forward as an amendment to the PUD, the City believes a much more detailed and involved review of drainage patterns would have occurred. At the very least, had this change been proposed as an amendment to the PUD, the City hopes the County would have sought input, review, and comment from the City on this issue pursuant to the County's obligations under its Comprehensive Plan's Interlocal Coordination Element.

The City believes the County would be well within its rights to deny the Developer's currently proposed plans so that such plan could be reviewed in a PUD Amendment process which is better suited to this type of review. Alternatively, in the event the County Commission finds it appropriate to approve the Developer's requests, the City asks that the following condition be included: ***"No fill or grade shall be authorized or approved unless the Developer shows by competent substantial evidence, subject to independent review and verification by the County and comments from impacted neighboring jurisdictions in a manner consistent with the Intergovernmental Coordination Element of the Comprehensive Plan, that such alterations to grade shall not alter historical natural water flows in a manner that will adversely affect any adjacent property or neighborhoods."*** Such a condition will give the community greater confidence that neighbors will not suffer so that the Developer can benefit.

Item 4. Reclaimed Water

The City Commission is disappointed to see that the Developer's response to questions raised by your Technical Review Committee on the topic of reclaimed water were a passive, "We'll install purple pipe." The PUD approved in 2005 contemplated the Developer's predecessor in interest taking a much more active role in making reclaimed water available. In fact, in the approved PUD the developer was to be in the lead on all water, sewer, and reclaim infrastructure. Then occurred the "Water Wars," the result of which was a settlement agreement between the

County, Flagler Beach, Palm Coast, and Developer's predecessor in interest in 2007. Pursuant to that Settlement Agreement, the City became responsible for providing the water and sewer and the potential future reclaimed water facility was to be built by the Developer on the City's water treatment site. It is important to remember that the Developer's predecessor in interest was a party to that Settlement Agreement and all of the obligations owed by the predecessor developer are now owed by the Developer.

All parties involved in the Settlement Agreement fully expected the developer to take an active lead role in making sure reclaimed water was a reality by the time the project generated demand for water and sewer. Specifically, Section 4.4 of the Settlement Agreement provides:

> The POA [the developer] shall design, permit, and construct a reclaimed water treatment facility capable of producing 1.0 million GPDADF of reclaimed water ("Reclaimed Water Capacity") meeting FDEP requirements under Chapter 62.610 F.A.C. ("Reclaimed Facility"), at its expense, to be located on the FLAGLER BEACH wastewater treatment plant site, to be conveyed at completion to FLAGLER BEACH. *The Reclaimed Facility shall be constructed as a condition of delivery of the Wholesale Capacity by Flagler Beach*, subject to the provisions of Section 4.5(2) below [emphasis added].

As you can see in the emphasized language, the City's obligation to provide the bulk of the capacity is conditioned upon the delivery of a reclaimed water plant. The commitments and obligations of the parties in the Settlement Agreement are as valid today as they were in 2007. The Developer is obligated to fulfill its end of the bargain it chose to inherit. As stated in the introductory paragraphs, the Developer does not get to insist upon all the benefits of the old agreements while reneging on the promises its predecessor made. We all know how important the use of reclaimed water by this project was in the 2005 review. The entitlements the Developer now possesses were granted at least in part because the predecessor developer had offered and agreed to take such an active role in the future of the community.

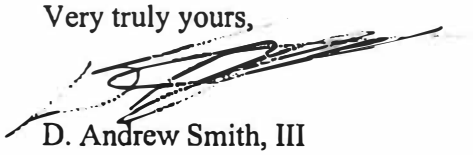
The City remains ready, willing, and able to comply with its commitments as stated in the Settlement Agreement. The City is further willing to negotiate with all necessary parties reasonable modifications to the terms of the Settlement Agreement that may better fit the current needs and objectives of the parties. The City expects the Developer, however, to be equally ready, willing, and able to fulfill its obligations and to be equally reasonable in its efforts to find an appropriate solution that honors one of the central components this PUD was built upon. For that reason and in the event the County Commission finds it appropriate to approve the Developer's current requests, the City requests that a condition of approval be included to the effect of: ***"Prior to issuance of any certificates of occupancy Developer shall satisfy its obligations relating to reclaimed water contained within the Settlement Agreement entered in Case No. 06-001531CA before the Circuit Court of the Seventh Judicial Circuit in and for Flagler County, Florida, or otherwise negotiate and agree to modifications of such terms with all necessary parties in such a manner as to ensure reclaimed water will be available from the City of Flagler Beach prior to***

developer having demand for water and sewer capacity." Such a condition helps ensure that impact mitigation measures built into to the PUD are honored and brought to fruition.

Conclusion

In closing, this project will be a part of Flagler County for the rest of all of our lifetimes. PUDs can be wonderful developments. The PUD process gives local jurisdictions and developers a tool to turn a project into a jewel. This Developer, as do most developers, has great creative vision. I have never met a developer who did not get its hackles raised at least a little at "governmental intrusion" into its creative vision. I have spoken to many after the ribbons were cut, though, that have said something to the effect of: "You know, I really didn't like some of the things they made me do but, in retrospect, I think they made it a better project." Holding to our core values can sometimes be exhausting but it is always worthwhile. On behalf of the City Commission, City of Flagler Beach residents, and myself, thank you sincerely for your time, efforts, and consideration.

Very truly yours,



D. Andrew Smith, III
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