File

CONSERVANCY of Southwest Florida
OUR WATER, LAND, WILDLIFE, FUTURE.

Protecting Southwest Florida's unique natural environment and quality of life ... now and forever.

Cecil L. Pendergrass, Chair
Larry Kiker, Vice Chair
Tammy Hall
Frank Mann
John E. Manning
Board of County Commissioners
Lee County
2120 Main Street
Fort Myers, FL 33901

Re: River Hall Privately Sponsored Amendment to the Lee County Comprehensive Plan, CPA2012-00001

The Conservancy of Southwest Florida has long been active in providing comments to protect the environment and quality of life in Southwest Florida. Our goal is not to stop all development. We understand that development will happen, and we strive to help that development occur at a time and in a location that balances the need for growth with the protection of natural resources and community character. This proposal, however, does not balance the need for growth with protection of environmental resources or community character.

This request is not consistent with the Lee Plan, is not consistent with Florida Statutes and promotes planning policies which are contrary to good practices and which undermine the efficacy and reliability of the comprehensive plan.

Inconsistency with the Lee Plan

Pursuant to **Objective 2.4**, modifications of the future land use map are to be made in light of new information and changed conditions. The existing map is presumed to be correct. It is the applicant's responsibility to show - in a clear manner - why a change is needed. The Lee Plan states that in order for a change to be made, there must be new information and/or changed conditions. In this case, there are neither.

There are no changed conditions or new information which supports this proposed change. Changed ownership - and as the principles have remained the same, it could be argued there is not even new ownership - is not new information or a changed condition.

The applicant, who has been involved with the project since the inception, has always been aware of the future land use entitlements on the property, and that there were **two** failed attempts to change

1495 Smith Preserve Way | Naples, Florida 34102 | 239.262.0304 | Fax 239.262.0672 | www.conservancy.org

the future land use to increase entitlements. Denying this application does not impact property rights of the applicant - the applicant knew or should have known what development rights were approved when business decisions and investments were made. The applicant should have planned investments based on approved property rights, not potential property rights. This request is speculative, which, by its very nature cannot be a valid investment backed expectation, a changed condition or new information. This request must be denied because it does not meet the minimum standard required for a future land use map change.

Policy 2.4.3 specifically states that it is Lee County's policy to not approve further urban designations. This request is seeking to change a rural designation to a more urban designation. According to page 5 of the staff report, this request would remove 27% of the total rural designation in the Fort Myers Shores Community Plan. As such, this request is not consistent with this policy.

Policy 5.1.5 states that Lee County must protect existing and future residential areas from any encroachment of uses that are potentially destructive to the character and integrity of the residential environment. This proposal does this very thing by seeking to erode the existing rural character of the community. As such, this request is not consistent with this policy.

Policy 21.1.5 was adopted in 2009 in response to the last time there was an application to increase density for the River Hall projects. The Board of County Commissioners (BoCC) adopted a text amendment specifically protecting the remaining rural lands in this planning area. This language prohibits amendments to the Future Land Use Map within the Caloosahatchee Shores Community Planning Area that increase the density of rural lands without a finding of "*overriding public necessity*". Increasing the number of buildable lots in a planned development in Lee County (particularly in light of the fact that staff has found the increase is not needed[1]) is not a public necessity. There is no benefit to the public. The only entity that benefits from this is the developer.

The staff report has focused on the phrase "overriding public necessity", and while that language is important, there is other language in Policy 21.1.5 that is just as important. The stated reason for this policy is to retain rural character and rural land uses. Nothing about this proposal does this, and, in fact, this proposal would result in additional erosion and premature conversion of existing rural lands. The staff report, on page 3, agrees that this change would represent "the incremental erosion of the Rural category".

[1] See Page 14 of the staff report

The language "overriding public necessity" is commonly used in policy statements and court decisions as meaning "no other reasonable option is available" and/or "necessary to avoid public harm" and/or "necessary for public health and safety". This phrase is commonly part of eminent domain policies and proceedings, and requires that the entity wanting to change property rights literally have no other reasonable options. Additionally, the public benefit from altering the subject property must be so great that it is easily apparent and defensible. **This is not true for this request**.

Page 14 of the staff report includes the following paragraph:

> The Lee Plan does not provide a definition of "overriding public necessity." There are multiple ways that the phrase "overriding public necessity" could be interpreted. The phrase is in a policy that acknowledges an important aspect of the Community's plan is to retain its' rural character and rural land use where it currently exits. One way in which the policy could be interpreted is that if there is a demonstrated need for additional urban lands to accommodate additional urban or suburban uses and densities. There are already thousands of acres of designated vacant urban land to the south and west of the subject site. These lands in addition to being designated for urban/suburban uses are in fact zoned for residential uses. The River Hall property itself currently is zoned for 1,999 dwelling units, but at the time this is being written **only 324, or about 16 percent, of these units have been constructed.** These facts lead staff to conclude that currently **there is not a need for the additional dwelling units that the applicant is requesting.** (emphasis added)

In 2007, before the housing crash, the BoCC voted 4-1 to not adopt a proposal that would have limited development on the site to 2,800 units.

Since 2007, the need for additional housing in Lee County has dramatically decreased. There are no changed conditions that provide a reasonable basis to approve this request for 2,999 units. Changed ownership is not new information or changed conditions. The applicant knew or should have known what development rights were included with their purchase.

This request is not consistent with Policy 21.1.5.

Spot Zoning and Enclaves

On three different pages, the staff report states that approval of this request will create enclaves of future land uses[2]. In addition,

[2] See pages 3, 4, and 12 of the staff report.

this request will result in spot zoning (or reverse spot zoning) in the concurrent rezoning application. "Enclave" is a term used in annexations. The same concept in zoning is called spot zoning. Both practices - annexation of enclaves and spot zoning - are prohibited. Enclaves are prohibited by Florida statutes, case law finds against spot zoning.

Future land use map enclaves (FLUMES) undermine comprehensive planning. The creation of FLUMES allows for special benefit of a limited group of property owners at the expense of others and is inconsistent with the community plan. Case law and planning principles are against this type of classification.

Spot zoning is the name given to the piecemeal rezoning of land to a greater density, leading to disharmony with the surrounding area. Spot zoning is generally considered as giving preferential treatment to one parcel at the expense of another, or of the zoning scheme as a whole.[3] Another definition found in Florida case law is a rezoning which creates pockets of different uses solely for the benefit of a particular property owner.[4] The courts have consistently found that spot zoning does not comply with established zoning law, and that spot zoning leads to disintegration of established zoning districts.[5]

Section 171.046(1), Florida Statutes

To draw an analogy, in annexations, enclaves are prohibited because of public policy planning concerns. The 2013 Florida Statutes, Section 171.046(1) states that "[t]he Legislature recognizes that enclaves can create significant problems in planning, growth management, and service delivery, and therefore declares that it is the policy of the state to eliminate enclaves." On page 3 of the staff report, as a reason to not transmit, staff states that this amendment will create "enclaves of future land use classifications."[6] [7]

This request represents similar bad planning policy which would cause inconsistency within community character. The staff report states that because the applicant does not have unified control over all the lands, there are tracts of land that will remain rural that will be surrounded by sub-outlying suburban lands.

---

[3] Bird-Kendall Homeowners Associates et. al vs. Metropolitan Dade County Board of County Commissioners, 695 So. 2d 9081 1997 Fla. App. LEXIS 7194

[4] Southwest Racnches Homeowner Assoc. v. Broward Count, 502 So. 2d 931,935 (FLa. 4th DCA 1987)

[5] Bird-Kendall Homeowners Associates et. al vs. Metropolitan Dade County Board of County Commissioners, 695 So. 2d 9081 1997 Fla. App. LEXIS 7194 stating that the change would impact the character of the entire neighborhood but only benefit the applicant.

[6] Creating enclaves of future land use categories is also one of the findings of fact on page 4.

[7] Page 12 of the staff report states that the proposed amendment will create enclaves of land that would not match future land use category of the surrounding property in the development because the applicant does not have unified control of the land.

It is the policy of the state to eliminate enclaves. Although this is on a future land use map, not an annexation, it is clear that enclaves are against public policy. It is also clear that spot zoning is contrary to good planning practices and public policy. There is no reason to think that enclaves on a future land use map are beneficial or good public policy. Lee County should not approve the creation of enclaves on their future land use map and should deny amendments which create enclaves such as this one.

Inconsistency with Florida Statutes 163.3177

This request is not consistent Section 163.3177(1) of the Florida Statutes.

Section 163.3177(1), Florida Statutes

Balanced Commitments

The first sentence of Section 163.3177(1) of the Florida requires the comprehensive plan to provide the principles, guidelines, standards and strategies for the orderly and balanced future economic, social, physical, environmental and fiscal development of the area that reflects the community commitments. In this case, we know that what the community commitments are: to retain rural land uses and rural character. This request does not do that. This request is to take land out of the rural future land use. Additionally, this change could lead to negative environmental impacts. On page 11 of the staff report, Lee County Environmental Sciences staff specifically states "that the additional units allowed by the increase in density will lead to increased and possibly negative human/wildlife interactions."

Predictable & Reliable Standards

The last sentence of Section 163.3177(1) of the Florida Statutes requires that Lee County establish meaningful and predictable standards for the use and development of land. This means that someone who purchases a home in a rural subdivision should reasonably be able to expect that they will live in a rural subdivision, at the density and intensity presented at time of purchase. This request opens up the possibility that neighborhoods will not be congruent, and that adjoining parcels will be of significantly different sizes and developed at different densities, and that planned developments are not so much planned but rather planned for now with the possibility that the community will change at a later date.

Allowing an applicant who owns less than 100% of a development (this applicant owns 65% of the River Hall development) to make changes which impact the entire development and impacts all land owners does not create meaningful and predictable standards for the use or development of land. Why would people buy in a planned development if they knew that at any time, the plan which they bought into could be abandoned and a new plan - different from the one they invested in

- could be approved? Allowing this is the opposite of predictable, and as such, is not consistent with Section 163.3177(1) of the Florida Statutes

The applicant is asking for the real property rights of the individual owners to be ignored so that the applicant may undertake speculative development on the River Hall site. To be clear - this request by the applicant is speculative. As similar requests have been denied twice, any investment made by the applicant toward this request is a business decision based on *speculation* that the BoCC would change their mind. It is not your job, or the job of citizens of Lee County to protect people from business decisions that aren't profitable.

It is your job, however, to protect individual land owners who specifically purchased low density housing in a rural subdivision, and based their investments on the development plan adopted by Lee County and represented to them as a rural subdivision with a maximum build out of 1999 units at the time of sale. This is called creating certainty in the marketplace, and maintaining predictable reliable standards.

These owners purchased property with specific and distinct "investment backed expectations" that development would occur in the manner presented to them by the applicant, with an expectation that absent "overriding public necessity", there would be no additional density and that the rural character of the subdivision would be protected. Their investment back expectation is real, not speculative. In is imperative you protect these landowners, and that you maintain predictable and reliable standards for the Future Land Use Element of the Lee Plan.

While the legal entity requesting this change may be different than the legal entity that made those representations to the existing land owners, the principle actors involved in both entities are the same. The applicant knew or should have known about these representations. The applicant knows or should know the expectations of the other land owners in the River Hall development. The applicant wants additional entitlements with no consideration to the real property rights to these other owners in River Hall.

Also, on page 18 of the staff report, staff states that density will be utilized from Suburban areas ***not included in the amendment or rezoning area even though those landowners have not joined in with this request***. This means that there is a question of who really owns these lands and is entitled to any currently unused density on these Suburban lands. Neither staff nor applicant know whose density they are taking to use. This is a huge problem. If there is a question

of ownership, it is irresponsible of Lee County to authorize any changes to that property or use of that density. Doing so undermines the predictability and reliability of standards required by the Florida Statutes. This request is not consistent with Section 163.3177(1) of the Florida Statutes

Conclusion

We are requesting you not transmit this amendment to the state agencies. This request is not consistent with the Lee Plan, is not consistent with good planning practices and is not consistent with Florida Statutes.

The two previous requests to increase density for River Hall were both denied. Both of those requests were better and stronger than the request before you today. In 2004 and 2007, the applicant owned 100% of the project site. There were no other property owners to consider, and building for single family homes was increasing. Under those far more favorable circumstances, the request for additional density was denied.

Now, the applicant, having sold 35% of the property, when there is no need for additional homes, comes back to ask again for additional development rights for the remaining 65% of the property. The applicant and staff are ignoring the real property rights of the other land owners who purchased their home sites based on the representations made by the applicant of a rural community with a maximum number of homes in the community of 1,999.

It is your responsibility to have standards that create meaningful and predictable results. That means protecting the rights of the landowners who bought their individual lots based on the representation of a rural community as presented by the applicant. To allow the applicant to renege on that presentation and to ignore those property rights would be unfair and set an extremely unsettling precedent.

Thank you for your time in consideration of these issues. If you have further questions or need additional information, please contact me at (239) 262-0304 x 252 or by email at juliannet@conservancy.org.

Sincerely,

Julianne Thomas

Julianne Thomas
Growth Management Specialist