From:	Dan Lobeck
To:	Nicholas Pachota; Jim Boldt; Mitzie Fiedler; Rachel Frank; Rick Howard; Richard Longo; Helen Moore; Mercedes Barcia
Cc:	Roger Clark; Jeff Boone (jboone@boone-law.com)
Subject:	Milano PUD Amendment/ Rezoning 22-38RZ/ Ord. 2023-11
Date:	Friday, May 19, 2023 5:27:59 PM
Attachments:	Memo to Venice City Council - Milano PUD.docx Milano PUD - Addl Exhibits.pdf
Importance:	High

Honorable Mayor and Council Members:

Again, this is for Venetian Golf & River Club Property Owners Association, Inc. and the North Venice Neighborhood Alliance, Inc., regarding the above-referenced matter.

Attached is a revised version of my Memorandum to you last night, as well as three new exhibits, all regarding the Milano PUD amendment before you Tuesday and Wednesday.

By this email also to Ms. Barcia, we ask that these attachments be entered into the record for the public hearing.

This afternoon, we delivered to City Hall a briefing book for each of you which divides the updated Memorandum and a few exhibits (all already in the record plus the three new ones attached hereto) into twelve topics, as listed below, with a tabbed Index.

If you have an opportunity to obtain your briefing book at City Hall and review it prior the hearing, we hope that will increase the ease of your review. In any event, it may be useful to you at the hearing if you want to look up something about our positions at that time.

Thank you very much for your careful review and considerations in this very important matter. We know that this is a lot for your time and attention, and your affected constituents appreciate it.

As before, all that we are asking you to do is consider the expressed interests of the thousands of affected homeowners in this matter, and – as to your Land Development Regulations, Comprehensive Plan and state statutes, that you Follow the Law.

Thank you very much for your considerations.

1. Affected Person Status

2. What is Sought by the PUD Amendment

3. The Size and Location of the Commercial Site is Unlawfully to Serve the Surrounding Area

Rather Than the PUD Residents

4. The Applicant Lacks the "Unified Control" of the PUD Required by the LDR's

5. State Law Prevents the Developer from Removing the Cielo Open Space Without a Plat Amendment Executed by All Homeowners

6. To Protect Residents, the LDR's Require That Any Commercial in a PUD be Vetted at the Time the PUD is Approved - Not Later by Amendment

7. The PUD Amendment Creates Commercial Impacts Which are Incompatible with Affected Residences

8. The Open Space Dedication Requirement is Overdue and Bars the Amendment

9. Cielo Declaration and State Law Protect the Open Space

10. Traffic is a Major Problem and Remains Unresolved

11. Paving Over the Wetlands Violates the Comprehensive Plan

12. For Good Reasons, Your Planning Commission Recommends Denial

Dan Lobeck, Esq.
Florida Bar Board Certified in
Condominium and Planned Development Law
Law Offices of Lobeck & Hanson, P.A.
2033 Main Street, Suite 403
Sarasota, FL 34237

Telephone: (941) 955-5622
Facsimile: (941) 951-1469
www.lobeckhanson.com

The Honorable Nick Pachota, Mayor
The Honorable Jim Boldt, Mitzie Fiedler, Rachel Frank, Rick Howard, Dick Longo and
Helen Moore, City Council Members
The City of Venice, Florida
401 W. Venice Avenue
Venice, Florida 34285

Hand-Delivered and By Email

Re: Milano PUD Amendment 22-38 RZ/ Follow the Law

Honorable Mayor and City Council Members:

On Tuesday and Wednesday, May 23 and 24, you will consider a developer's request to amend the Milano Planned Unit Development (PUD) Binding Master Plan to pave over 10.42 acres of freshwater wetlands and open space for extensive commercial development, and for other related changes.

The petition is vigorously opposed by North Venice residents and others, on the basis of adverse impacts and numerous violations of your Land Development Regulations and Comprehensive Plan.

I will appear before you next week on behalf of the Venetian Golf & River Club Property Owners Association and the North Venice Neighborhood Alliance, as well as several homeowners in the Cielo Subdivision of the Milano PUD who assert that this is an attempt to unlawfully take their platted and designated open space. They have timely filed Requests for Affected Person Status. Professional planner Jan Norsoph will also appear to seek denial of the amendments.

We also appeared before your Planning Commission, which has recommended denial, on several grounds.

The following analysis of many flaws in the proposed amendments, <u>any one of which is fatal</u> to their approval, is lengthy but clear. We hope that you will find the time to review it before next week's hearing, for a fuller understanding of the issues.

We are providing this to you by email, with a courtesy copy to the applicant's attorney, and then to you on Friday at City Hall in briefing books tabbed and indexed to each issue. We will let you know when they are delivered.

We simply ask the City to follow the law.

Thank you for your considerations.

Dan Lobeck, Esq.
Florida Bar Board Certified in
Condominium and Planned Development Law

Law Offices of Lobeck & Hanson, P.A.
2033 Main Street, Suite 403
Sarasota, FL 34237

Telephone: (941) 955-5622
Facsimile: (941) 951-1469
www.lobeckhanson.com

Affected Person Status

Under Section 2-53 of the City Code, a person may be designated an Affected Party in a quasi-judicial hearing before the City Council or Planning Commission "if they have an interest in the application which is different than the public at large." The City's request form instead uses the term Affected Person and asks how the person "will be adversely affected to a greater degree than other members of the community." These approximate the relevant standards under Florida case law.

As more fully stated in their Requests for Affected Person Status, all of the corporate and natural persons requesting recognition by the City Council as Affected Persons qualify, just as they (but for Tim Kenny and Seth Thompson, who now newly apply as Cielo homeowners, with Suzanne Metzger as before) were accepted by the Planning Commission at its public hearing in this matter.

The Identified Cielo Homeowners, Tim Kenny, Suzanne Metzger and Seth Thompson, are homeowners and residents in the Cielo Subdivision, in which the subject site is located within about 700 to 1,000 feet to their north, and stand to lose that site as declared and platted open space and natural habitat of their Subdivision, with the destruction of its values replaced by a far less attractive, noisy and light-polluting commercial center.

North Venice Neighborhood Alliance, Inc. (NVNA) has as its stated corporate purpose the promotion of responsible development and preservation of open spaces in the North Venice area where the subject site is located, and has participation and funding from numerous residents in the neighborhoods of Venetian Golf & River Club (VGR&C), Willow Chase and the Milano PUD (Milano, Aria, Cielo and Fiore, the last three of which are under developer control). NVNA's Directors own and reside in either VGR&C or Aria (which is a short distance to the south of the subject site, in the Milano PUD).

Venetian Golf & River Club Property Owners Association, Inc. (VG&RCPOA) is the official statutory Homeowners Association for VGR&C, the Board of Directors of which is elected by the 1,377 homeowners in the community. It is the only such organization in VGR&C (the unelected Community Association having been formed in 2007 when the POA was under developer control).

The adverse impacts at issue for the requested Affected Persons include problematic traffic congestion, noise, light pollution, visual ambiance on the local road-fronting site and loss of habitat for waterfowl that are enjoyed in the nearby communities.

Also, as to adverse impacts on VGR&C residents, who are represented members of NVNA and VG&RCPOA, a major adverse impact of the proposed Milano PUD amendment would be its substantial aggravation of the operational disfunction of the primary Veneto Boulevard entrance and exit of VGR&C on Laurel Road. Already, turn movements are problematic at that intersection, particularly when crossing lanes of Laurel Road. They would become severely worse with the proposed entrance and exit for the Commercial Center which is included in the proposed PUD amendment directly across Laurel Road from the Veneto Boulevard access. The applicant has illustrated this as follows, with Veneto at the north and the Commercial Center access to the south. The proposed widening of Laurel Road to accommodate the Commercial Center would make this problem even worse.

What Is Sought by the PUD Amendment

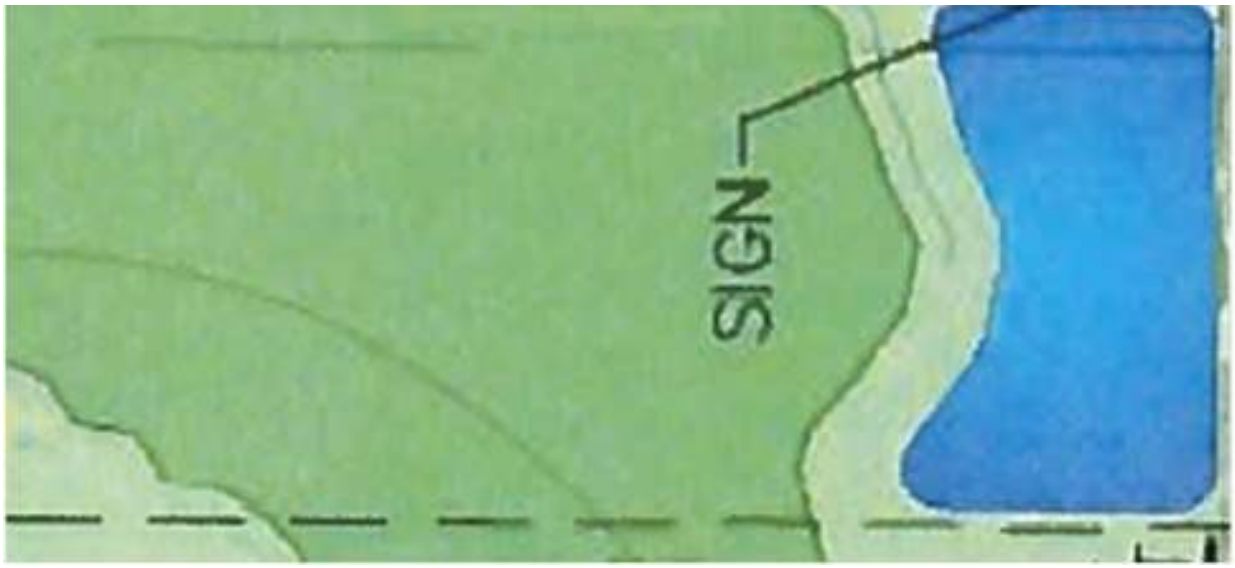
The PUD amendment would change the designation of 10.47 acres at the northwest portion of the Cielo Subdivision from “Open Space” to “Commercial”, together with other amendments to the Binding Master Plan.

This is an aerial photograph of the property, from materials filed with the City by the applicant’s environmental consultant.

The table shows the site as 6.6 acres of “Freshwater Marshes”, 2.24 acres of “Reservoirs” and 1.56 acres of “Open Land”.

The next page shows that property on the current Milano PUD Binding Master Plan.

The Legend shows the dark green as Wetlands, the light green as Open Space and the blue as Lakes.



The proposed amendment to the Milano PUD Binding Master Plan would change the entire area to "Commercial".

The applicant has proposed to pave over the entire site with buildings and parking.

That, in essence, is what is before the City Council. The City's Land Development Regulations (LDR's) and Comprehensive Plan determine whether it may lawfully be approved.

The City is applying the Land Development Regulations (LDR's) in effect prior to their revision effective upon adoption on July 12, 2022, and that is what is cited herein, principally in Section 86-130, governing PUD's. That is in part because the Transitional Provisions adopted in the Introduction of the LDR revision changing the LDR's to Chapter 87 of the City Code include the following *(emphasis added)*:

> Approved Binding Master Plans will remain in effect after the adoption of this ordinance no. 2022-15 and shall retain all previously approved standards including, but not limited to: land use, density and intensity, open space percentage provisions, and any other specified development standards. **Amendments to Binding Master Plans shall be processed under the effective regulations at the time of application for such amendment.**

Again, the LDR revision was adopted on July 12, 2022. The subject Milano PUD amendment petition was filed on June 14, 2022, under the old LDR's.

The Size and Location of the Commercial Site is Unlawfully to Serve the Surrounding Area Rather Than to Serve the PUD

Although it's difficult to identify the strongest objection to the proposed PUD amendment, as there are many, one stands out at completely airtight.

That is the blatant violation -- based on the testimony of developer Pat Neal of the applicant as well as its traffic engineer -- of Section 86-130 (r) of the Land Development Regulations, as follows (emphasis added):

> ***Commercial uses*. Commercial uses located in a PUD are intended to serve the needs of the PUD and not the general needs of the surrounding area. Areas designated for commercial activities normally shall not front on exterior or perimeter streets, but shall be centrally located within the project to serve the residents of the PUD.**

The City's staff report concludes, with respect to the proposed amendment to the PUD Binding Master Plan, **"The character of the use would be commercial development intended to serve the surrounding area … ."**

Your Planning Commission found the PUD amendment application in violation of this requirement, as one of several reasons for recommending City Council denial, as follows:

86-130(r) – commercial activity will not be limited to the Milano PUD

At the Planning Commission public hearing, Mr. Neal boasted that the commercial development allowed by the PUD amendment will serve numerous subdivisions throughout the area, beyond the Milano PUD. His transportation engineer, Frank Domingo of Stantec, acknowledged the same, in that those numerous subdivisions beyond the PUD were included in the Traffic Impact Zones that he was required to study for traffic contribution to the commercial center, in the report required by the City. This is all in the attached transcript of the applicant's direct presentation and cross-examination at the January 17, 2023 Planning Commission hearing.

The following is sworn testimony of Pat Neal at that hearing:

> I think this is a good project. I think when we're done you'll be able to approve it and I think you'll be proud to see it when it's done. It will serve roughly 6,900 existing homes, about 12,000 people, not including land that isn't built on yet.
> …

> [This] is the only feasible site for a grocery store north of I-75 and east of I-75. I think I further stated that a typical grocery store in the 40-50-thousand-square-foot basis wants to see roughly 6,000 rooftops, and this exceeds that number greatly.

[Shown a list of 13 neighborhoods, mainly outside the Milano PUD, that the applicant has claimed in published and website materials would be served by the proposed commercial center]:

> This is a list of approved PUDs which are either built out or are being built out in this neighborhood, and it also shows land that has other PUDs headed toward it, and the purpose is to demonstrate that there's a demand for this property and that it's compatible with the neighborhood.
>
> … we think we'll provide a way for walk and bicycle and golf cart trips from the Venetian Golf and River Club." And that the 2,200 homes that we're building in the Milano and Vistera and the 1,500 homes that others are building … Add to that the existing homes and the number will easily approach 6,000 residents by the year 2030." Well, that's before I had this map that says there's more than that.

The transcript then shows that Mr. Neal said "I don't disagree" that the Milano PUD is approved for 1,350 homes. In fact, the current Binding Master Plan in the record shows that to be the exact number allowed.

That of course if far fewer than the 6,000 home market that Mr. Neal claimed for his commercial center. That then is an admission that the proposed PUD amendment, rather than being "intended to serve the needs of the PUD" is "intended to serve the needs of the general area."

That could not be a clearer and more blatant violation of Section 86-130(r) of the City's Land Development Regulations.

Then in his testimony under cross-examination, Mr. Neal came down with his excuse: The City has not enforced this Code in other instances so he does not have to comply with it either:

> I once again revert to the long-standing City policy which is not to enforce that provision. We were well aware of it at the first beginning, we're well aware of it now, and we'll demonstrate, if necessary, to the elected -- to the Planning Commission and the board and any tribunal having jurisdiction that that has never been enforced or not uniformly enforced by the City of Venice.

That of course – even if it is true – is nonsense.

It is undisputed that the Code is violated by the proposed PUD amendment. As such, it must be denied.

In a May 17, 2023 filing with the City, a planner with the developer's law firm came up with a new argument: The commercial center is less than the total square footage in all of the commercial

development allowed in the PUD together so it must be intended to just serve the PUD residents and not the surrounding area.

Again, that is nonsense, and directly contradicted by the size and the location of the proposed commercial center – and the clear testimony of the applicant under oath.

Attention has been focused to date on the Site and Development Plan which the applicant submitted but has pulled from consideration while it seeks approval only for its amendment to the amendment to the PUD Binding Master Plan.

Even the commercial development under that Site and Development Plan exceeds the allowed scope, including the requirement of Section 86-130(r) of the LDR's that it serve the needs of the PUD residents, <u>not</u> the needs of the residents in the "surrounding area."

It includes a grocery store of 47,240 square feet, a restaurant of 18,000 square feet and other commercial development of 5,000 square feet, and a parking lot that takes all the rest of the site.

That's no small development. Here is a rendering of the "elevation" of the grocery store frontage from the application. Note that it is so massive that it runs off the page to include the segment below.

Moreover, the PUD amendment only restricts commercial development on the 10.47 acres to a broad list of uses, a maximum size of any single use building to 65,000 square feet and a Floor Area Ratio (FAR) of .5, which would allow up to 227,000 square feet of commercial development.

Section 86-130 (r) of the Land Development Regulations is consistent – although more specific- with Policy LU 1.2.16.7(b) of the Venice Comprehensive Plan for this area, which provides in pertinent part as follows:

> **The intent of the non-residential portion of the MUR is to provide for neighborhood scale and serving uses; not for regional purposes.**

The staff report seems to suggest that all the Comprehensive Plan requires is that the commercial development not be "regional" in scope, by somehow construing that term to mean so vast as to have a "multi-jurisdictional" market area – that is reaching beyond the borders of the City of Venice. That of course is inconsistent with the other part of the Comprehensive Plan policy that nonresidential development in a PUD is limited to a "neighborhood scale."

Again, though, there is the very clear and restrictive requirement of Section 86-130(r).
As to the location restriction of Section 86-130(r), the staff report observes that a majority of other PUD's have commercial development fronting on exterior, perimeter streets. There is however an important distinction.

Those earlier commercial uses were part of the annexation agreements relating to those lands, and those uses were grandfathered at the time the lands were rezoned as PUDs in accordance with existing land development regulations. The law was followed in those earlier cases.

There is no precedent for the city approving a substantial commercial development designed to serve several thousands of people to be built at a location surrounded by residential neighborhoods, and at the very edge of an already existing PUD, the approved binding master plan for which stated that there would be no commercial property.

Please see the more thorough analysis on this point by Gary Scott which he has independently provided to the City Council.

The Applicant Lacks the "Unified Control" of the PUD Required by the LDR's

Section 86-130(k) of the LDR's includes the following:

> All land in a PUD shall be under the control of the applicant, whether that applicant is an individual, partnership or corporation or a group of individuals, partnerships or corporations. The applicant shall present firm evidence of the unified control of the entire area within the proposed PUD.

Also, Section 86-130(t)(3)a of the LDR's requires that any application for a PUD zoning shall include "Evidence of unified control". Further, LDR Section 86-23(m)(1) requires that the Planning Commission include among the factors it considers in this application the "Sufficiency of statements on ownership and control of the development …".

Section 86-130(v) requires that any amendment to a PUD must comply with the Land Development Regulations governing the PUD. That includes Sections 86-130(k), 86-130(t)(3)a, and 86-23(m)(1), requiring a showing of the applicant's unified control of the PUD. As recited above, that is unified control of "all land in a PUD" and "of the entire area within" the PUD.

That is evidently because a Planned Use Development is planned in advance for the benefit of all property owners in the PUD, so purchasers know what to expect by relying on the "Binding" Master Plan.

The Binding Master Plan says, as to the entire PUD, "Commercial: none."

Now that the developer has lost its Unified Control of the PUD, under the LDR's it's too late to try to change that, even if it could under other constraints identified herein.

The fact that the amendments are to the Binding Master Plan for the entire PUD is shown by the fact that the City required the applicant to produce a new traffic study for the entire PUD, not just the site of the proposed change from Open Space to Commercial.

Indeed, the applicant does not even have Unified Control of the Cielo Subdivision which is sought to be altered. As discussed separately herein, Cielo has been platted of record and lots sold and conveyed, so that the 10.42 acres is committed to open space unless Cielo is replatted with the unanimous joinder of all homeowners explicitly required by section 177.081(2), Florida Statutes.

The only thing that the applicant has presented to the City in response to the City's request for evidence of unified control is a December 13, 2016 deed from the PUD Developer, Neal Communities of Southwest Florida, LLC, conveying the subject property "subject to any restrictions of record and subject to governmental regulations."

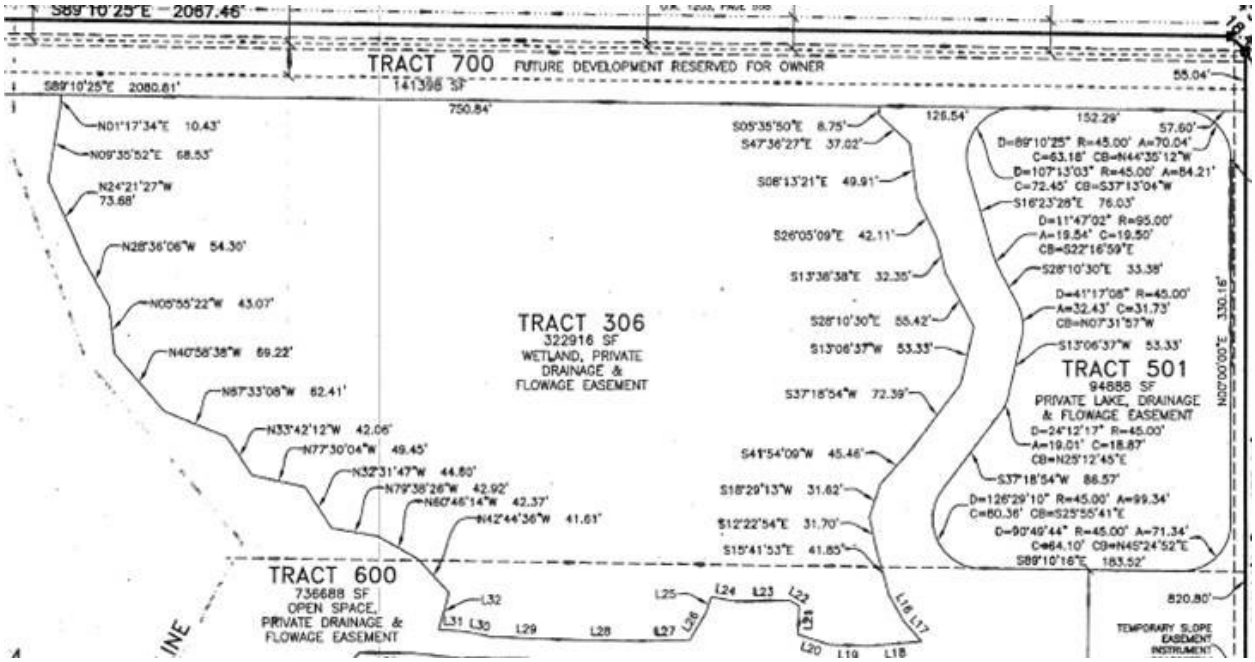
The Planning Commission specifically found, "Evidence of unified control was not clearly provided as required by 86-130(t)(3)(a)."

State Law Prevents the Developer from Removing the Cielo Open Space Without a Plat Amendment Executed by All Homeowners

Very importantly and fundamentally, on December 10, 2019 the applicant recorded a **final Plat for the Cielo Subdivision**, reciting that it was approved by the Venice City Council on November 12, 2019. The minutes of that meeting refer to it as the "final Plat" and the City continues to acknowledge that it is the Cielo final Plat.

The Plat is attached hereto.

Here's a portion of that Plat which includes the site which the applicant now proposes to designate for Commercial development:



You can see that the proposed "Commercial" property is designated in the Plat for Wetland, Drainage & Flowage, Open Space and Lake.

Specifically, the Tracts which would be taken for the commercial development include all or a part of the following, upon which the Plat – on page 3 of 9 – places the following designations and easements:

Tract 306: Wetland, Private Drainage & Flowage Easement

Tract 501: Private Lake, Drainage & Flowage Easement

Tract 600: Open Space, Private Drainage & Flowage Easement

The only area that the Cielo Plat designates as "Future Development Reserved for Owner" is Tract 700, a narrow strip at the north edge of the Subdivision. It is to the north of the 10.47 acres the applicant now seeks to designate as Commercial and is not within it.

If you will look at the full Plat attached, you will see that the Cielo homesites were platted to the southwest of this site.

This is how the applicant chose to plat and develop Cielo.

Initially, the applicant sought approval of a Plat amendment and a Site and Development Plan at the same time as the proposed amendment to the PUD Binding Site Plan, for the Commercial designation.

Then on July 13, 2022, I emailed objections to the City for NVNA that included the following:

Written Consent of All Cielo Owners Is Required to Amend the Plat

Section 177.051(2), Florida Statutes provides that once a Plat for a subdivision is recorded, any amendment is deemed to be a "Replat" and is subject to the same requirement as for a Plat in the statutes.

That includes not only approval by the City under section 177.071, Florida Statutes, but also the following, under section 177.081(2), Florida Statutes:

> Every plat of a subdivision filed for record must contain a dedication by the owner or owners of record. The dedication must be executed by all persons, corporations, or entities whose signature would be required to convey record fee simple title to the lands being dedicated in the same manner in which deeds are required to be executed. All mortgagees having a record interest in the lands subdivided shall execute, in the same manner in which deeds are required to be executed, either the dedication contained on the plat or a separate instrument joining in and ratifying the plat and all dedications and reservations thereon.

Accordingly, the Cielo homeowners cannot have their open space stolen from them by the developer for commercial development without their written consent. That has not been obtained. The statutes prohibit the City from approving the replat until that consent has been obtained.

From what we have learned is a finding by staff in consultation with the City Attorney that this conclusion is correct, on August 1, 2022, City Senior Planner Nicole Tremblay included the following in a letter to the applicant requiring responses to deficiencies found in the applications:

> Please address F.S. § 177.081(2) regarding the requirement for all property owners included in the recorded final plat for Cielo to execute the dedication on the proposed revised plat (or through separate instrument).

After receiving that letter, the applicant chose not to respond and still to this day has not done so. Instead, it decided to put off its proposed Plat Amendment, as well as its Site and Development Plan, and instead seek approval only of its proposed amendment to the PUD Master Plan. In doing so, the applicant evidently hopes that the City will overlook the applicant's lack of authority to seek and obtain the change. The applicant wants the City to say, "OK we'll give you this change in Milano PUD even though it is against what is now binding on the property and violates what is committed to the Cielo homeowners in their Plat."

Further, the applicant recently applied for approval by the City Engineer of a Plat amendment to change the open space to commercial. The City Engineer rejected the request, pointing out that it is inconsistent with the Milano PUD Binding Master Plan and again asked the applicant to address F.S. § 177.081(2) regarding the requirement for all property owners included in the recorded final plat for Cielo to execute the dedication on the proposed revised plat (or through separate instrument).

Again, the applicant has not responded.

It is also worth considering that after the applicant recorded the Cielo Plat, it sold most of the lots created by the Plat, with representations that the subject site would be preserved Open Space, as provided in the Plat and the PUD Binding Master Plan. (The applicant only stopped doing that very recently, in marketing the remaining platted homesites).

An example is this graphic of the Cielo property given before closing by the developer to Suzanne Metzger in her purchase of 260 Corsano Drive in Cielo, as shown on the next page. You will recognize the proposed Commercial site, designated as “Preserve”, open space and a lake. Ms. Metzger is among the Cielo homeowners who were understandably shocked and aggrieved upon finding that the developer now proposes to change that property to a Commercial center.

Contract to buy
Signed
9/20/20
260 Corsano Dr.

SHM (M)

Another such Cielo homeowner is Tim Kenny of 232 Corsano Drive. His purchase and sale Closing Documents from the developer, which he was required to approve by Docusign (and which we have entered into the record in their entirety) includes the same map. It is shown to the right (with the label of **PRESERVE** on the site now proposed to be amended for the Commercial Center enlarged by inset for illustration).

Mr. Kenny will testify at the hearing that he is able to see the property at issue from his homesite (as marked on this original map from the Closing Documents) and as such will be adversely affected by the nature site's replacement with commercial buildings and their light pollution as well as noise.

A third Cielo homeowner with the same map in his Closing Documents from the developer, showing PRESERVE where the Commercial Center is now proposed, is Seth Thompson at 257 Corsano Drive. He also will testify at the hearing. On the next page is a graphic showing the proximity of these three homes from the subject site.

- 260 Corsano Dr – (dated 9/20/20) 1085’
- 268 Caserta Court – (1/2/21) 1025’
- 232 Corsano Dr – (2/8/22) 700’
- Examples of three homes with contracts showing PRESERVE

At the Planning Commission hearing the applicant contended that it should be permitted to replat Cielo just like what was done in the Aria and Milano subdivisions.

Regarding those two subdivisions, Neal in those instances reserved specific identified tracts for future residential development on the final plats for those subdivisions. Neal then later replatted those tracts as residential, not commercial. That is not what happened in Cielo.

The Cielo final plat only reserved Tract 700 for future development, which is a very narrow strip of land running adjacent to Laurel Road and which relates to the plan to widen that road. The land upon which the applicant now wants to construct a commercial center was never reserved or intended for development and was always identified as open space.

To Protect Residents, the LDR’s Require That Any Commercial in a PUD Be Vetted at the Time the PUD is Approved – Not Later by Amendment

Section 86-130(b)(8) of the Venice Land Development Regulations allows a PUD to designate commercial development at the time when the PUD is approved. That disallows the proposed PUD amendment, now many years after the PUD was approved with no commercial development. (As

such, it also renders the proposed Site and Development Plan and Plat amendment inconsistent with the PUD).

The regulation is as follows (emphasis added):

DIVISION 8. - PLANNED DEVELOPMENT ZONING DISTRICTS

Sec. 86-130. - PUD planned unit development district.

(b) *Permitted principal uses and structures*. **Permitted principal uses and structures in PUD districts are**:

(1) Single-family dwellings, cluster housing and patio houses.

(2) Townhouses.

(3) Multiple-family dwellings.

(4) Private clubs, community centers, and civic and social organization facilities.

(5) Parks, playgrounds, putting greens and golf courses.

(6) Essential services.

(7) Houses of worship, schools, nursing homes and child care centers.

(8) **Neighborhood commercial uses <u>which are determined at the time of approval for the PUD</u> to be compatible with the existing and future development of adjacent and nearby lands outside the PUD**.

(9) Other uses of a nature similar to those listed, after determination and recommendation by the planning commission, and determination by the city council at the time of rezoning that such uses are appropriate to the PUD development.

The Milano PUD included no commercial uses at the time it was originally approved as the VICA PUD in 2014 and when it was merged into the Milano PUD by Pat Neal's companies in 2017. When the developer sought that PUD merger in 2017, and kept the PUD free of commercial development, the City Planning staff recommended approval, noting that the land use of the PUD was residential and that the adjacent land use was residential, and as such they were compatible. Staff also found that the PUD protected single family neighborhoods from the intrusion of incompatible uses, thus was consistent with the City's Comprehensive Plan.

The evident purpose of this timing element is so that persons buying into and around the PUD will know the whole package of what will be built, and will not be subject to a bait-and switch, such as is being now proposed, to find that designated open space is to be removed and replaced with the adverse impacts of commercial development.

The PUD Amendment Creates Commercial Impacts Which Are Incompatible with Affected Residences

Policy 8.2 of the Venice Comprehensive Plan provides as follows (emphasis added):

Land Use Compatibility Review Procedures.

Ensure that the character and design of infill and new development are compatible with existing neighborhoods. Compatibility review shall include the evaluation of the following items with regard to annexation, rezoning, conditional use, special exception, and site and development plan petitions:

A. Land use density and intensity.
B. Building heights and setbacks.
C. Character or type of use proposed.
D. Site and architectural mitigation design techniques. Considerations for determining compatibility shall include, but are not limited to, the following:
E. Protection of single-family neighborhoods from the intrusion of incompatible uses.
F. Prevention of the location of commercial or industrial uses in areas where such uses are incompatible with existing uses.
G. The degree to which the development phases out nonconforming uses in order to resolve incompatibilities resulting from development inconsistent with the current Comprehensive Plan.
H. Densities and intensities of proposed uses as compared to the densities and intensities of existing uses.

Regarding Policy 8.2 of the Comprehensive Plan concerning compatibility, the question is whether a commercial center of this size, which is to include a full-sized supermarket as well as a fast-food restaurant with a drive-through window, and multiple other stores, is compatible with the surrounding neighborhoods.

In 2017, when the Milano PUD Amendment was before the City Council, Pat Neal was asked by a member of the Council if he would consider constructing a park in the Milano PUD since the City was in need of more parks. Ironically, attorney Boone, answering for his client, suggested that a recreational park at this location would be an incompatible use because of the traffic, noise and lights. But now Mr. Boone's client asks the Council to believe that a commercial center with its traffic, noise and lights is compatible. It is not.

This Council as well as the Planning Commission has on multiple occasions cited Policy 8.2 to support a decision to deny a developer's application. Multiple times in the past, Policy 8.2 has been utilized as it should be to protect residential neighborhoods from incompatible uses. Just as one example, in May, 2018, an application to amend the Pinebrook South PUD to add a permitted use was before the Council. The applicant wanted to construct rental apartments within the PUD. The Council decided

that such a use would be incompatible and denied the application. There are other, similar situations that have also occurred, as the Council is no doubt aware.

Related to the issue of incompatibility are not only the traffic congestion issues addressed otherwise herein, but the issue of whether changing conditions since adoption of the PUD create a need for the commercial center at this location.

The Planning Commission report includes as Reason #4 for denial: Compelling evidence for changing conditions was not presented as required by 86-47(f)(1)(f).

There has been no evidence that this proposed change in use is necessary because of changing conditions. All the evidence by way of speakers at the Planning Commission hearing was that a commercial center at this location is not needed. There has been no evidence that residents are currently inconvenienced as far as their commercial needs or that the nearby retail stores, restaurants, and professional offices are unable to meet the current demand. The proposed commercial center is not needed.

The applicant suggests that this area of Venice is growing, that this commercial center is or will be needed and it will benefit those in the area by providing convenient shopping on the east side of I-75. But the majority of those people, who according to Neal will benefit the most from the commercial center, do not want it. Surveys performed in the Venetian Golf and River Club, Cielo and Aria communities were similar in their results. Approximately 70%+ of those responding are opposed to the commercial center.

And as far as the commercial center providing convenient shopping, there is already a variety of commercial services available nearby. Within three miles of the proposed location there are two significant commercial developments and literally hundreds of stores, shops, restaurants and professional offices. The fact that there is nearby convenient shopping was promoted by Neal in its marketing material that was given to prospective buyers of homes in the Cielo community said:

“Cielo is just minutes away from your everyday destinations-golf courses, shopping, dining….and more are also within a short drive.”

“Cielo residents have easy access to the area’s best beaches, local schools, shopping and restaurants, …”

Most of the residents of the area do not want to pay the price of a diminution in their quality of life in exchange for more convenient shopping, and there was no evidence presented showing that more convenient shopping is needed. It matters to those residents where they live, not where they shop

The Open Space Dedication Requirement Is Overdue and Bars the Amendment

A similar protection against a bait-and-switch to develop designated open space in a Planned Unit Development is provided in Section 86-130(j)(3) of the LDR's, as follows:

> Land in a PUD designated as open space will be restricted by appropriate legal instrument satisfactory to the city attorney as open space perpetually, or for a period of not less than 99 years. Such instrument shall be binding upon the developer, his successor and assigns and shall constitute a covenant running with the land, and be in recordable form.

Section 86-570 of the LDR's defines "Open Space" as that term is used in the LDR's as follows:

> ***Open space*** means property which is unoccupied or predominantly unoccupied by buildings or other impervious surfaces and which is used for parks, recreation, conservation, preservation of native habitat and other natural resources, or historic or scenic purposes. It is intended that this space be park-like in use. The term "unoccupied or predominantly unoccupied by buildings or other impervious surfaces," as used in this definition, shall mean that not more than five percent of the area of any required open space, when calculated by each area shall be occupied by such surfaces. Such open space shall be held in common ownership by all owners within the development for which the open space is required. Any property within 20 feet of any structure (except accessory structures within the designated open space) or any proposed open space area having any dimension of less than 15 feet, shall not be considered open space in meeting the requirements of this chapter. Where areas within a development are identified as native habitat, such areas shall be utilized to fulfill the open space requirements of this chapter.

The land within Cielo that Neal proposes to use for a shopping center includes land identified on the final plat as open space. (Tract 600). That same land is designated in the PUD Binding Master Plan as "Open Space" (as graphically shown above), with the remainder of the site labeled "Wetland" and "Lake", which are other forms of Open Space under the LDR definition just recited.

The subject land was "designated as open space" when the Milano PUD Binding Master Plan was adopted in 2017, if not before in the preceding PUD in 2014.

As such, it is required by LDR Section 86-130(j)(3) (as recited above) to be restricted as open space perpetually by a recorded legal instrument. Not commercial development. Open Space.

Additionally, Section 86-231(c)(2)(n) of the Land Development Regulations provides that a final plat is to include a dedication to public use "of all streets, alleys, parks or other open spaces shown thereon …" (emphasis added). "Final plat" is defined in Section 86-230 as the final map of all or a portion of a subdivision which is presented for final approval.

The intention of the LDR's is clear. When a final plat is prepared, any open space shown on that plat is to be protected in the plat for that purpose. The fact that it was not done in regard to the Cielo

Subdivision final plat should not result in the open space shown on the plat being allowed to be converted to asphalt and concrete. That open space instead should immediately be dedicated to the city by separate legal instrument as should have been done two and a half years ago.

The staff report states:

> The City's position has historically been that this dedication should take place at the final plat of the last phase of a PUD. While a recent policy change has been made to begin requiring this at the final plat of each phase of a PUD, this procedure has not been in place throughout the lifetime of the Milano PUD.

That previous practice of delaying the open space dedication until the final plat in the PUD is not supported by the wording of the applicable LDR's.

Even so, the final plat of the last phase of the Milano PUD has in fact been approved and recorded! As such, the Open Space dedication is due or overdue, and as such is protected by the LDR's from a change of Open Space to Commercial.

Milano PUD is made up of the Milano, Cielo, Aria and Fiore subdivisions. The last final plat within that PUD to be approved by the city was that of the Fiore subdivision on July 13, 2021.

At the Planning Commission meeting of July 5 that related to the transfer of 24 acres of open space within Milano, city attorney Kelly Fernandez spoke of the city's practice, saying, "Our LDR require open space at the time of the final plat to be dedicated for 99 years… At the time of the final plat is when we have on the plat itself the language that protects the open space for 99 years."

The fact that the Cielo subdivision has been fully platted was confirmed in an email by Roger Clark, Director of Planning and Zoning, dated June 17, 2022. There should have by now been a dedication of the open space shown on the Cielo final plat.

The legal instrument required by 86-130(j) and by the stated practice of the department should have been executed and submitted to the city for approval and recording at the time the Cielo final plat was approved, thereby protecting the open space within that subdivision for 99 years. That is what was done with the Fiore subdivision, the last final plat in the PUD, when it was recorded on July 13, 2021. Why it was not also done on the Cielo Plat is unknown. However, any way you look at it the Open Space dedication for Cielo is overdue and is required now.

The requirement of the LDR's for the recorded Open Space protection precludes amending the PUD Binding Master Plan to convert the Open Space in Cielo to Commercial development.

The staff report states:

> The Binding Master Plan shows a development area of residential lots that have not yet been memorialized through a preliminary or final plat. Therefore, the final recording of the dedication of open space for the entire PUD has not taken place.

Staff has confirmed that this is the position being taken by the applicant and that it refers to an area shown by two rectangles on the Binding Master Plan within what became the Cielo subdivision.

Below are those two rectangles with the proposed Commercial area added to their right (east), for illustration purposes.

The Cielo developer did not choose to include this area of potential residential development in the Cielo Plat, which restricts the uses of that land. Why the developer left out that residential development is unknown. One logical conclusion, however, is that if the proposed PUD amendment is approved, the developer planned to move to convert what is now protected Open Space in this area on the Cielo Plat to a westward extension of that Commercial area. (Although Mr. Neal "promised" to the Planning Commission when pressed on this point that he would not do that, there is no stipulation to that effect in the proposed amendment of the Binding Master Plan). In any event, that consideration is immaterial to the illegality of the current proposed amendment.

Very significantly, the current Binding Master Plan for the Milano PUD states, "Where the PUD Master Plan identifies areas for residential uses, the developer shall have the option to convert such residential uses to open space." (There is no mention of an option to convert any open space to additional residential uses or any commercial use).

So this is exactly what the developer did, in recoding the Cielo Plat with the omitted homesites instead converted to open space.

Again, the applicant determined not to include that area for homesites in the Cielo Plat. Therefore, those homesites cannot be added to the site without the joinder of all homeowners in the Subdivision as required by s. 177.081(2), Florida Statutes. There is no "memorializing" of such homesites to be done, whatever that means, through a future amendment of the Cielo Plat for which the applicant lacks the required legal authority.

In any event, City staff acknowledges that a final Plat has been approved and recorded for the entirety of the Milano PUD, including specifically Cielo. As such, even under staff's excessively liberal interpretation of when the Open Space dedication is due, it is clearly due – past due – today and an amendment of the Binding Master Plan which is inconsistent with the requirement of dedication of the Cielo open space is not allowed.

There have been references to the final Plat of Cielo not being as a "final final Plat." **There is no such thing**, in the LDR's or otherwise, **as a "final final Plat."** Even if it is contemplated that a final Plat can be amended, that does not negate its character as a final Plat. If that was the case, there would never be a final Plat even after a final Plat is recorded, and everyone would have to wait forever for that potential amendment until the final plat becomes "final final."

If the Open Space dedication was not due for reason of a potential future amendment of the Cielo Plat to add more homes, it may never be due if the developer sought not to pursue that change. Clearly that cannot be the case, and under the LDR's the Open Space dedication was due at the time of the Cielo plat, and even with staff's previous historic delay until the final plat for the subdivision is approved, it is due because that final plat has occurred.

Additionally, Section 86-570 of the LDR contains a definition of "open space", which includes the statement, "**Such open space shall be held in common ownership by all owners within the development for which the open space is required**." For any meaning to be given to that requirement, the Open Space in Cielo as provided not only in the Binding Master Plan but certainly as provided in the approved and recorded final Plat of the Cielo subdivision must be deemed to be held in common ownership by all owners in the Cielo development.

Cielo Declaration and State Law Protect the Open Space

City staff has indicated that it's not considered appropriate to look to the Cielo Declaration of Covenants, Conditions and Restrictions for any prohibition on what the applicant seeks to do, in converting designated Open Space to Commercial.

However, because the Declaration operates as a covenant binding the property, and together with the Plat protects the property rights of the Cielo homeowners, it is relevant. It further shows that the

applicant does not have the authority to obtain the requested change in the Milano PUD Binding Master Plan as to the subject Cielo property.

Under Section 4.01(a) of the Cielo Declaration of Covenants, Conditions and Restrictions, the Common Property includes the following property listed by reference in Exhibit "E" of the Declaration, as follows:

As set forth on the Plat for Cielo
Tract 100: Private Roadway, Ingress, Egress, Utility, Drainage, Landscape & Hardscape Easement
Tract 200: Amenity Center
Tracts 300-306: Wetland, Private Drainage & Flowage Easement
Tracts 500-504: Private Lake, Drainage and Flowage Easement
Tracts 600-603: Open Space, Private Drainage & Flowage Easement

Operation and Maintenance Responsibilities for Above-Referenced Tracts
Tracts 100 through 603 shall be privately operated and maintained as Common Areas, Common Property and/or Common Elements by the Cielo Neighborhood Association, Inc., in accordance with the Declaration.

(Section 1.11 of the Declaration provides that the terms Common Area, Common Property and Common Elements as they appear are interchangeable).

Exhibit "E" then provides:
Reservation for Owner:
Tract 700: Future Development Has Been Reserved for Owner – Owner has been defined on the Plat at Border and Jacaranda Holdings, LLC and Neal Communities of Southwest Florida, LLC

Again, Tract 700 is the narrow strip of land at the north edge of Cielo, which the applicant is not including in the proposed PUD amendment for commercial development.

Section 4.01(d) of that Declaration provides that the Declarant, Neal Communities of Southwest Florida, LLC, may amend "the development plan and/or scheme of development of the Common Property", provided that such an amendment "does not delete or convey to another party any Comon Property designated, submitted or committed to common usage if such deletion or conveyance would materially and adversely change the nature, size and quality of the Common Property." Clearly, the proposed deletion of Open Space through a PUD Master Plan amendment and its replacement with Commercial development would violate that standard.

There are provisions in the Declaration which purport to grant authority to the Declaration to amend the Plat, but they are subject to limits in the Declaration which would prevent what the applicant seeks, such as requiring that any removed Common Area be replaced with comparable new Common Area and others which provide that a Common Area may not be deleted it that would "materially and adversely change the nature, size and quality of the Common Property". The rules of construction

require that they be read together to give effect to all where possible and that ambiguities be construed against the drafter, so the limits will prevail.

More important, the Declaration is subject to state statutes in effect at the time. That includes 177.081(2), Florida Statutes, which requires that every property owner in the subdivision execute any replat, before witnesses and a notary the same as for a deed. Neal seeks to address that by including in the Declaration that each owner must sign such an instrument and if an owner does not, it is not needed. It is highly unlikely that a court would order lot owners to sign the replat sought by the applicant and it would violate the statute to replat without it.

And even better, the Declaration is subject to 720.3075, Florida Statutes, which limits Developer amendments. Subsection (5) of that statute provides:

> It is declared the public policy of the state that prior to transition of control of a homeowners' association in a community from the developer to the nondeveloper members, as set forth in s. 720.307, the right of the developer to amend the association's governing documents is subject to a test of reasonableness, which prohibits the developer from unilaterally making amendments to the governing documents that are arbitrary, capricious, or in bad faith; destroy the general plan of development; prejudice the rights of existing nondeveloper members to use and enjoy the benefits of common property; or materially shift economic burdens from the developer to the existing nondeveloper members.

The statutory definition of "governing documents" includes the Declaration and its exhibits, which includes Exhibit E listing the Common Properties.

The "Release"

In their extensive rebuttal arguments before the Planning Commission, the applicant's attorneys spent most or much of their time focusing on a certain "Release and Termination of Cielo Easements & Restrictive Covenants" ("the Release") which was recorded in the public records on October 21, 2022 by the Developer-controlled Association and by Border and Jacaranda Holdings, LLC and Neal Communities of Southwest Florida, LLC (together, for the purposes of this discussion, "the Developer").

The Release purports to remove 10.42 acres of open space located within the Cielo Community at the southeast corner of Jacaranda Boulevard and Laurel Road from the Declaration. It is stated in the Release that those 10.42 acres "shall no longer be deemed Common Property of the Association."

The so-called “Release” is clearly invalid, because there is no basis of authority it to be created (and no such basis is even sought to be recited therein), because it conflicts with and does not seek to amend the Cielo Declaration in which the Common Property is identified, because it conflicts with the governing Plat, and because even if done as a Declaration amendment it conflicts with protections of the Common Property in the Declaration and violates ss. 177.081(2) and 720.3075(5), Florida Statutes, as recited herein.

Further, the Release was not properly approved by the developer-controlled Association. Upon inquiry, there has never been an Association Board meeting at which the Release was mentioned, much less discussed or voted upon, and the homeowners have been denied any knowledge of the matter until the recent discovery of the Release in the public records.

The Release states that the parties to it, which includes the developer-controlled Association, “agree that it is in the best interests of the landowners within the Cielo Subdivision”, to release the 10.42 acres from the terms of the Declaration, which under the stated terms of the Release includes removing it from the Common Property of the Association. Certainly, again from inquiry, this does not reflect the views of the large majority of Cielo homeowners.

The only aspect of the 10.42 acres addressed in the Release is an assertion by the Developer that “no Association drainage and/or flowage systems or facilities exist” on the property nor are they “necessary” for any such systems or facilities and that their removal from the Common Properties “shall have no material or negative impact on the drainage and flowage of the remaining portions of the Cielo Subdivision.” This is despite the fact that all of the 10.42 acres is designated on the Cielo Plat as being for “drainage and flowage” and include a large wetland area which the Developer’s environmental consultants have labeled “freshwater marshes” and a large lake which those consultants label as a “reservoir.”

The entirety of the Cielo Subdivision is subject to (1) the Cielo Declaration and (2) the Cielo Plat, both of which are recorded in the public records of Sarasota County. The deletion of the 10.42 acres from Cielo’s Open Space, to allow commercial development by the Developer, violates both the Declaration and the Plat.

This is reflected in the fact that, again, despite having several Whereas clauses, nowhere in the Release is any statement of the authority for it to be done.

It is undisputed, and acknowledged in the Release, that the 10.42 acres is Common Property of the Cielo Subdivision. That is clear under Section 4.01 of the Declaration and the Exhibit “E” to the Declaration which it incorporates in the Declaration by reference.

Several provisions in the Cielo Declaration grant broad authority to the Developer to delete Open Space, including in Sections 2.02(c), 2.03, 4.01(d) and 12.04. However, Section 4.01(d) includes the following (emphasis added):

> Declarant reserves the right to amend and alter the development plan and/or scheme of development of the Common Property, in Declarant's sole and absolute discretion, provided such amendment does not delete or convey to another party any Common Property designated, submitted or committed to common usage if such deletion or conveyance would materially and adversely change the nature, size and quality of the Common Property.

Also, because the 10.42 acres are identified as Common Area in the Declaration, including explicitly in Exhibit "E" thereto, its deletion would require a Declaration amendment. Section 12.6 of the Declaration begins, "This Declaration may be amended only in accordance with this Section," and then provides, as subsection (a) (emphasis added):

> Prior to the Turnover Date, Declarant reserves the right to amend this Declaration, the Articles and By-Laws in any reasonable manner whatsoever, without the requirement of Association consent or the consent of any Loy Owner or the mortgagee of any Lot, so long as such amendments do not delete or convey to another party any Common Property designated, submitted or committed to common usage if such deletion or conveyance would materially and adversely change the nature, size and quality of the Common Property; provided however, this provision shall not limit or affect the Developer's ability to re-plat and/or reconfigure all or part of the Subdivision's Common Property and amend the Declaration in connection therewith. Notwithstanding anything to the contrary herein, the Declarant reserves the right to relocate or reconfigure the Common Areas, including the right to substitute relocated or similar Common Areas in other locations within the Subdivision, thereby deleting the Common Areas in the prior location. The right of Declarant to amend as herein set forth shall prevail, anything else contained herein to the contrary notwithstanding.

Clearly, the deletion of the 10.42 acres of Open Space for commercial development by the Developer is not "reasonable", "would materially and adversely change the nature, size and quality of the Common Property" and would not "relocate or reconfigure the Common Areas" such as to "substitute relocated or similar Common Areas in other locations within the Subdivision, thereby deleting the Common Areas in the prior location" – as no substitute Common Areas are provided.

Applicable rules of construction mandate that meaning must be given to all language used, on the presumption that unnecessary language is not included. Also, separate provisions must be read together (*in pari materia*), to create a harmonious scheme and avoid inconsistency. Also, more specific provisions prevail over general ones. And despite the Developer's attempt in the Declaration to disavow the rule that ambiguities are construed against the drafter (the Developer), that rule prevails where the document, as here, is not jointly drafted. Accordingly, despite broad grants of authority to the Developer in the Declaration with regard to Open Space, the stated limitations on that authority – as recited above -- must be given effect.

Additionally, the Declaration is subject to 720.3075, Florida Statutes, which limits Developer amendments. Subsection (5) of that statute provides:

> It is declared the public policy of the state that prior to transition of control of a homeowners' association in a community from the developer to the nondeveloper members, as set forth in s. 720.307, the right of the developer to amend the association's governing documents is subject to a test of reasonableness, which prohibits the developer from unilaterally making amendments to the governing documents that are arbitrary, capricious, or in bad faith; destroy the general plan of development; prejudice the rights of existing nondeveloper members to use and enjoy the benefits of common property; or materially shift economic burdens from the developer to the existing nondeveloper members.

The statutory definition of "governing documents" includes the Declaration and its exhibits, which include Exhibit "E" listing the Common Properties.

Certainly, turning the 10.42 acres of declared Common Property and open space into commercial development for the economic benefit of the Developer would be unreasonable, as well as arbitrary, capricious and in bad faith, would destroy the general plan of development under which the Cielo homeowners bought their homes, and would prejudice the rights of existing nondeveloper members to use and enjoy the benefits of common property. As such, it is unlawful under s. 720.3075(5), Florida Statutes.

Further, because the 10.42 acres is platted as open space on the Cielo Final Plat, its deletion to allow commercial development requires a replat under state law. Section 177.081(2), Florida Statutes requires that every property owner in the subdivision execute any replat, before witnesses and a notary the same as for a deed. The Developer seeks to address that by including in the Declaration that each owner must sign such an instrument and if an owner does not, it is not needed. It is highly unlikely that a court would order lot owners to sign the replat sought by the applicant and it would violate the statute to replat without it.

The Developer has applied for City approval of a replat to change the 10.42 acres from open space to commercial development. City staff has appropriately required the Developer to address the statutory requirement of execution by all Cielo homeowners, which the Developer to date has failed to do.

Accordingly, because the "Release" is inconsistent with the Cielo Plat, it is legally ineffective in removing the 10.42 acres as Open Space.

Apart from the illegality of the Release under the Declaration and state law, this back room maneuver of the Neal companies to take open space that is within the control of the Neighborhood Association and the homeowners of Cielo without their knowledge or consent should not be given effect.

Traffic is a Major Problem and Remains Unresolved

Under Sec. 86-47(f)(1) of the LDR's, the Planning Commission is required to report to the City Council

for this proposed rezoning (such as a PUD amendment) that it "has studied and considered the proposed change in relation to several factors, including:

> h. Whether the proposed change will create or excessively increase traffic congestion or otherwise affect public safety.

The Planning Commission has reported to you the following, in support of its recommendation for denial: "**Congestion may be increased excessively by this proposal**."

The trip generation study prepared by the applicant's traffic consultant concluded that the "commercial development is expected to generate a total of 704 total trips with 413 new trips after accounting for pass-by trips and internal trips." The City's consultant stated that the traffic impact statement submitted by the Applicant "does not look at intersection operations or site access". At this point the City has not been provided any information as to what traffic congestion is going to result from there being 704 trips generated by the development and with its entrance being directly across Laurel Road from the entrance to the VGRC. But it should not take a traffic consultant to tell a person that there is going to be congestion.

Confirming the idea that the shopping center is going to result in traffic congestion is Appendix A to the Applicant's traffic consultant's traffic analysis which is part of the Applicant's Petition. That attachment, which is identified as a "Site Plan", shows that **there is going to be seven lanes of traffic on Laurel Road at the entrances to the commercial center and the Venetian Golf and River Club**.

Imagine a resident of the VGRC, elderly or not, exiting the community and wanting to turn left on Laurel or go straight into the commercial center. (That person most likely will not be walking to the super market since that would require him or her to walk across seven lanes of traffic while, at least on the return trip, carrying one sack or more of groceries. Despite what the promotional material of the developer depicts, that is rarely going to happen, and never will walking across seven lanes of traffic twice be a safe proposition.) That driver, while sitting at the stop sign, will need to be accessing what as many as seven different vehicles are doing. There is not only going to be congestion, there is going to be confusion and an increase in the number of accidents. Approval by the City of the proposed regional shopping center at this location will create a dangerous intersection. Would governmental immunity protect the City if such a dangerous intersection were knowingly approved?

The Applicant claims that the total number of trip miles and the number of trips are going to be reduced as a result of people in the area having to travel fewer miles for their shopping needs. And Laurel Road is going to be widened, which will reduce traffic congestion. Common sense tells us that traffic congestion at the entrance to the Venetian and the proposed regional shopping center will be greatly increased not decreased.

Laurel Road may be widened. But in its current state as a two-lane road, it will fail as a result of the increased traffic, according to all of the consultants. And depending upon what underlying traffic data is used, **Jacaranda Boulevard may also fail as a two-lane road according to the City's traffic**

consultant. These projected road failures provide an idea as to the amount of traffic that would result from the proposed commercial center.

The staff report states that although the City cannot deny the amendment under state law solely for failure to meet "concurrency", that is exceeding the adopted level of service on affected roads and intersections, the City can validly deny based on factors which include the effect of excessive traffic on compatibility. The functional safety of affected road segments and intersections would be another, including, again, notably the intersection that the commercial entrance and exit would share with Venetian Golf & River Club, on the other side of Laurel Road.

The PUD amendment, with its very sparse limits on the 10.47 acres, allows much more commercial development than the 70,240 square feet on the Site and Development Plan which will not be before the Planning Commission – being sufficient for up to 227,000 square feet of commercial buildings under the .5 FAR provided.

The traffic from the large commercial development depicted in the Site and Development Plan is itself very large even by the traffic study in which the applicant seeks to lowball traffic by its violations of the required Methodology – an increase of 945 PM peak vehicle trips on affected road segments and intersections. It can only be imagined what would be shown by a proper and lawful traffic study – particularly if it includes the traffic allowed by the maximum potential development if the proposed PU

In addition to the deficiencies in the traffic study noted by the City's experts, there is the fact that it only analyzes traffic from the Site and Development Plan which is not before the City Council, rather than from the proposed amendment to the PUD Binding Master Plan, which is the only proposal actually at issue.

Indeed, the City's consultant stated that the traffic impact statement submitted by the applicant "does not look at intersection operations or site access."

Paving Over the Wetlands Violates the Comprehensive Plan

The subject site was left as open space in the proposed and approved Milano PUD Binding Master Plan for an obvious reason. It is among the extensive system of wetlands and wetland buffers throughout the northern part of the Cielo subdivision.

The applicant's environmental consultant shows the environmental features of the site in the filed materials as follows:

The “Open Land” includes wetland buffers. Even the path around what are elsewhere referred to as “Ponds” includes many trees. The developer proposes to clear the site of trees, as well as the extensive existing heavily treed buffer area to the north of it.

And then there are the wetlands, shown as Freshwater Marshes on this exhibit, 6.6 of the 10.42 acres comprising the site.

The developer explicitly seeks permission from the City to pave over all of it.

Although the developer’s environmental consultant sees no problem with paving the wetlands, another environmental evaluation of the site filed with the application, dated June 13, 2022 by Florida Natural Areas Inventory, rates them a full 7 out of 10 for water environment and wetland plants.

That evaluation also concludes that the “Wetland provides some habitat for wading birds and other wetland dependent species” and “Wading birds have been observed foraging in the wetland.” Even the developer’s consultant acknowledges that the use of the wetlands by wood storks, an endangered species, is “likely” and that there is a “potential” for sandhill cranes and other listed species. If any are observed during construction, the developer’s consultant promises (wink wink) that the developer will respond appropriately.

Further, there is nothing in the developer’s environmental reports which evaluates the impact of paving over the site on adjacent wetlands, which from observation appear to have high environmental value. For example, this is a recent photograph of a wetland area directly to the south of the

site. Wading birds, which include listed species, observed the day of the photo include roseate spoonbill, wood stork, great egret, snowy egret, glossy ibis, white ibis, great blue heron, little blue heron and blue-winged teal.

Policy OS 1.3.1 of the Venice Comprehensive Plan mandates “Requiring development to first avoid impacts to wetlands” and then to minimize impacts and then only mitigate for impacts when impacts to wetlands “are unavoidable.”

More fully, the policy provides as follows (*emphasis added*):

Strategy OS 1.3.1 - Wetland and Aquifer Recharge Areas Protection

The city shall protect its groundwater sources, particularly in wetland and aquifer recharge areas, through its Land Development Code and review processes by:

1. Establishing site plan requirements to ensure developments evaluate natural drainage features, man-made drainage structures, and impact to wetland and aquifer recharge areas

2. Requiring development to first avoid impact to wetlands and aquifer recharge areas

3. Requiring development to minimize impact and then mitigate for impacts to wetlands and aquifer recharge areas when impacts to wetlands and aquifer recharge areas are unavoidable

4. Limiting activities/uses that are known to adversely impact such areas
5. Restoring/mitigating wetlands in connection with new development
6. Maintaining the natural flow of water within and through contiguous wetlands and water bodies

7. Maintaining existing vegetation to serve as buffers to protect the function and values of the wetlands from the adverse impacts of adjacent development
8. Requiring any wetland mitigation be based upon the most current state-approved methodology
9. Prohibiting the dredging, filling, or disturbing of wetlands and wetland habitats in any manner that diminishes their natural functions, unless appropriate mitigation practices are established in coordination with and approved by local, regional, state, and federal agencies
10. Coordinating with Sarasota County, Federal, and State review agencies on wetland designation, mitigation policies, and regulations.

In direct violation of this policy, the developer seeks City approval to go right to destruction of the wetlands and "mitigation" by purchasing four "mitigation credits" from the Myakka Mitigation Bank, to improve wetlands elsewhere, which the applicant's environmental consultant acknowledged to the Planning Commission is outside the City of Venice.

The developer's environmental consultant seeks to justify the total wetland destruction by stating that "there are limited alternatives that allow an economically viable project on the subject property."

How about scaling down the project to the truly neighborhood-serving scope that the LDR's and Comprehensive Plan can allow in a PUD? How about not building a commercial development there at all, as required for the other reasons we have provided?

The environmental sensitivity of this area is also evidenced by the fact that it is within the protection zone of an identified eagle's nest just to the south, active when the Neal companies purchased the property in 2014 but now claimed by them to have no eagles.

The wanton destruction of native habitat and foraging (and possible nesting) by listed species also violates Policies OS 1.4.2 and 1.4.3 of the Venice Comprehensive Plan.

It is significant that the 2016 staff report for the Milano PUD (Rezone Petition No. 16-07RZ) stated that "The proposed site plan preserves more than 98% of wetland systems and associated upland buffers creating a significant wildlife corridor system throughout the project area."

That would be substantially impaired by the proposed PUD amendment if it is approved

Following our initial presentation of the above observations, the City obtained an independent analysis by its environmental and planning consultants.

They found numerous violations of the City's Comprehensive Plan, concluding among other observations that the applicant's environmental report "does not consider all wetland impacts and is not first avoiding, minimizing, or mitigating for all impacts or otherwise limiting activities of adverse impact or restoring wetlands in connection with the new development."

On the basis of its consultants' objections, the City informed the applicant on October 26, 2022 as follows:

There were 5 Comprehensive Plan strategies identified with which the proposed project would conflict:

- OS 1.2.2 – Environmental Impact Mitigation
  - Does not account for impacts from offsite drainage and road improvements; does not account for all potential listed species
- OS 1.3.1 – Wetland and Aquifer Recharge Areas Protection
  - Does not account for impacts from offsite drainage and road improvements; does not document maintenance of natural flow or maintenance of existing vegetation, and more
- OS 1.3.2 – Wetland Encroachments
  - Does not account for impacts from offsite drainage and road improvements; does not identify and delineate all wetland boundaries
- OS 1.4.2 – Protection of Native Habitats and Natural Resources
  - Does not account for all potential listed species; does not document preservation or protection of significant habitat; does not demonstrate lower quality habitats were considered for impact before higher quality habitats and resources
- OS 1.4.3 – Endangered or Threatened Species
  - Does not account for all potential listed species; does not identify the habitat of listed species; does not document that habitat fragmentation will be minimized

Further issues identified were the discrepancy in size from the SWFWMD permit and the Kimley- Horn report (8.79AC vs. 6.6AC) and the justifications provided for wetland impacts, which the authors of the report note are not expected to be valid justifications per the applicable state and federal rules.

The applicant remains in violation of Policy OS 1.3.1 of the Venice Comprehensive Plan, which mandates "Requiring development to first avoid impacts to wetlands" and then to minimize impacts and then only mitigate for impacts when impacts to wetlands "are unavoidable."

The applicant has resorted to the argument that even though it is failing to avoid or minimize wetland impacts by the development which would be newly allowed by its proposed PUD amendment, its complete paving over of extensive wetlands and wetland buffers should be excused because the original PUD plan has a lot of wetland protections.

The problem with that approach is that Policy OS 1.3.1 requires avoidance and minimization before mitigation as measures in any "development" in wetlands. That development here is the proposed commercial development in functional wetlands by amending the Milano PUD Binding Master Plan to

replace wetlands and wetland buffers with development, explicitly with no limit on lot coverage or any other avoidance or minimization.

So what is the "development" addressed in Policy OS 1.3.1 as applied to the proposed PUD amendment? Is it the entire PUD, as the applicant urges, rather than the 10.42 acres to be changed? Even if that absurd prospect is entertained, does the PUD amendment operate to increase adverse wetland impacts of development throughout the PUD without first avoiding or minimizing them, as Policy OS 1.3.1 requires? Is off-site mitigation (even outside the City of Venice) required because the onsite wetland destruction is "unavoidable" as Policy OS 1.3.1 requires.

Obviously not.

The final report to the City on environmental impacts by Wade Trim, the City's planning consultants, on March 16, 2023, does not find the application in compliance with the City's environmental protections, in the Comprehensive Plan. Instead, deficiencies are found and questions are raised.

Wade Trim's final March 16, 2023 report to the City, as well as the companion final report on that date by the City's expert environmental consultant, Earth Resources Consulting Services should not be mistaken, as they recite the conclusion of compliance by the applicant's planning consultant, Kimley-Horn, but then followed by the consultant's response in less prominent italics. An uncareful reading could construe the recited conclusions of the applicant's consultant as being those of the City's consultants.

The Wade Trim findings include:

> **As currently proposed, the project will impact the on-site wetland and a permitted stormwater management pond.**
>
> **…**
>
> **Earth Resources Consulting Scientists concluded that the characterization of the existing wetland conditions and the preliminary Uniform Mitigation Assessment Method (UMAM) scores for the wetland are generally accurate. However, additional wetland impacts associated with off-site drainage and road improvements were not accounted for in the KHA report, and the potential for several listed species were not included in the KHA report.**
>
> …
>
> **With the limited time to evaluate the KHA March 14, 2023, response, Wade Trim and Earth Resources Consulting Scientists can neither verify nor dispute that the subject property is the only location available for commercial development within the Milano PUD.**
>
> **…**

Pertaining to Strategy OS 1.3.1 (2, 3, and 4), the City Council must determine the appropriate interpretation to make on the policy language related to avoidance and minimization of impacts to wetlands and whether based on the overall Milano PUD the KHA response meets the intent of this Strategy.

Very significantly, the City's environmental consultants, Earth Resources Consulting Services, have held firm in their conclusions that the proposed PUD amendment violates the wetland protections of the Policy OS 1.3.1 of the Comprehensive Plan. Their final March 16, 2023 report to the City should not be mistaken, as it recites the conclusion of compliance by the applicant's planning consultant, Kimley-Horn, but that is then followed by the consultant's response in less prominent italics. The position of the City's expert environmental consultant, in that final March 16 report, is as follows:

OS 1.3.1 – Wetland and Aquifer Recharge Areas Protection

Earth Resources Response: The quality of a wetland is not appropriate justification for wetland impacts nor does it alleviate the need for demonstrating avoidance and minimization of wetland impacts through design modifications and/or alternative site analysis. Wetland quality is taken into consideration when determining the amount of mitigation required to offset the impact.

The Planning Commission findings in recommending denial include the following as Reason #3: "The application is inconsistent with the intent of Comprehensive Plan Strategy OS 1.3.1 and Strategy LU 4.1.1, specifically Policy 8.2, and thus not in compliance with 86-47(f)(1)(a)."

Clearly, the proposal to replace functioning wetlands and wetland buffers with commercial development in the 10.42 acres at issue, with absolutely none of the avoidance or minimization in that development required by the Comprehensive Plan requires denial of the application by City Council.

For Good Reasons, Your Planning Commission Recommends Denial

Under Section 86-23(h) of the Land Development Regulations, the Planning Commission had the duty to "determine whether specific proposed developments conform to the principles and requirements of the Comprehensive Plan." And pursuant to Section 86-47, the Planning Commission, when reporting to the City Council concerning the rezoning of land, was required to show that it has studied and considered the proposed change in relation to certain specified factors. The Planning Commission has dutifully fulfilled its obligations and has voted not to recommend approval of the Petition.

In addition to the other reasons for denial referenced herein as cited in the Planning Commission report, there are the following, based on required standards for consideration in the Land Development Regulations:

Commission Reason #6. No substantial reasons why the property cannot be used with the existing zoning were presented. 86-47(f)(1)(n).

At the hearing before the Planning Commission, the Applicant failed to present any evidence as to why the 10.42 acre parcel cannot and should not continue to be used as wetlands, open space and lakes as shown on the Milano PUD Binding Master Plan of 2017.

Planning Commission Reason #7. Compelling evidence for a lack of adequate sites for this use elsewhere in the City was not presented. 86-(f)(1)(p).

No evidence was presented by the Applicant on the question as to whether there are – or are not - other adequate sites available elsewhere in the City for the project. The burden was upon the Applicant to provide that information for the Planning Commission, and it did no do so. There is plenty of property in Venice zoned for business. Large commercial centers belong in areas of the City that are zoned commercial and not in isolate strips in the middle of large residential areas.

The transmittal memo by City Planning to City Council for its public hearing summarizes the Planning Commission's findings as follows:

Comments from the Planning Commissioners that voted against recommending approval included finding that the petition does not demonstrate compliance with the land development code on the following items:

i. 86-130(r) – commercial activity will not be limited to the Milano PUD;
ii. 86-130(t)(3)(a) – evidence of unified control was not clearly provided;
iii. 86-47(f)(1)(a) – the application is inconsistent with the intent of Comprehensive Plan Strategy OS 1.3.1 and Strategy LU 4.1.1, specifically Policy 8.2;
iv. 86-47(f)(1)(f) – compelling evidence for changing conditions was not presented;
v. 86-47(f)(1)(h) – congestion may be increased excessively by this proposal;
vi. 86-47(f)(1)(n) – no substantial reasons why the property cannot be used with the existing zoning were presented; and
vii. 86-47(f)(1)(p) – compelling evidence for a lack of adequate sites for this use elsewhere in the city was not presented.

City Planning Staff has confirmed that Cielo is fully platted

From: Jill Pozarek <spqr63bc@hotmail.com>
Sent: Wednesday,
To: Roger Clark <RClark@venicefl.gov>
Subject: Quick question - "platting status"

Caution: This email originated from an external source. **Be Suspicious of Attachments, Links and Requests for Login Information**

Dear Roger,

Thanks in advance, as you've always been helpful, and I do appreciate it.

In Neal's recent filing regarding the proposed shopping center at the corner of Laurel Road and Jacaranda, it is stated that the project is within the Milano PUD and within the platted Cielo Development. Is Cielo fully plated as of this date?

Does the p … n and re-zoning? An

Many than

☆ **Roger Clark** June 17, 2022 at 7:25 AM

RC

RE: Quick question - "platting status"

To: Jill Pozarek

Siri found new contact info in this email: Roger Clark rclark@venice... add to Contacts...

Jill,

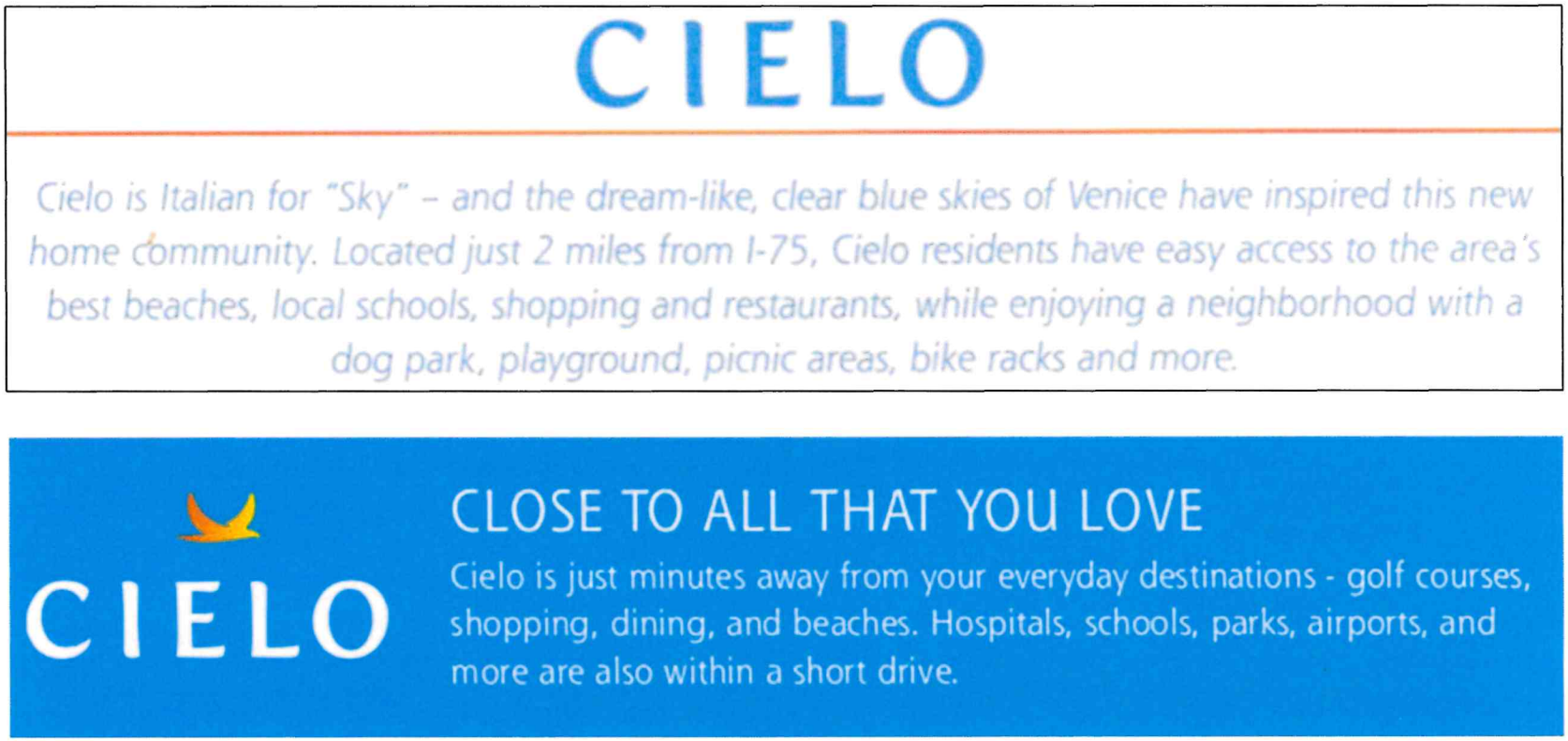
Yes, Cielo is fully platted and yes, the Fiore plat is included in the overall Milano PUD. The proposed text regarding open space in the draft LDRs will apply to new PUDs if it is adopted, not existing as they have been reviewed and developed under the existing code.

Thanks,

Roger

No compelling evidence for changing conditions has been demonstrated by the applicant

Neal's own marketing material for Cielo admits the neighborhood has "easy access to the area's best…shopping and restaurants," and that it is "just minutes away."



CIELO

Cielo is Italian for "Sky" – and the dream-like, clear blue skies of Venice have inspired this new home community. Located just 2 miles from I-75, Cielo residents have easy access to the area's best beaches, local schools, shopping and restaurants, while enjoying a neighborhood with a dog park, playground, picnic areas, bike racks and more.

CIELO

CLOSE TO ALL THAT YOU LOVE

Cielo is just minutes away from your everyday destinations - golf courses, shopping, dining, and beaches. Hospitals, schools, parks, airports, and more are also within a short drive.

Source: Cielo marketing material obtained at the sales office in January 2023.

Applicant's commercial center requires seven lanes on Laurel Road creating congestion across from Veneto Blvd, the sole entry and main exist for VGRC

- From VGRC, in order to turn onto Laurel Road Eastbound, a driver must turn LEFT <u>across</u> four lanes of traffic
- Only access by Cielo residents requires <u>three LEFT turns</u> across multiple lanes to enter the commercial center…within their own PUD

Proximity does not create convenience!