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VIA PDF EMAIL

Amber L. Slayton, Esq., City Attorney
City of North Port
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Re: Heron Creek Land Use and Conversion Tables

Dear Amber:

You have requested that we provide the City of North Port ("City") with a written opinion on whether the Land Use Table contained in section 3.0 of Ordinance 2011-033 may be modified by the Developer to allow the transfer of land use entitlements from one phase to another phase.

I. Background

In responding to your request, we have reviewed the following materials provided by the City:

- Ordinances 2000-13, 2005-28, 2006-46, 2011-33, 2013-16;
- Resolution 01-R-5;
- Various emails and applications provided by the City;
- Biennial Status Report for Heron Creek (November 1, 2018 – October 31, 2020;
- September 7, 2021 letter from Dan Lobeck with attachments;

- September 20, 2021 letter from Morgan Bentley with documents referenced therein; and
- September 30, 2021 letter from Dan Lobeck with attachments;

A. Ordinance 2011 -33

On September 11, 2000, the City Commission ("Commission") adopted Ordinance 2000-13 as the development order for Heron Creek, a development of regional impact ("DRI"). Throughout time, this development order has been amended several times. On March 10, 2010, the developer requested to update Map H with existing and proposed development, address affordable house stipulations, revise the current stipulations relating to the proposed pathway along the Myakkahatchee Creek, and propose a land use conversion matrix that would allow the developer to convert approved uses from one area to another without increase in external impacts. Specifically, in the Notice of Proposed Change ("NOPC") that the developer revised in August of 2011, the developer explains that, due to changing market conditions in commercial development, the developer proposed a conversion matrix that would provide the developer flexibility in meeting the needs of the City and demands of the real estate market. The conversion matrix also demonstrates how residential, retail, offices and medical offices can be converted through the local development order process without exceeding thresholds that would trigger a substantial deviation to the DRI. The applicant proposed no change to the development intensity or the buildout or phasing dates of the project. On January 9, 2012, the Commission adopted Ordinance 2011-33 as the development order for Heron Creek ("Development Order").

The Development Order specifically provides the following:

> 3.01 The amended ADA for Heron Creek DRI is hereby approved for the following land uses and phases, and land use conversion matrix subject to the conditions contained herein consistent with the revised Map H (attachment 3 of the DO), and is subject to the other provisions of the Development Order (including Attachment 4 of DO):

Land Use	Phase I (97-2001)	Phase II (02-2006)	Phase III (07-2011)	Phase IV (12-2017)
Residential Single Family	275 DU	377 DU	251 DU	

(LUC 210)				
Residential Multifamily (LUC 220)	125 DU		175 DU	
Golf Course (LUC 430)	18 holes	9 holes		
Tennis Club (LUC 492)		5 Courts		
Medical/Professional (LUC 720)			43,000 GLA	
Office General (LUC 710)			40,000 GLA	
Retail Shopping Center (LUC 820)	90,000 GLA	30,000 GLA	488,000 GLA	137,500 GLA

The Land Use Table, as specified above, may be modified by the Developer without further amendment to this Development Order, subject to the following:

a) This transfer or conversion may occur subject to the following conversion table: *(The conversion table showing conversion from and to each land use in the land use table is omitted from this letter due to space constraints but can be found in section 3.01 of the Development Order).*

b) The transfer or conversion may occur provided that: 1) the external trips approved for the DRI remain the same and 2) no additional impact will occur to other public facilities (such as sewer and water). Further, no alteration to the Map H may occur as a result of the conversion.

c) Forty-Five (45) day notice of any conversion must be provided to the City, the Department of Economic Opportunity, Division of Community Planning and Development, and the Southwest Florida Regional Planning Council. In addition, the amount of the conversion must be reported as part of the subsequent monitoring report and petition to develop. When a petition to develop which includes a transfer or conversion of land use is submitted to the City, proof that no adverse impact is being caused by the transfer or conversion or any combination thereof must be provided.

> d) The transfer of conversion does not increase the allotted number of units on any particular parcel to a level above what is permitted in the DRI or the City of North Port Land Development Code and does not exceed the substantial deviation criteria of subsection 380.06(19)(b), F.S.

Regarding the conversion matrix, the Development Order included the Sufficiency Comments from the Developer that explained how the proposed conversion matrix was established to ensure there would be no impact to the regional transportation system when converting units. The City had expressed concern that the proposed conversion matrix could permit a greater number of housing units than was allowed within any zoning district and the Developer agreed with proposed restrictive language to alleviate the City's concern. Additionally, the Developer attached a Technical Memorandum from Tindale, Oliver, and Associates, which established the methods and background information for the conversion table estimates. Specifically, the conversion rates were determined by comparing the previously approved Phases 1-3 development program and corresponding external trip generation, to a proposed development program. The proposed development program would provide for additional retail entitlements concurrent with a decrease in or "trade-off" of other entitled uses (i.e. office and residential). As approved, the entitlements of the Heron Creek DRI were estimated to generate approximately 2,804 net external trips during the PM peak hour. The conditions of the Development Order limit development based on external trips, with improvements conditioned at various trip milestones. The analysis determined that an updated development mix, incorporating additional retail entitlements, would not result in additional net external trip generation from the DRI and provided the following example to demonstrate:

> An additional 245 ksf of retail is estimated to increase net external trip generation by 513 vehicles per hour or 2.095 vehicles per hour/per ksf. The multi-family decrease of 767 dwelling units is estimated to decrease net external trip generation by the site by 372 vph, or .486 vehicles per dwelling unit. Therefore 2.095/.486 = 4.31 multi-family dwelling units trade-off for 100 square feet for retail.

As explained in the Technical Memorandum, the intent of the change to the Development Order was not to eliminate any intended land uses from development, but rather to allow for the reallocation of the quantities that are approved based on changes in the market demand

The Development Order recognizes some of the land use entitlements have been developed (i.e. a grocery store) and improvements made (i.e. bus shelters and roads) while other land use entitlements from earlier, expired phases remain undeveloped (i.e. the Development Order recognizes that building permits for Phase II have not been issued and requires payment of application fees before their issuance even though the phase has expired)[1]. The City is responsible for enforcement of the Development Order and the Development Order remains in effect until December 31, 2017, which is also the build out date. The Development Order further provides that the DRI shall not be subject to down-zoning, unity density reduction, or intensity reduction prior to December 31, 2017, unless the City of North Port can demonstrate that substantial changes in the conditions underlying the approval of the Development Order have occurred or that the Development Order was based on substantially inaccurate information provided by the developer, or the change is essential to the public health, safety, or welfare. Pursuant to information from City Staff and based on declarations of the state of emergency, the City subsequently extended the Development Order Phase IV and buildout date to March 9, 2024.

B. Ordinance 2013 -16

On October 14, 2013, the Commission enacted Ordinance 2013-16, which amended Section 4.10 of Ordinance 2011-33. This amendment provided for an additional local condition, where prior to any certificate of occupancy for any development beyond 286,000 gross square feet of development within the 84-acre parcel located at the southeast quadrant of Price and Sumter, the developer must construct an eight-foot-wide sidewalk including a pedestrian bridge over the Blueridge Waterway, if determined necessary by the City. At the time Ordinance 2011-33 was enacted, the developer had only received approval for the development of a 3,890 gross square feet McDonald's on the 84-acre parcel.

C. Subsequent Correspondence

On February 22, 2021, the City's Interim City Manager, sent a letter to the Developer regarding failure to comply with conditions of approval for Heron Creak DRI. Attached to that letter, the City listed 10 conditions where action was required. Two of the conditions were: 1) a biennial report was delinquent and 2) while the land use phasing

[1] Those fees were subsequently paid and building permits obtained nine months after the Development Order was approved.

chart with conversion matrix "is not out of date; … staff would just like to take this opportunity to note that the applicant has utilized this condition to transfer the undeveloped land uses into Phase IV."

Subsequently, the Developer filed its biennial status report for Heron Creek for the period of November 1, 2018 to October 31, 2020 ("Biennial Report"). The Biennial Report identified that the extension of the buildout date was granted during reporting period and minor changes to phasing dates and development allocation have been made as shown below.

Land Use	Phase I (97-2001)		Phase II (02-2006)		Phase III (07-2011)		Phase IV (12-2021)	
	Proposed	Actual	Proposed	Actual	Proposed	Actual	Proposed	Actual*
Residential Single Family (LUC 210)	~~275 DU~~ 376 DU	376 DU	~~377 DU~~ 457 DU	457 DU	~~251 DU~~		70 DU	
Residential Multifamily (LUC 220)	~~125 DU~~				~~175 DU~~		300 DU	133 DU
Golf Course (LUC 430)	18 holes	18 holes	9 holes	9 holes				
Tennis Club (LUC 492)			5 Courts	5 Courts				
Medical/Professional (LUC 720)					~~43,000 GLA~~		43,000 GLA	20,070 GLA
Office General (LUC 710)					~~40,000 GLA~~		40,000 GLA	
Retail Shopping Center (LUC 820)	~~90,000 GLA~~ 68,075 GFA	68,075 GFA	~~30,000 GLA~~ 34,240 GFA	34,240 GFA	~~488,000 GLA~~ 3,890 GFA	3,890 GFA	~~137,500 GLA~~ 639,295 GLA	102,374 GLA

*Staff provided the actual development in Phase IV to be 197 DU MF; 31,452 GLA medical; and 90,744 GLA retail.

Pursuant to Ordinance 2011-33, the total land use approved is 903 Single Family Residential units, 300 Multi-family unit, 27 Holes of Golf, 5 Tennis Courts, 43,000 SF of Medical/Professional, 40,000 SF of General Office and 745,500 SF of Retail Shopping

Center. Pursuant to the Biennial Report, the total land use constructed is 833 Single Family Residential units, 133 Multi-family units (48 independent living units and 169 ½ Continuing Care units), 27 Holes of Golf, 5 Tennis Courts, 20,070 SF of Medical/Professional, 0 SF Office General, and 206,579 SF of Retail Shopping Center.

The Developer submitted an application for development under Phase IV and the application caused the City to ask whether the Land Use Table contained in section 3.0 of Ordinance 2011-033 may be modified by the Developer to allow the transfer of land use entitlements from one phase to another phase. It's worth noting that neither "transfer" nor "conversion" are defined terms in the City's Code, or the applicable Ordinances described above.

II. Interpreting Development Orders

A development order shall be interpreted using the fundamental principles applicable to statutes and ordinances. *Trafalgar Woods Homeowners Assn., Inc. v. City of Cape Coral*, 248 So. 3d 282, 284 (Fla. 2d DCA 2018). Hence, where the language of a development order is plain and unambiguous, there is no room for construction or interpretation, and the effect of the development order must be determined according to the literal meaning of the language therein. *Killearn Properties, Inc. v. Dept. of Community Affairs*, 623 So. 2d 771, 775 (Fla. 1st DCA 1993); *Rinker Materials Corp. v. City of N. Miami,* 286 So. 2d 552, 553–54 (Fla. 1973). When a code does not define a term, Courts have turned to the dictionary meaning to find the plain and ordinary meaning of undefined terms. *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1041 (Fla. 2d DCA 2012). However, Courts will not give an ordinance a literal interpretation that would produce an unreasonable or ridiculous conclusion. *License Acquisitions, LLC v. Debary Real Est. Holdings, LLC*, 155 So. 3d 1137 (Fla. 2014); *State v. Brogden*, 84 Fla. 520, 524, 94 So. 653, 654 (1922) ("While it is desirable that ordinances should be free from doubt, the court should strive so to construe them as to give reasonable effect to the object aimed at. Scrutiny unreasonably rigid will not be resorted to in considering the meaning of ordinances.")

In cases of ambiguity or doubt the meaning of the development order, courts are required to give effect to every word, phrase, sentence, and part of the ordinance, if possible, and words in an ordinance should not be construed as mere surplusage. *State v. Knighton*, 235 So. 3d 312 (Fla. 2018). Related provisions must be read together to achieve a consistent whole, and where possible, courts must give full effect to all ordinance provisions and construe related ordinance provisions in harmony with one another. *Id.*

Further, Courts generally may not insert words into municipal ordinances in order to express intentions which do not appear and must give to an ordinance the plain and ordinary meaning of the words employed by the City Commission. *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553–54 (Fla. 1973). Courts are required to resolve doubts in the interpretation of an ordinance in a manner that will render the ordinance valid. *Lee Cty. v. Lippi*, 693 So. 2d 686, 689 (Fla. 2d DCA. 1997). The development order must be determined by that which preceded it and that which it was intended to execute. *MCZ/Centrum Flamingo II, LLC v. City of Miami Beach*, 08-22419-CIV, 2009 WL 10700922, at *17 (S.D. Fla. Aug. 12, 2009). If a development order cannot be interpreted from the language in the order itself, the entire record may be examined and considered for the purpose of interpreting the development order and determining its operation and effect. *Id*. Furthermore, deference is owed to a city commission's interpretation of its own rules and regulations "so long as its interpretation is based on a permissible construction." *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1228 (11th Cir. 2009). The city's interpretation of its own regulation is not only based on a permissible construction, but it may also be the only reasonable interpretation of that regulation. *Id.* Intent of the city commission in enacting a zoning ordinance is to be determined primarily from the language of ordinance itself and not from conjecture aliunde. *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552 (Fla. 1973). Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner. *Id.*

III. Legal Analysis

The Development Order is clear and unambiguous as to the total amount of land use that was approved for the site, the phases that were planned, and the ability of the Developer to modify the Development Order without further amendment of the Development Order, subject to the conditions of transfer or conversion. The Development Order was adopted in 2012, when the development was already in Phase IV. At that time, according to the Land Use Table, the Development Order approved 137,500 SF of retail. This is also when the conversion matrix was first included in the Development Order. The conversion matrix allows for each of the undeveloped land uses to be converted to one of the other uses. (Note: At that time, the Golf Course and Tennis Club land uses were completed and were not included in the conversion matrix). The Development Order also specifies that <u>the Land Use Table may be modified by the Developer without amendment to the Development Order</u> so long as the 4 conditions of <u>transfer</u> or conversion are followed. The Development Order specifically says, "transfer

or conversion." This indicates that these terms have different meanings as related to the Development Order. It also is commonly understood that "conversion" and "transfer" are distinct terms. Several dictionaries define the words as follows:

- Transfer – to cause to pass from one to another, Merriam-Wester, https://www.merriam-webster.com/dictionary/transfers; to move from one place to another; to move something/somebody from one place to another, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/transfer_1?q=transfer
- Conversion - the act of converting**:** the process of being converted; to change from one form or function to another, Merriam-Wester, https://www.merriam-webster.com/dictionary/converison; the act or process of changing something from one form, use or system to another, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/conversion?q=Conversion

Hence, the Development Order provides that the Developer may modify the Land Use Table by either: 1) converting land uses, meaning changing from one land use to another; or 2) transferring land uses, meaning moving land uses from one phase to another, in the Land Use Table. Any such modification, again, is subject to the four conditions of transfer or conversion. Therefore, it is clear from the plain, unambiguous commonly understood language of the Development Order taken in whole, that the Developer is permitted to transfer land uses amongst the phases so long as the four conditions of transfer or conversion are met.

Moreover, both the City, through enforcing its Development Order, and the Developer through its actions, have continually interpretated the Development Order to mean that the Developer could transfer land uses in the Land Use Table from one phase to another so long as the four conditions of transfer or conversion were met. This is demonstrated in numerous ways. First, the City approved 197 DU of multi-family, 31,452 GLA of medical and 90,744 GLA of retail for construction after the Development Order was entered into in 2012. This necessarily required a recognition that the Developer could transfer land uses from one phase to another. The Developer continues to apply for development of more retail and to reinstate approval of 180 multi-family units.

Additionally, more than a year after the Development Order was adopted, the City enacted Ordinance 2013-16. In Ordinance 2013-16, the City provided that development beyond 286,000 SF in the 84-acre parcel would trigger the requirement that the developer construct a pedestrian bridge. Without the ability to transfer undeveloped land uses into Phase IV, the developer would never have been able to develop more than 286,000 SF on the 84-acre parcel. If the developer could not have transferred land uses amongst phases and therefore could never have exceeded 286,000 SF on that parcel, then Ordinance 2013-16 would have been meaningless. Also, in the February 2021 correspondence, the City confirmed the Land Use Table was not out of date and noted that the Developer had utilized the transfer/conversion condition to transfer all undeveloped land uses into Phase IV. In the Biennial Report, the Developer provided an updated Land Use Table that shows the transfer of undeveloped land uses into Phase IV.

If the City had intended that the Development Order result in the Developer losing its entitlements to the undeveloped land uses in the phases of the Land Use Table, upon the expiration date of those phases, then the City would have drafted the Development Order accordingly. It also would not have specified that the DRI was not subject to unit density or intensity reduction prior to the build out date. Furthermore, the City would not have included a provision in the Development Order requiring payment of fees prior to the issuance of any building permits for Phase II because that phase would have already expired. Additionally, the City would have created a conversion table showing that only the undeveloped retail shopping center land use could be converted to the other uses because it was the only land use shown in the Phase IV.

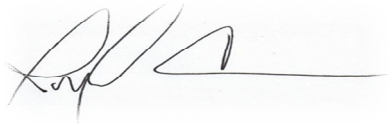
It is clear from the plain language of the Development Order and consistent with actions of the Developer and the City in its enforcement of the Development Order and adoption of the amendment to the Development Order, that both the Developer and City have understood from 2012 to the present that the Development Order allows for the movement of land uses from one phase to another, so long as the four conditions of transfer or conversion are met.

II. Conclusion

It is our opinion, that the Development Order is clear and unambiguous as to the allowable development in Phase IV and the ability of the Developer to modify the Land Use Table by transferring land uses amongst the phases of the development without further amendment of the Development Order and subject to the conditions of transfer or conversion therein.

Should you need anything further on this matter, please feel free to contact us. Thank you for providing us the opportunity to assist the City in this matter.

Sincerely,



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