

January 3, 2024

**VIA PDF EMAIL**

Amber L. Slayton, Esq., City Attorney  
City of North Port  
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Re: Heron Creek Comprehensive Plan – Parcel K

Dear Amber:

You have requested that we provide the City of North Port (“City”) with a written opinion on whether, under the current development order, multifamily units can be developed on Parcel K of Heron Creek, which has a land use designation of Low Density Residential, or whether the Developer will need to seek a comprehensive plan amendment changing the land use designation. This letter will address only the issue regarding whether a comprehensive plan amendment is needed as it relates to the land use designation of Parcel K and will not discuss zoning or other land development related matters.

**I. Background**

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

- Memorandum from the Development Services Department to Amber Slayton regarding Heron Creek Residential Entitlements Under the

Development of Regional Impact and Neighbor Meeting Requirements, dated October 2, 2023;

- Interoffice Memorandum From Margaret Roberts to A. Jerome Fletcher II, regarding Analyze Parcel K Issue – Heron Creek, dated January 20, 2022
- Letter from Noah Fossick to Matt Morris regarding requirements for Heron Creek Parcel K dated May 30, 2023;
- Order on Defendants/Counterclaim Plaintiffs’ Amended Motion for Partial Final Summary Judgment on Counter-Claim and Cross-Claim, in Heron Creek Associates, Ltd. V. Steve Dsupin, et al (Case No. 2020 CA 4364 NC)
- Ordinances 2000-13 with Map H, 2005-28, 2006-46, 2011-33 with Map H, 2013-16;
- Marsh Creek Questionnaire Checklist for DRI ADA Submission
- Multiple correspondence from Department of Community Affairs in 1996, 1997, 2001
- BMO’s Letter regarding Heron Creek Land use and Conversion Table dated October 15, 2021;
- Comprehensive Plan 1988-1998, adopted March 15, 1989
- Comprehensive Plan, adopted November 10, 1997, amended July 1999, and amended May 28, 2002 (this was provided as one document without detailed information of the revisions in 1999 and 2002).
- Comprehensive Plan, adopted June 27, 2017
- Applicant’s Calculations
- Staff’s Calculations

## **A. Comprehensive Plans**

In the Comprehensive Plan 1988-1998, the City identifies in its Future Land Use Plan, Guiding Growth Management Strategy, that it anticipates the majority of growth in the City will occur contiguous to the present developed area. This area is anticipated to have low, medium, and high-density residential growth areas and that within this urban infill area, public services and facilities can be economically and efficiently extended to meet the needs of the projected population. The Comprehensive Plan 1988-1998 shows Heron Creek in two future land use categories, with Parcel K being in the Low Density Residential (Undeveloped) land use category. Policy 1.2 of the Future Land Use Element provides that Low Density Residential is a maximum of 4 residential units per gross acre, medium density residential is 4.1-10 residential units per gross acre, and high density residential is 10.1 to 15 residential units per gross acre. The Comprehensive Plan 1988-1998 only speaks of residential units but does not specify whether the residential units

must be single-family or multifamily or both in the same development. At the time Heron Creek applied for its development approval, the Comprehensive Plan 1998-1998 was in effect.

When Heron Creek's Development Order was approved, the Comprehensive Plan adopted Nov. 1997, amended July 1999, and amended May 28, 2002 ("1997 Comprehensive Plan") was in effect. In the 1997 Comprehensive Plan, the City no longer identifies the Urban Infill Area on its Future Land Use Map. Instead, the Heron Creek property is divided into two primary land use categories on the Future Land Use Map: Activity Center (Town Center), which provides for governmental, low, medium and high densities, offices, commercial and medical facilities; and Low Density Residential. Heron Creek's Parcel K remains located in the Low Density Residential land use category. Pursuant to Policy 1.1 of the Future Land Use element, Low Density Residential are lands are designated for residential areas of low density, with a maximum of 4 residential units per gross acre for unplatted areas (for currently platted single-family lot maximum density of 4.3 residential units per gross area) . The 1997 Comprehensive Plan specifies single-family in currently platted lots with a maximum density of 4.3 units per gross acre but does not specify the type of residential units when setting the gross acre density for unplatted land.

In the current Comprehensive Plan Adopted June 27, 2017 (the "2017 Comprehensive Plan"), Heron Creek is still divided into two primary land use categories on the Future Land Use Map: Activity Center and Low Density Residential, with a small area designated for Recreation/Open Space. Figure 1 provides the density and intensity of the Activity Center at Heron Creek. In Policy 1.1 of the Future Land Use Element, Low Density Residential remain the same as in the Comprehensive Plan; Low Density Residential are lands with a maximum of 4 residential units per gross acre for unplatted areas. Again, the 2017 Comprehensive Plan does not specify whether the residential units for unplatted land must be single-family or multifamily or both in the same development.

From the time of application through current day, Parcel K has continued to be designated as Low Density Residential on the Future Land Use Map for the Comprehensive Plan 1988-1998, 1997 Comprehensive Plan, and the 2017 Comprehensive Plan. Each of these plans has provided that Low Density Residential are lands with a maximum of 4 residential units per gross acre for unplatted areas and did not specify whether the residential units in unplatted lands must be single-family or multifamily or both in the same development. Due to these consistencies, the Comprehensive Plan 1988-

1998, 1997 Comprehensive Plan, and the 2017 Comprehensive Plan will be referred to as the “Comprehensive Plan” and my analysis is applicable to each.

### **B. Ordinance 2000-13**

On November 7, 1996, Marsh Creek applied for development approval in accordance with Section 380.06, Fla. Stat. for a development of regional impact (“DRI”) to be known as Marsh Creek DRI, which is now known as Heron Creek. Heron Creek was a master planned community to be developed on an 831.38 acre unplatted parcel of land.

On September 11, 2000, the City Commission (“Commission”) adopted Ordinance 2000-13 as the development order for Heron Creek, a development of regional impact. In that ordinance, the Commission found that, subject to the conditions found in the ordinance, the application for development approval (proposing 1,970 residential units (903 single-family and 1,067 multifamily units), as well as retail, office, recreation, golf, tennis, conservation, and roadways throughout the development) was consistent with the Comprehensive Plan and did not appear to conflict with other local land development regulations. Map H, which was part of the application for development approval and served as the preliminary master site plan, provides a site data table showing the total number of residential multifamily and single-family units and shows designated parcels identifying the acreage and use. For parcels that are designated as residential, there is not a specific designation of multifamily or single-family.

### **C. Subsequent Ordinances**

From 2000-2013, this development order was amended several times and, ultimately the number of approved multifamily residential units was reduced from 1,067 to 300 units. Further, in Ordinance 2011-33, the Commission approved an updated Map H with existing and proposed development (removing the specification of parcel acreage), however, Map H continued to provide a site data table showing the total number of residential multifamily and single-family units and showing designated residential parcels without specifying the type of residential units that would be placed on the parcels. Ordinance 2011-33 also addressed affordable housing stipulations, revised the current stipulations relating to the proposed pathway along the Myakkahatchee Creek, and approved a land use conversion matrix that would allow the developer to convert approved uses from one to another without increase in external impacts. Specifically, the developer had explained that, the intent of the conversion matrix 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 due to changing market conditions. The conversion matrix provided that single-family residential, multifamily residential, retail, offices and medical offices could each be converted to the other through the local development order process without exceeding thresholds that would trigger a substantial deviation to the DRI. Use of the conversion matrix was subject to several conditions including that the transfer or conversion could not further alter Map H and did not increase the allotted number of units on any particular parcel to a level above what is permitted in the DRI or the City's Land Development Code and did not exceed the substantial deviation criteria of subsection 380.06(19)(b), Fla. Stat. In each ordinance from 2000 to the last one in 2013 approving the Heron Creek development, the Commission found the proposed development to be consistent with the Comprehensive Plan.

#### **D. Current Development**

Under the Comprehensive Plan and by both City staff and the Applicant's calculations, it appears that Heron Creek has 381 unplatted gross acres located in the Low Density Residential land use category. Pursuant to the maximum allowable residential units per gross acre for unplatted areas under the City's Comprehensive Plan, the 381 acres of Heron Creek located in the Low Density Residential land use category could have as many as 1,524 residential units (4 times the total 381 unplatted gross acres = 1,524 residential units). Currently, the City and Applicant state that the 381 unplatted acres of Heron Creek currently contains only the residential development of 372 single-family homes.

#### **II. Interpreting Comprehensive Plans and Development Orders**

A comprehensive plan provides the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments, §163.3177, Fla. Stat. This plan is used to guide future decisions in a consistent manner, §163.3177, Fla. Stat. Specifically, after a comprehensive plan has been adopted all actions taken in regard to development orders shall be consistent with such plan as adopted. §163.3194(1)(a), Fla. Stat. Further, any development order shall be considered consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order are compatible with and further the objectives,

policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government. S. 163.3194(3)(a), Fla. Stat.

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).

Moreover, once a DRI has been approved, the right to develop pursuant to the terms of the DRI vests. *Bay Point Club, Inc. v. Bay Cnty.*, 890 So. 2d 256, 258 (Fla. 1st DCA, 2004). Vesting means development rights obtained through a previously approved DRI are not lost by subsequent changes in the law. *Id.*

### **III. Legal Analysis**

The Comprehensive Plan shows that 381 unplatted gross acres of Heron Creek are located in the Low Density Residential land use category. Pursuant to the maximum allowable residential units per gross acre for unplatted areas under the City's Comprehensive Plan, the 381 unplatted acres of Heron Creek located in the Low Density Residential land use category could have as many as 1,524 residential units. Currently, the City and Applicant state that the 381 unplatted gross acres currently contains only the residential development of 372 single-family homes and the Developer has proposed developing 150 multifamily residential units on Parcel K. If those 150 multifamily units were developed on Parcel K, the total number of residential units on the 381 unplatted acres would be 372 single-family units and 150 multifamily units, totaling 522 residential dwelling units, which is significantly less than the maximum (1,524 residential units) allowed under the City's Comprehensive Plan.

Furthermore, even if the analysis was conducted on net acres designated as residential under the DRI, Heron Creek would be below the maximum allowable residential units in the Low Density Residential land use category. Heron Creek has eight tracts (A, B, C, D, E, F, G, and K) identified as residential that are located within the Low Density Residential land use category on the Future Land Use Map. Those eight tracts of land total 138.37 net unplatted acres and seven of the eight tracts of land are developed;

Only Parcel K remains undeveloped. If the maximum allowable residential units were calculated on a net residential acre for unplatted areas, the eight residential tracts located in the Low Density Residential land use category could have as many as 553.48 residential units (4 times the total 138.37 acres = 553.48 units). Currently, the City and Applicant state that the 138.37 unplatted acres contains only the residential development of 372 single-family homes. The Developer has proposed developing 150 multifamily units on Parcel K and if those multifamily units were developed, the total number of residential units on the 138.37 unplatted net residential acres would be 372 single-family units and 150 multifamily units, totaling 522 dwelling units, which is less than the maximum (553 residential units) allowed under the City's Comprehensive Plan.

In the adoption of the Development Order (from the initial to the current ordinance), the Commission has continually found that the Development Order is consistent with the Comprehensive Plan and that it does not appear to be in conflict with other local land development regulations. The Development Order is clear and unambiguous as to the total number of residential units that was approved for Heron Creek. The Development Order is clear and unambiguous that residential development is to occur on Parcels A, B, C, D, E, F, G, H, I, and K. The Development Order at Map H does not specify whether the development of Parcel K is limited to single-family or multifamily dwelling units – only that it must be residential.

It is clear from the plain language of the Comprehensive Plan and Development Order that multifamily residential development can be developed on Parcel K without seeking a comprehensive plan amendment so long as Heron Creek does not exceed the maximum of 4 units per unplatted gross acre for the residential areas in the Low Density Residential land use category of the Future Land Use Map.

## **II. Conclusion**

It is our opinion, that multifamily development can occur on Parcel K under the Comprehensive Plan so long as it does not exceed the maximum of 4 units per gross unplatted gross acre for the residential areas in the Low Density Residential land use category on the Future Land Use Map, and it complies with the Development Order and any requirements of the City's zoning and land development regulations.

Amber L. Slayton, Esq.

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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,

A handwritten signature in black ink, appearing to read "Jennifer R. Cowan". The signature is fluid and cursive, with a prominent initial "J" and "C".

Jennifer R. Cowan, B.C.S.

BRYANT MILLER OLIVE, P.A.