

PAVESE LAW FIRM

STEVEN C. HARTSELL

Direct dial: (239) 336-6244
Email: stevehartsell@paveselaw.com

1833 Hendry Street, Fort Myers, Florida 33901 | P.O. Drawer 1507, Fort Myers, Florida 33902-1507 | (239) 334-2195 | Fax (239) 332-2243

November 17, 2014

Michael Jacob, Managing Assistant County Attorney
Lee County
P.O. Box 398
Fort Myers, FL 33902

RE: *Hideaway Cove RPD Amendment*
Our File No. 83814.001

Dear Michael,

I represent Taylor Morrison of Florida, Inc., and have been working with John Asher and Alexis Crespo (Waldrop Engineering) in an effort to help Taylor Morrison obtain a development order on the 32 acres upland parcel it owns in the 60 acre Hideaway Cove RPD (Res. Z-05-041). The process has become complicated because a bankruptcy court awarded ownership of the 28 acre preserve parcel to a different owner before the development order was obtained. That fact has made it impossible for Taylor Morrison to meet a condition in the RPD requiring that a conservation easement be placed on the 28 acre preserve.

Recent discussions with the Planning and Environmental Sciences staff (copied below) have led us to the consideration of a possible approach that would allow Taylor Morrison to move forward. At the end of a recent meeting, staff asked me to put this information into a letter for your consideration and so that they could discuss it with you. I'll begin with a relatively brief synopsis of the history of the property in order to give you the proper context. I will close with proposed revisions to the RPD conditions which we believe will allow Taylor Morrison to move forward while not impacting the 28 acre preserve parcel *status quo*.

Hideaway Cove (fka "Estero 60") PROJECT HISTORY

STRAP NO.	ACREAGE	PROPERTY OWNER
20-46-25-01-00009.0000	8.71	Peninsula Sailfish, LLC
20-46-25-01-00009.1020	32.00	Taylor Morrison of Florida, LLC
20-46-25-01-00009.1040	20.09	Peninsula Sailfish, LLC
Total Acres	60.80	

In 2002, De Salvo, Tr. owned the 60 acres in Lots 6-11, San Carlos Grove Tract (also known as Estero 60) when Plan Amendment CPA 2002-02 was filed. On June 13, 2003, shortly before the Transmittal Hearing, the 60 acres was sold to Estero Commons, LLC [Lee County Clerk Instrument #5873170]. On October 23, 2003, CPA 2002-02 was approved by Lee County by Ordinance 03-20 designating the subject property as Outlying Suburban. The Applicant (Estero Commons, LLC) agreed during the amendment process to restrict future development to a maximum of 120 dwelling units, of which 90 units could be clustered on the 32-acre subject

4635 S. DEL PRADO BLVD.
CAPE CORAL, FLORIDA 33904
(239) 542-3148

4524 GUN CLUB ROAD, SUITE 203
WEST PALM BEACH, FLORIDA 33415
(561) 471-1366

Letter to Michael Jacob
November 17, 2014

property, while the surrounding 28 acres would remain in preserve. This agreement was adopted as a new Policy 1.1.6 (renumbered in May, 2007, to Policy 1.1.11). The additional 30 dwelling units would be available for sale or transfer as Transfer of Development Right (TDR) units.

Lee Plan Policy 1.1.11 *The Sub-Outlying Suburban areas*

1. For Lots 6 -11, San Carlos Groves Tract, Section 20, Township 46 S, Range 25 E of the San Carlos/Estero area:

- a. The property may be developed at a gross density of one dwelling unit per acre; however, a gross density of up to two dwelling units per acre is permitted through the planned development zoning process, in which the residential development is clustered in a manner that provides for the protection of flowways, high quality native vegetation, and endangered, threatened or species of special concern. Clustered development must also connect to a central water and sanitary sewer system.*
- b. A maximum of one hundred and twenty (120) residential dwelling units, along with accessory, and accessory active recreation uses are permitted through the use of clustering and the planned development zoning process. The dwelling units and accessory uses must be clustered on an area not to exceed thirty two (± 32) acres, which must be located on the northwestern portion of the property. No development may occur in the flowway, with the exception of the improvement of the existing road access from the site to Pine Road. The remainder of the property will be designated as preserve/open space, which can be used for passive recreation, and environmental management and education. In addition, the developer will diligently pursue the sale or transfer of the preserve/open space area, along with development rights for thirty (30) of the maximum one hundred and twenty (120) residential dwelling units, to the State, County, or other conservation entity. (Added by Ordinance No. 07-09)*

Subsequent to adoption of Policy 1.1.6, on May 21, 2004, Estero Commons sold the 32 acres to Estero Preserve, LLC. On May 21, 2004 (in OR Book 4306, Page 2145) Estero Commons also signed a Mortgage and Security Agreement on the 60 acres that was later assigned on September 14, 2005, to Natoli, Tr. (Natoli, Tr. at the same time released from that mortgage the 32 acre upland parcel which Estero Commons had sold to Estero Preserve, LLC. On September 15, 2008, in the Estero Commons bankruptcy, Natoli, Tr. was awarded title to the 28 acre preserve parcel and become predecessor to the present owner of the 28 acre preserve area, Peninsula Sailfish, LLC). ***THE POINT: Policy 1.1.11 (fka Policy 1.1.6) was adopted when Estero Commons was the owner of all 60 acres and before Peninsula Sailfish, or any of its predecessors, had any interest in the property. The owners of the 32 acre parcel and the 28 acre parcel are both subject to Policy 1.1.11.***

In 2005, Estero Commons applied to rezone the 60-acre property from Agricultural (AG-2) to Residential Planned Development (RPD) in order to implement the Outlying Suburban Designation. In compliance with the adopted Policy 1.1.6, the Applicant requested a total of 90 units clustered on the 32-acre parcel with the adjacent 28-acres remaining in preserve. The request also included permission to sell/transfer the 30 dwelling units/TDRs.

Letter to Michael Jacob
November 17, 2014

Although Staff recommended approval of the proposed 90-unit development due to its consistency with the Outlying Suburban, availability of public infrastructure, and compatibility with the surrounding development pattern, **the application was ultimately approved only for a maximum of 64 single family dwelling units to be located on the 32 acres, plus the 30 units available for transfer from the 28 acre preserve.** (See the Conditions from RPD Z-05-041, below).

Taylor Morrison involvement

On December 5, 2005, the 32 acres upland owner (Estero Preserve, LLC) paid \$100,000 for a signed and recorded conservation easement Agreement with the 28 acres preserve owner (Estero Commons, LLC) in which Estero Commons agreed that when the local DO required it, then Estero Commons would convey a conservation easement to Lee County over the 28 acre preserve as required by RPD Resolution Z-05-041. In late December, 2005, Morrison Homes contracted for, and later purchased, the 32 upland acres from Estero Preserve, LLC, along with the right to rely upon the recorded conservation easement Agreement which ran with the land. Morrison Homes paid \$6.8 million for the 32 acres with the conservation easement Agreement in place.

Later [approximately 2007], Estero Commons filed for bankruptcy. The owner of the 28 acre preserve parcel, Natoli, Tr./Peninsula Sailfish, filed a claim in the bankruptcy because they had the mortgage on the 28 acre preserve parcel and the bankruptcy judge ordered the 28 acre preserve property to be conveyed to them free of the conservation easement Agreement. **The bankruptcy order did not make any reference to removing any of the zoning and Lee Plan conditions already in place on the 28 acres.**

Taylor Morrison has made a very significant investment in the 32 acre parcel with the reasonable expectation that the conservation easement would be conveyed when the DO was issued. Now they find that the post-bankruptcy owner of the 28 acre Preserve (Peninsula Sailfish) refuses to convey the easement or to sell the property to allow Taylor Morrison to move forward.

In 2012, Taylor Morrison filed an RPD Amendment (DCI2012-00056) to increase the density to 90 units, as was intended by Ordinance 03-20, and remove conditions that required a conservation easement on the 28-acres controlled by others. The intent was to maintain the *status quo* for the 28-acres as preserve as shown in Policy 1.1.11 and on the RPD Master Concept Plan, but remove language requiring easements that Taylor Morrison could not provide due to lack of ownership. Subsequently Taylor Morrison also filed a Plan Amendment application to amend Policy 1.1.11 which is also under review but on hold for now.

The Present Proposal

The Applicant proposes that the following revisions to the RPD Conditions do not have offsite impacts nor do they require review in a public hearing. They are consistent with the existing RPD and Lee Plan Policy 1.1.11 which controls this site, unless it is amended.

***The following are the RPD conditions in Resolution Z-05-041.**

[My notes in italic in brackets; Deletions crosshatched; additions underlined.]

1. The development of this project must be consistent with the five-page Master Concept Plan entitled "Hideaway Cove RPD", stamped received on February 9, 2006, last revised December 8, 2005, except as modified by the conditions below. This development must comply with all requirements of the Lee County LDC at time of local development order approval, except as may be granted by deviation as part of this planned development. If changes to the Master Concept Plan are subsequently pursued, appropriate approvals will be necessary.

Of the 120 dwelling units authorized by Policy 1.1.6 (renumbered to Policy 1.1.11) of the Lee Plan, a maximum of 64 dwelling units may be developed on the 32 acres designated for development on the Master Concept Plan. The development rights for the remaining 30 dwelling units may only be utilized by the owner of the 28 acre preserve area in accordance with Policy 1.1.6 (renumbered to Policy 1.1.11) of the Lee Plan.

[Note that the last sentence already references the Lee Plan limits for use of the 30 TDRs for the 28 acre preserve to be consistent with Policy 1.1.11]

...

4. Prior to local development order approval:

- a. ~~The development order plans must delineate the 28 acres of preserve in substantial compliance with the Master Concept Plan.~~ The plans must also delineate a physical barrier between the preserve and any abutting lots with preserve signs placed at every other lot corner. The physical barrier may include, but is not limited to, a contiguous double staggered hedge of native shrubs, a 3-foot high berm, or a 4-foot high fence to prevent encroachment of clearing or other such activities into the preserve; and

[Note that the first sentence is unnecessary in view of Policy 1.1.11 and the existing conditions and MCP designations of the adopted RPD]

- b. The development order plans must delineate a 20-foot wide buffer between the proposed road and the adjacent Estero Scrub Preserve. The 20-foot wide buffer must include a minimum 3-foot high berm with a double staggered native hedge planted with a minimum 24-inch height, 3-gallon container size, shrubs to provide a physical barrier between the Estero Scrub Preserve and the proposed roadway to deter wildlife from entering the roadway; and
- c. The proposed roadway must utilize valley gutters to prevent the trapping of wildlife within the roadways; and

- d. At the time of development order or other approval process for Transfer of Development Rights (TDR) from the 30 dwelling units provided for in Lee Plan Policy 1.1.11 for the 28 acre preserve, a recorded Conservation Easement dedicated to Lee County and any other appropriate agency or land trust for the 28-acre preserve must be submitted. Passive recreation such as trails, picnic tables, benches, observation platforms, boardwalks, educational signage, and conservation activities, such as re-sloping of the existing borrow pit shoreline to provide a littoral shelf, hand removal of exotic vegetation, restoring existing trails/roadways to an appropriate native habitat, and management activities to maintain healthy ecosystems are allowed within the Conservation Easement upon review and approval from the Division of Environmental Sciences' Staff.

[Note that the new language is consistent with the end of Condition #1, above, and simply clarifies how to start the process for the 30 TDR's.]

5. Prior to any site work, an appropriate gopher tortoise permit from Florida Fish and Wildlife Conservation Commission and any other associated receipts must be submitted to the Division of Environmental Sciences' (ES) Staff. Excavation of gopher tortoise burrows within the areas of impact must be coordinated with ES Staff, and all gopher tortoises and commensal species found must be moved to areas of appropriate habitat pursuant to FDEP permits in the 28-acre preserve area.

[Note that the language reduces any burden on the 28 acre preserve, but requires the GT removal to be consistent with applicable state law.]

[Remaining conditions would be unchanged]

We believe that these very minor clarifications could provide the needed protection for the public and the property owners' rights to use the property they own individually without unreasonably placing any burdens on the exercise of those rights, and also avoiding the need to go through Plan Amendments and Zoning Amendments which have been difficult to address for the past two years that we have been trying to move this development order forward. We look forward to discussing this with you and staff when you have had a chance to talk to them about it.

Very Truly Yours,



Steven C. Hartsell

Atmt: Res. Z-05-041
cc: Paul O'Connor, Lee County Planning Director
Peter Blackwell, Lee County Planning
Becky Sweigert, Lee County Environmental Sciences
Susie Derheimer, Lee County Environmental Sciences
John Asher, Taylor Morrison
Alexis Crespo, Waldrop Engineering