

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, any one of which is fatal 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.

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 the PUD residents

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"**

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 is 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, not 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.

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.”

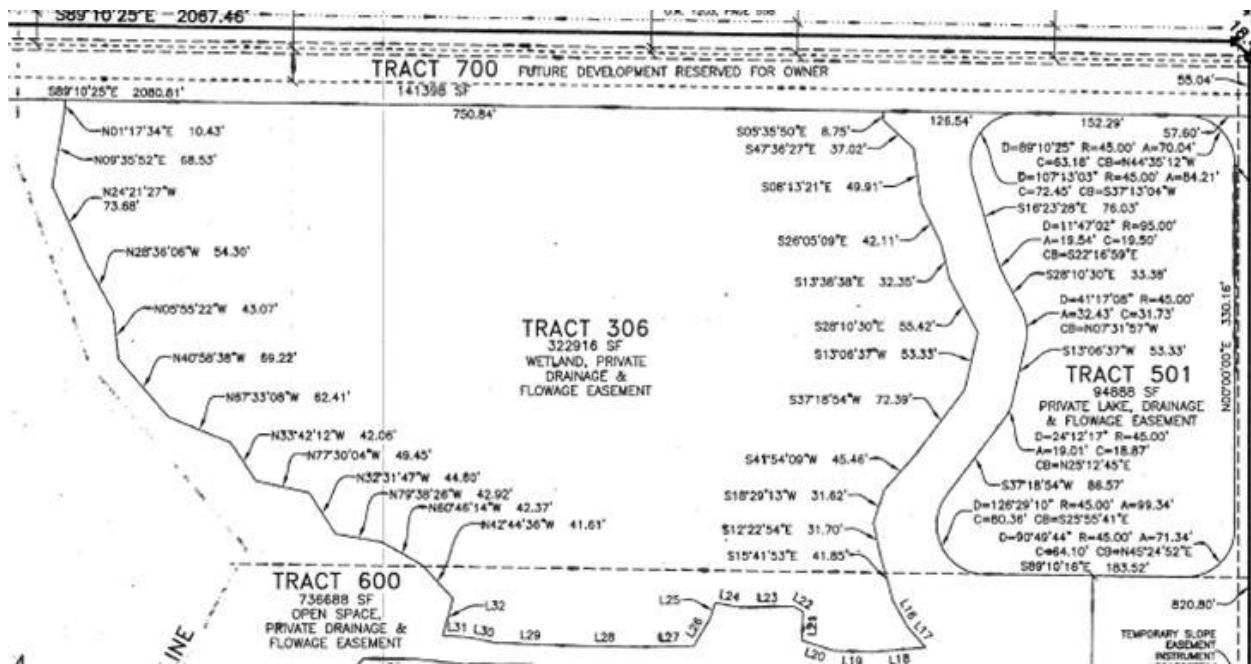
The Planning Commission specifically found, “Evidence of unified control was not clearly provided as required by 86-130(t)(3)(a).”

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. 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.

HOME SITES

PARKING (N)

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. Below 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



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 which are determined at the time of approval for the PUD 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 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 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.



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. 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 inconsistent amendment of the Binding Master Plan is not allowed.

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 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." 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 if 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.

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.

It has reported to you that it will: "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.”

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.

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
 - o 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
 - o 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
 - o 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
 - o 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
 - o 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 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.

That, as with the developer’s desired excuse for violating the LDR’s by seeking commercial development which serves the surrounding area outside the PUD, is utter nonsense.

Very significantly, the City’s environmental consultants have held firm in their conclusions that the proposed PUD amendment violates the wetland and other environmental protections of the Comprehensive Plan.

No Valid Choice but to Recommend Denial

Based on the existing law, Land Development Regulations and Comprehensive Plan of the City of Venice, the City Council has no valid choice to but to deny the proposed amendment to the Milano PUD Binding Master Plan.

We will separately present to you the compelling basis for the recommendation for denial by your Planning Commission, including specific comments by Planning Commissioners, upon receiving a transcript of that part of the hearing tomorrow.

Thank you very much 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