LAW OFFICE OF ROBERT K. LINCOLN, P.A.
LAND USE AND LOCAL GOVERNMENT LAW AND LITIGATION
46 N. WASHINGTON BLVD. # 7, SARASOTA, FL 34236 | (941) 681-8700 | WWW.FLALANDLAW.COM

March 30, 2017

Delivered via Email: jfreeman@palmettofl.org

Jim Freeman, City Clerk
City of Palmetto
516 8th Ave W.
Palmetto, FL 34221

RE: Bonita Vista General Development Plan (GDP), Application #16-710
Continued Public Hearing, April 3, 2017

Dear Mr. Freeman:

Please include this letter in the record for the April 3, 2017, quasi-judicial hearing on Application #16-710.

I represent Palms of Terra Ceia Community Development District (the "CDD"). In addition to being an attorney board certified in City, County and Local Government Law, I am a planner and have been qualified as an expert in that field before circuit courts and administrative tribunals. A copy of my CV is attached.

I offer the following facts, comments, and analysis on the application before the City Commission. Some of the factual statements provided are based on the expert opinion of Robert Lombardo, P.E, who will present supporting testimony during the hearing on April 3, 2017.

I. The CDD will be specially damaged by approval of the GDP as proposed.

Bonita Vista LLC proposes to deposit untreated, unattenuated stormwater from its site into the CDD's stormwater management system. The Subject Property of the Application is not a part of the CDD, will not pay assessments or taxes to support the CDD, but plans to use the CDD's facilities for treatment and attenuation.

In addition, the location of the proposed north driveway within 20' of the intersection of 14th Avenue and the portion of 23d Street that is owned and maintained by the CDD places a direct risk and liability on the CDD, which will be subjected to public safety issues arising from the dangerous driveway, and therefore required to address those issues.

II. The GDP must comply with the Zoning Code and the Comprehensive Plan.

At the March 13, 2017, public hearing, Bonita Vista's representatives asserted that the only criteria for the Commission's consideration was whether the application is consistent with the City's

Comprehensive Plan. That representation was incomplete and inaccurate. Consistency with the Comprehensive Plan is necessary, but certainly not sufficient. See, e.g., Bd. of Cty. Comm'rs v. Snyder, 627 So. 2d 469, 475 (Fla. 1993) ("We do not believe that a property owner is necessarily entitled to relief by proving consistency when the board action is also consistent with the plan."). The proposed development must comply with all the requirements of Article VIII (Planned Developments Generally) and Article IX (Planned Development Housing District), the procedural and decision standards in Article XI, as well as any other applicable provisions of the Zoning Code. See Town of Longboat Key v. Islandside Prop. Owners' Coalition, LLC, 95 So. 3d 1037 (Fla. 2d DCA 2012) (upholding circuit court reversal of rezoning where rezoning did not comply with the requirements of the zoning code).

The City Commission must deny this application because it does not meet the requirements of the Zoning Code and the Comprehensive Plan.

III. The City Commission lacks Any Authority to Approve Density over 16 Units per Are for the Subject Property, and the 20 Unit Per Acre Density Requested by the Developer is Inconsistent with the Comprehensive Plan.

The Developer, Bonita Vista, is requesting a "deviation" to allow 20 units per acre of density for the project. The City Commission has no authority to grant density exceeding 16 units per acre for the Subject Property based on the current application.

Under § 9.5, the density of a PD-H district is 16 units per acre, with density bonuses. Bonita Vista has not met the requirements set out in § 9.5.b for obtaining a density bonus. Even assuming the Commission has authority to grant "deviations" from the Development Guidelines set out in § 8.5, density is not one of those Guidelines. The City Commission is not free to create and apply new or different criteria in the context of a quasi-judicial zoning action, but must apply the established criteria found in the Zoning Code. Miami-Dade Cty. v. Omnipoint Holdings, Inc., 863 So. 2d 375, 376 (Fla. 3d DCA 2003). The Zoning Code includes no provision that would give the City Commission authority to simply authorize 20 unit per acre density for he Subject Property, where it does not meet the established standards for obtaining a density bonus.

In addition, Bonita Vista's proposal does not comply with the City's Comprehensive Plan. Future Land Use Policy 1.3.1 and Table 1-1 establish that the "base" density for the property is 16 units per acre, and any increase is predicated on obtaining "density bonuses." As set forth above, the application has not met any of the established criteria set out in the Zoning Code for obtaining a density bonus. Therefore, the request for 20 unit per acre density is not consistent with Policy 1.3.1.

Furthermore, the "Planned Community" (PC) provisions of Policy 1.3.1 also contain a compatibility requirement that, contrary to the testimony of Mr. Cornelius, is not met because Mr. Cornelius did not properly apply the criteria. Policy 1.3.1 states:

> densities of adjacent and surrounding development shall be considered when determining the density permitted for a specific project. For purposes of this document, adjacent property shall include those properties an equal dimensional distance to the north, south, east and west of the subject property. For example, if the subject property is 250 feet wide by 287 feet deep with the

width running east -west and the depth running north- south, all properties 250 feet east and west of the subject property shall be included in the averaging formula. The averaging formula shall be done as follows:

1. If the adjacent property *is developed or is controlled by an approved site plan*, the existing density or approved site plan shall be used to determine the maximum density;

2. If the adjacent property is vacant, the average density shall be calculated from the adjacent property land use categories using the base density of 16 du /ace for the PC category;

Here, the "adjacent" 10 Downing property was developed under a site plan that included all of the condominium property, including the recreation parcel. The entire site should have been considered in the average density calculation, resulting an in average density of approximately 16 units/acre. This is also true under the definition of density, which refers to the "gross acre of land," and would include all of the lands subject to the original site plan. However, even if the two tax parcels were considered separately, the tennis/pool parcel is "developed" and its acreage should have been included in the average (with a 0 density). Properly considered and calculated, the average density of the adjacent lands is approximately 16 units per acre.

Because the application for the Subject Property does not meet the published standards for obtaining a "density bonus," and is not consistent with the surrounding densities, the City Commission does not have authority to grant the increase, and approving the increase would be inconsistent with Policy 1.3.1 of the Comprehensive Plan. Furthermore, approving density over 16 units per acre is inconsistent with Future Land Use Policy 1.8.4, which is to "discourage high intensity development outside the Downtown and redevelopment area by avoiding rezoning in outlying areas of the City which compete with the scale and function of the City's Downtown Commercial Core area." Zoning a small lot that has no other recreational or functional amenities, at 20 units per acre, is not consistent with the CRA and Core area, and not consistent with the Palms of Terra Ceia as it has been historically developed.

IV. <u>The project proposed in the application does not provide the 25% open space required by Section 8.5(i) when the exclusions and requirements of that section are properly considered.</u>

The project site proposed in the application is 39,233 square feet. Twenty-five (25) percent of the project site is 9,808 square feet. The applicant reports 15,035 square feet of "pervious" area as open space. The applicant is incorrect.

Under § 8.5(i), areas within perimeter setback areas, road right-of-way and minimum yards, "may not be included in determining open space."

a. The required perimeter setback is 35'. Just looking at the open space depicted within 35' of the south and west property lines, there is 3,955 square feet (s) and 2,719 sq ft (w).
b. The required road-right-of-way minimum yard is also 35'. The pervious areas in the front (e) of the site are 2,226 square feet and the pervious areas within 35' of 23d Street total 2,535 square feet.

   In addition, areas that are open water and ditches generally cannot be included in the open space calculation. The open ditch contains a minimum of 900 square feet (measured at the bottom).

Bonita Vista's open space calculation is wrong because the reported 15, 035 square feet include areas that must be excluded under § 8.5(i). If the ditch bottom, and the areas within 35' of the rights-of-way are excluded from the open space calculation, 5,661 square feet would not count toward the required open space. Deducting that amount from 15,035 square feet leaves 9,374 square feet of open space - less than the required 25%. Alternately, deducting the 35' perimeter areas on the north and west from the open space calculation along with the excluded right-of-way yards removes a total of 8,131 square feet from the 15,035, resulting in only 6,904 square feet of open space, which is less than 20%.

Under either scenario, the GDP does not meet the 25% open space requirement, as defined and limited by the Zoning Code.

V. The Project proposed by the Application does not comply with the drainage or GDP standards because the developer has not properly addressed stormwater issues.

First, the stormwater pipe depicted on the GDP crosses lands owned by the 10 Downing Property, which lies between the Subject Property and the CDD property. The Subject Property has no easement to place such a pipe. Any "common law" right Bonita Vista might attempt to assert to justify discharge across the 10 Downing Property, or into the CDD's system is limited under common law and under the Zoning Code.

Even if the Subject Property currently drains across the 10 Downing Property, the Subject Property does not have the unfettered right to discharge the increased runoff resulting from development of the Subject Property onto the 10 Downing Property, or across it into the CDD's drainage system for treatment. See, e.g., Westland Skating Center, Inc. v. Gus Machado Buick, 542 So. 3d 959 (Fla. 1989). Furthermore, under Section 6.21 of the Zoning Code, during and after the project is developed, "the characteristics of stormwater runoff shall approximate the rate, volume, quality and timing of stormwater runoff that occurred under the site's natural unimproved or existing state . . . ."

Second, the existing plans do not address how runoff from the roof on the west side of the Subject Property – with the proposed 8' setback – would be managed. Any water falling from the roof onto the west side of the property will flow directly toward and onto the tennis courts at 10 Downing. This is not fair, acceptable or consistent with the Zoning Code or law.

The CDD's position is simple: the Subject Property must treat and control the amount and rate of its post-development stormwater discharge, regardless of where it ultimately discharges that waste. Given that necessity, the logical place for the Subject Property to discharge is the existing ditch. Even if Bonita Vista were legally allowed to discharge across 10 Downing's property to the CDD's system, it must have a system that will limit those discharges to approximate the rate, volume, quality and timing of stormwater runoff that occurred under the site's natural unimproved or existing state. The proposed GDP does not depict the stormwater facilities that would address these issues and meet the requirements of law, and therefore does not meet the requirements of § 8.4.2.d, which requires the GDP to depict the location and dimensions of proposed drainage facilities.

VI. The 35' perimeter setback requirement of § 8.5(a) apply to all boundaries of the Subject Property.

At the March 13, 2017, public hearing, Bonita Vista representatives asserted that "perimeter setbacks" only apply to portions of the property that abut property with different zoning. They claim that only the west/14th Avenue side of the Subject Property is subject to the perimeter setback, because all of the other abutting properties are also zoned PD-H.

Bonita Vista's position is not consistent with the particular requirements of Planned Development zone districts under the City's Code. As noted and required by § 8.3, "all land included for the purpose of development as a PD shall be under the legal control of the applicant. . . ." A single PD district is governed by a single Conceptual Development Plan or General Development Plan. Here, even if some of the adjacent parcels are zoned PD-H, they are not under a common CDP or GDP and are not under unified ownership or control.

It is only where property is under unified control and a single CDP or GDP that it would be permissible to use "building setbacks" rather than "perimeter setbacks" because management of the impacts from the different uses and structures is under the control of the developer. Under Bonita Vista's theory, anyone could rezone property next to an existing PD-zoned property and build right on the property line, regardless of impacts to the adjacent properties. That is not and cannot be the reasonable interpretation and application of the Zoning Code.

Therefore, the 35' perimeter setback applies to all boundaries of the Subject Property. As a result, not only does the GDP violate the 35' perimeter setback with respect to the 10 Downing Property, it also fails to provide sufficient open space.

VII. The City Commission must impose the variance standard on any deviations in order to avoid invalidation of the Code or any Approval.

Section 8.5 provides "development guidelines" for planned developments and states "the guidelines serve to identify minimum or maximum standards from which the proposal should not deviate, unless otherwise approved by the city council." Section 8.5 provides no process by which an applicant can request approval of a "deviation" form the guidelines, but § 8.2 states "Variances may be requested by the applicant but must be specified on the master plan and approved by the City Council." The Zoning Code defines a variance as "a relaxation . . . of the dimensional regulations of this code where such action will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of actions or the situation of the applicant, a literal enforcement of this code would result in unnecessary and undue hardship."

The Zoning Code cannot permit the City Commission to grant "deviations" without express standards to govern the decision. "The general rule is that a zoning ordinance must prescribe definite standards and that neither the city council, the board of appeals created by ordinance or statute, nor the building inspector are properly vested with discretionary rights in granting building permits or variances in exception to the zoning ordinance unless there has been established a definite standard to guide them in the exercise of such powers. N. Bay Village v. Blackwell, 88 So. 2d 524, 526 (Fla. 1956). A PUD

ordinance that lacks sufficient standards to guide approval is void. Miami v. Save Brickell Avenue, 426 So. 2d 1100, (Fla. 3d DCA 1983). The provisions of Longboat Key's planned development regulations that provided for "departures" were struck for failing to have meaningful standards. Islandside Property Owners' Coalition et al v. Town of Longboat Key, 20 Fla. L. Weekly Supp. 1063a (12th Cir., November 14, 2012). Therefore, to preserve the validity of the ordinance and any action taken under it, the City Commission must apply the "variance" standard to any request for a "deviation" from the legislatively adopted guidelines for planned developments.

A. Bonita Vista Has Not Established Justification for the Deviations it Requested.

Bonita Vista has requested three "deviations": a 30.4' reduction in the perimeter setback along the west property from 38.5' to 8'; a .5 reduction in the right-of-way setback from 38'5 to 38'; and a "deviation" to obtain 20 unit per acre density.

Bonita Vista's request for a 30.5' variance in order to locate the apartment building 8' from its property line shared with the 10 Downing Propery does not meet any reasonable standard, and certainly does not meet the requirement to demonstrate that meeting the guideline would cause an unnecessary and undue hardship. The smaller setback is necessary only because Bonita Vista wants to add additional density (without legal justification), does not want to put the parking under the building, and does not want to explore other options that would reduce the footprint of the building and allow it to be located more centrally on the Subject Property. Bonita Vista cannot establish that the variance is necessary to avoid any unnecessary or undue hardship imposed on its property.

Furthermore, granting the 30.5' variance from the perimeter buffer would violate Future Land Use Policy 1.14.4, which requires the City to review planned development applications to ensure "compatibility of possible development with nearby properties through consideration of height, mass, design, and buffering of potential buildings and sites. Potential, adverse impacts on nearby properties shall be reviewed and mitigated, as necessary and appropriate." Placing a 40' building 8 feet from adjoining property in a suburban area, does not ensure or achieve compatibility. Those impacts are not merely at ground level, and will not be mitigated by adding landscaping in the area between the building and the property line.

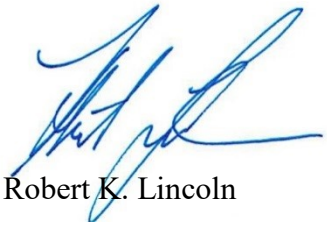
The same reasoning holds true for Bonita Vista's request for a variance from the setback from 23d Street. Bonita Vista has not demonstrated any unnecessary or undue hardship.

Finally, as noted above, density is not a "guideline" from which a deviation could be requested under § 8.5, and in any case, required a density bonus to be consistent with the Comprehensive Plan and § 9.2. Even if a "variance" was available to alter the density, Bonita Vista has not demonstrated any unnecessary or undue hardship arising from application of the 16 per unit limit that would justify a variance.

CONCLUSION

For the reasons stated above, Bonita Vista has not demonstrated that it is entitled to approval of its proposed GDP. The application does not comply with the requirements of the Zoning Code, is not consistent with the Comprehensive Plan, and therefore must be denied.

Best regards,



Robert K. Lincoln

cc: Mark Barneby, City Attorney
Karla Owens, Planning Director