

CITY OF VENICE CITY COUNCIL
SARASOTA COUNTY, FLORIDA

IN RE: MILANO PUD ZONING MAP AMENDMENT

BORDER AND JACARANDA
HOLDINGS, LLC,

PETITION NO. 22-38RZ

Applicant

VENETIAN GOLF & RIVER CLUB
PROPERTY OWNERS ASSOCIATION, INC.,
and, NORTH VENICE NEIGHBORHOOD
ALLIANCE, INC., and GARY SCOTT, and,
TIM KENNY, SUZANNE METZGER, AND
SETH THOMPSON AS IDENTIFIED CIELO
HOMEOWNERS,

Affected Parties

MOTION TO STRIKE

The Applicant, BORDER AND JACARANDA HOLDINGS, LLC, by and through its undersigned counsel, hereby moves to strike certain portions of that document titled “Mr. Lobeck’s Memo to Council 5.18.23,” as well as portions of that document titled “Council Memo and Additional Exhibits from Mr. Lobeck 5.19.23,” both of which are included in the May 23, 2023, City Council Meeting Agenda as Attachments under ORD. NO. 2023-11 (the documents hereinafter referred to collectively as “Lobeck’s Memos”), and as grounds therefore states:

1. Counsel for the Affected Parties, Dan Lobeck, Esq., submitted a memo to the City of Venice City Clerk and City Council Members on May 18, 2023, which was followed up by a revised memo that

included additional argument and exhibits submitted by said Counsel to the City Council Members on May 19, 2023.

2. Counsel for the Affected Parties directed a certain portion of the January 17, 2023, Planning Commission meeting reporting to be transcribed and has submitted such transcript to the City of Venice City Clerk. Such transcript has also been included in the May 23, 2023, City Council Meeting Agenda as an Attachment under ORD. NO. 2023-11, titled "Planning Commission Excerpt from 1.17.23 Applicant's Presentation" therein (hereinafter referred to as the "Transcript").

3. Lobeck's Memos included portions of witness testimony from January 17, 2023, Planning Commission meeting, presented as quotes or direct references from the Transcript (*see, Exhibit "A"* – the pages from Lobeck's Memos containing said witness testimony). All of the witness testimony presented in Lobeck's Memos is of the witness Pat Neal.

4. A review of the complete testimony provided in the Transcript, as opposed to the witness testimony as set forth in Lobeck's Memos, shows omissions in Lobeck's Memos from the complete testimony —omissions of testimony in response to and/or in connection with the same line of questioning, and omissions from the witness testimony as quoted (*see, Exhibit "B"*).

5. Upon reading the complete testimony contained in the Transcript and considering the omissions as detailed in Exhibit "B," it is clear that the witness testimony as presented in Lobeck's Memos has been taken out of context. As a result, the witness testimony as presented in Lobeck's Memos is misleading and is a mischaracterization of the testimony on record.

6. Such action by the Affected Parties' Counsel to misrepresent and mischaracterize the witness testimony under the Transcript is highly prejudicial to the Applicant and therefore should be struck from the record.

7. The Affected Parties will have full and fair opportunity to ask questions of the Applicant and of the witness whose testimony is quoted and/or referenced, Mr. Neal, during the City Council public hearing, which shall result in no prejudice for the Affected Parties whatsoever.

WHEREFORE, for the reasons stated above, the Applicant moves for an order striking all witness testimony as quoted and referenced in Lobeck's Memos.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via electronic mail to Dan Lobeck, Esq., dlobeck@lobeckhanson.com, and to Kelly Fernandez, kfernandez@flgovlaw.com, on this 22 day of ~~March~~, 2023.

MAY

BOONE, BOONE & BOONE, P.A.

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Exhibit "A"

The pages from Lobeck's Memos purportedly quoting or referencing the witness testimony from the Transcript is included below with such witness testimony boxed in red.

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.

...

Exhibit "A"

[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

Exhibit "B"

Pages of the Transcript are provided herein with certain portions therefrom noted as follows:

- Portions of witness testimony included in Lobeck's Memos by purported quote or reference is boxed.
- Portions of witness testimony omitted from Lobeck's Memos is underlined.

Exhibit "B"

7

1 more than \$10 million in support of
2 philanthropic organizations like the women's
3 Sertoma here in Venice. This lists another nine
4 Venice organizations.

5 Unlike the public builders, Mr. Chairman,
6 we're here in the flesh and blood. We're easy
7 to talk with. You might say we're easy to
8 negotiate with.

9 I think this is a good project. I think
10 when we're done you'll be able to approve it and
11 I think you'll be proud to see it when it's
12 done. It will serve roughly 6,900 existing
13 homes, about 12,000 people, not including land
14 that isn't built on yet, and we'll testify both
15 to the need and the local nature of the shopping
16 center.

17 Thank you, Mr. Chairman.

18 CHAIRMAN WILLSON: Thank you.

19 MR. BOONE: Thank you, Mr. Neal.

20 Commissioners, for the record, Jeffery
21 Boone of the Boone Law Firm here in Venice.

22 The proposal before you all today is very
23 straightforward. It's a PUD amendment affecting
24 2 percent of the land within the PUD. As you
25 know, the decisions to be made today are based

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Exhibit "B"

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1 the exhibit that you just provided. East of I-75,
2 Laurel Road developments with the Milano PUD
3 proposal. This was first made public when you had
4 your public workshop; is that correct --

5 A. I don't recall.

6 Q. -- this PUD amendment?

7 A. I don't recall specifically, but I don't
8 dispute that either.

9 Q. Okay. And remind us again for what
10 purpose did you show this to the Planning Commission
11 and address it?

12 MR. BOONE: Do you mean today, Dan?

13 MR. LOBECK: Today.

14 MR. BOONE: Okay.

15 THE WITNESS: Well, I think for the two
16 reasons I stated, Dan. One, I pointed out that
17 the area in green is the only feasible site for
18 a grocery store north of I-75 and east of I-75.
19 I think I further stated that a typical grocery
20 store in the 40-50-thousand-square-foot basis
21 wants to see roughly 6,000 rooftops, and this
22 exceeds that number greatly.

23 And then I concluded by saying under --
24 I'll tell you what my dad would say. He said
25 real estate lasts a long time. In fact, he'd

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Exhibit "B"

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1 say the only thing that's real is real estate.
2 So I concluded by saying to Mrs. Schierberg this
3 may not be a shopping center today, though
4 I think it will be, but if it's not today it
5 will be at some other day.

6 And the point I was implicitly trying to
7 make is that we would do a better job. We would
8 protect our neighbors. We'd communicate with
9 the people at Venetian Golf and River Club.
10 We'd be responsible environmentally, and they
11 would be proud of the outcome. We have things
12 that well in excess of the requirements, like
13 our lighting standards and our mitigation
14 standards.

15 So this is a shopping center site if
16 you're in my field of work.

17 Q. (BY MR. LOBECK) Thank you. And --

18 A. Is that good enough?

19 Q. No. That was perfect, actually. And I'd
20 like to go back to -- because I missed the part of
21 this. You said a grocery store, you described the
22 size, likes to see 6,000 rooftops? What size did you
23 refer to?

24 A. I said 40 or 50 thousand square feet.

25 Q. And is that because your site and

Exhibit "B"

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1 development plan that's not quite moving forward yet
2 calls for that range of a commercial size?

3 A. Yes.

4 Q. So is it your suggestion that that
5 commercial center would serve the general needs of at
6 least 6,000 rooftops?

7 A. We're back to this matter in 186, Dan. I
8 would say that, based on all the research that we've
9 done, the City has regarded that provision as
10 inoperative and they've mostly focused on the
11 compatibility of the use in the neighborhoods. So I
12 answer your question in the negative. I was just
13 trying to demonstrate what was good about this
14 property and why it was a grocery store site.

15 Q. Okay. So whether the City has enforced
16 that provision of the LDRs or not, I'm just trying to
17 get you to confirm --

18 A. Well (inaudible).

19 Q. -- and I think you basically said it, but
20 I didn't --

21 A. Equal protection under the law. I think,
22 quote, it's a good thing if public agencies treat one
23 applicant like all the other applicants. Just
24 sayin'.

25 Q. Um-hum, um-hum. So you're confirming then

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Exhibit "B"

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1 that based on showing this -- would you describe this
2 as a market area for your commercial center?

3 MR. BOONE: I'm going to -- I'm going to
4 object to that because that's not -- that's not
5 what -- that mischaracterizes his testimony.

6 THE WITNESS: This is a list of approved
7 PUDs which are either built out or are being
8 built out in this neighborhood, and it also
9 shows land that has other PUDs headed toward it,
10 and the purpose is to demonstrate that there's a
11 demand for this property and that it's
12 compatible with the neighborhood. That was my
13 intent.

14 Q. (BY MR. LOBECK) I know, but my question
15 was are you representing here that this is the
16 general market area for your proposed development?

17 A. I wouldn't say that, no.

18 Q. And you nodded your head. I'd like the
19 record to --

20 A. Well, I've got to be careful how to nod.

21 Q. I'd like the record to reflect that when I
22 asked that question, Mr. Neal nodded his head up and
23 down.

24 A. This is a list of approved PUDs.

25 Q. I know. For what purpose are you

Exhibit "B"

1 presenting it?

2 A. To demonstrate that these are the
3 residential PUDs approved in this neighborhood.

4 Q. For what purpose, though? Are you -- are
5 you saying that this commercial area's going to be
6 really good because all these people in this big
7 area --

8 A. You and I are having too much fun, Dan.

9 Q. -- need it? Need it? Are you saying
10 that? Are you doing -- are you saying this is here
11 because all these people need a grocery store?

12 A. My statement to Mrs. Schierberg was that
13 this green site is a proposed -- is a -- obviously to
14 anybody in my trade is a grocery store site and there
15 is no other, and there's these 13 adjacent
16 developments that have residential homes in them.

17 I'm not trying to draw the conclusion that you're
18 asking me to draw.

19 Q. And that would be served by this grocery
20 store? Yes or no?

21 A. My testimony was that --

22 Q. Could you please answer the question,
23 Mr. Neal?

24 A. No, I'm not answering. You've asked what
25 my testimony is and it is that these are the approved

Exhibit "B"

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1 residential properties.

2 Q. That would be served by your grocery
3 store?

4 MR. BOONE: Objection. He's asked that
5 question about four times now.

6 Q. (BY MR. LOBECK) I think we got your
7 testimony about you'd like to see 6,000 rooftops.
8 We'll move on. That's all I'm gonna get.

9 A. Everybody in this room knows what we're
10 talking about, which is section 186 which has been
11 routinely disregarded by the City, and we think that
12 it's a matter for proper consideration of this
13 Planning Commission and the City Council.

14 Q. So you think --

15 A. The fact that that manner or that
16 particular provision of the City land use code that
17 you've identified is a pretty cool thing for you to
18 speak of, but it has not been enforced by this city.

19 Q. Okay. Is it your testimony that if the
20 provision of the Land Development Code has not been
21 enforced by the City, has been disregarded, you're
22 entitled to have it not be enforced and disregarded
23 against you today?

24 MR. BOONE: Object. Object.

25 THE WITNESS: My lawyer has put his hand

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Exhibit "B"

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1 on my arm, so I think that means something.

2 MR. BOONE: Yeah, I'm going to -- I'm
3 going to object to the form of the question
4 because our position is that the City has
5 interpreted this code language a certain way,
6 and interpreting a certain way is a totally
7 different thing than disregarding.

8 Q. (BY MR. LOBECK) Mr. Neal, to refresh your
9 memory, the Sarasota Herald-Tribune has had some
10 articles on this, and we won't talk about the one
11 that appeared yesterday.

12 A. I love the Herald-Tribune.

13 Q. I'm sure you do.

14 A. I think it said -- what did it say about
15 evidence?

16 Q. Anyway, opinions of a journalist
17 notwithstanding, you were quoted in a January 15th,
18 2022, article of the Sarasota Herald-Tribune.

19 A. Oh, no. What did I say?

20 Q. I'll tell you.

21 A. Okay.

22 Q. And we'll see if the journalist lied about
23 it.

24 MR. BOONE: I think that -- I think the
25 proper way to do this is for you to show it

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Exhibit "B"

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1 to him, Mr. Lobeck, instead of reading it
2 to him, so let him read it.

3 Q. (BY MR. LOBECK) If you could, Mr. Neal,
4 read next to the blue line.

5 MR. BOONE: You can read as much of that
6 as you want before you answer that.

7 Q. (BY MR. LOBECK) Out loud, please.

8 A. I think that's almost --

9 Q. Out loud, please.

10 A. As President Trump would say, I think
11 that's almost perfect.

12 Q. Okay. Could you read it for the record,
13 please?

14 A. Here? This blue line right here?

15 Q. The blue line.

16 A. "We think that we will reduce total
17 traffic by 27 percent by drive-by capture and
18 diversion. And we think we'll provide a way for walk
19 and bicycle and golf cart trips from the Venetian
20 Golf and River Club."

21 Maybe that wasn't accurate, but that's what I
22 thought.

23 "And that the 2,200 homes that we're building in
24 the Milano and Vistera and the 1,500 homes that
25 others are building" -- that's not really a good

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Exhibit "B"

1 sentence, but you get the drift. "Add to that the
2 existing homes and the number will easily approach
3 6,000 residents by the year 2030."

4 Well, that's before I had this map that says
5 there's more than that.

6 Q. Even more?

7 A. So I think it's accurate.

8 Q. Okay. Would you agree based on the
9 testimony of your experts that Milano has been
10 approved for 1,350 homes?

11 A. I think that -- I beg your pardon.
12 I think I added to that Vicenza and Venice Woodlands
13 to make that total. Those are the other two
14 properties that I was constructing at that time.

15 Q. Those are outside of the Milano PUD, are
16 they not?

17 A. Yes.

18 Q. Okay. As to the Milano PUD, that's been
19 approved for 1,350 homes, correct?

20 MR. BOONE: Do you know that fact?

21 THE WITNESS: I don't. You say it. I
22 don't -- I don't disagree.

23 Q. (BY MR. LOBECK) You wouldn't -- you
24 wouldn't disagree with that, would you?

25 A. No. I just don't know.

Exhibit "B"

1 Q. So when that provision of the Land
2 Development Code says that a PUD's commercial area
3 shall serve the homes in the PUD and not in the
4 general area, wouldn't you have to agree with me that
5 your proposal violates the Land Development Code?

6 A. No. I do not agree with you. I once
7 again revert to the long-standing City policy which
8 is not to enforce that provision. We were well aware
9 of it at the first beginning, we're well aware of it
10 now, and we'll demonstrate, if necessary, to the
11 elected -- to the Planning Commission and the board
12 and any tribunal having jurisdiction that that has
13 never been enforced or not uniformly enforced by the
14 City of Venice.

15 Q. How many neighborhoods are in the Milano
16 PUD? Could you agree that it's four?

17 A. Yes, four.

18 Q. And has a final plat been filed for Aria,
19 one of those four?

20 MR. BOONE: Don't guess.

21 THE WITNESS: I can't really say, Dan. I
22 just -- no.

23 Q. (BY MR. LOBECK) That's amazing. That's
24 all I have for Mr. Neal, but I would like to call on
25 the environmental consultant. Thank you, Pat.