

Reply To: West Palm Beach

August 1, 2023

Mr. James Stokes, City Attorney
City Attorney's Office
City of Port St. Lucie
121 S.W. Port St. Lucie Blvd.
Port St. Lucie, FL 34984

Dear Mr. Stokes:

Please accept this letter on behalf of my client ACR Acquisitions, LLC (ACR), clarifying a number of inaccurate statements and misrepresentations found in a letter dated June 2, 2023, sent to the City on behalf of Riverland/Kennedy II, LLC ("GL") from Shubin Bass Professional Association, objecting to ACR's application for Figure 1-6 and Map H Amendments for the development generally known as Wilson Groves, which letter City staff are now relying on to recommend denial of ACR's comprehensive plan amendment application. As we received a copy of that letter less than 24 hours prior to the Planning and Zoning Board hearing on the applications, we did not have an opportunity at that time to present a point-by-point analysis of the letter's many flaws. Nor were we permitted to submit this response at the June 26, 2023, City Council transmittal hearing on our comprehensive plan amendment application due to procedural irregularities imposed at that hearing, including but not limited to the fact that the hearing was conducted like a quasi-judicial hearing but without the benefit of disclosures or cross-examination.

As demanded, we now submit this letter prior to August 1, 2023, at 5 p.m. to be included as part of the record to correct the many factual and legal misrepresentations and to make this point indisputably clear: **there is no legal or factual basis to impose new, amended, or accelerated traffic conditions on ACR's DRI based on the applications currently before the**

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City. The City may not use ACR's request to transmit its comprehensive plan amendment as a means to divest ACR of its vested rights where there is no connection between the two.¹

As you are aware, ACR has two applications currently pending before the City: Application No. P-21-127 to amend the Conceptual Master Plan, also known as "Map H," of the Wilson Groves DRI ("DRI DO") to rearrange the location of the uses within the approved DRI, and Application No. P-21-128 to amend Figure 1-6 of the City's Comprehensive Plan to reflect these changes. Only the comprehensive plan amendment application was before the City on June 26, 2023, and that same application will again be the only one before the City on August 7, 2023. The Wilson Groves traffic analysis supporting that application indicates the new land use configuration will not result in adverse impacts, and in fact, **that the revised Figure 1-6 (Map H) proposed by ACR would generate fewer daily trips than the existing Figure 1-6.** Further, ACR is advancing construction of Becker Road (which ACR was not required to construct until it hit 2,200 residential units) and has already paid the City tens of millions of dollars for roadway improvements – all before building a single unit. Nonetheless, Staff is recommending denial of the comprehensive plan amendment unless ACR agrees to accelerate construction of its internal roadway system, which is not legally or factually defensible.

Among the many procedural irregularities and acts of disparate treatment of ACR relative to GL Homes and others in the Southwest Annexation Area, the most egregious is City Staff's reversal of position less than one week prior to the June 26, 2023, transmittal hearing for ACR's comprehensive plan amendment, a wrong made worse by the manner that that hearing was conducted. Apparently emboldened by GL's June 2, 2023 letter, after recommending approval of the applications before the City's Planning and Zoning Board (PZB), and after the PZB voted unanimously in favor of recommending approval of the applications, City staff reversed position to a recommendation of denial unsupported by any new data. Rather, the change appears to be motivated by GL's letter and the vague, unsubstantiated concerns regarding the east/west road network as presently contemplated in the various Southwest Annexation Area DRIs, as expressed by the City at its February 22, 2023, Workshop. This position was not made known to ACR until days before the hearing and less than 24 hours from the deadline imposed by the City for it to provide its presentation materials. Nonetheless, staff's position is legally and factually deficient to support denial of ACR's comprehensive plan application.

Neither of ACR's pending applications requests an increase in the vested acreage, density or intensity of development within the existing DRI – each merely rearranges the location of certain uses on the Conceptual Master Plan (known as Map H in the DRI DO and Figure 1-6 of the Comprehensive Plan), which, as demonstrated by the traffic analysis ACR submitted, will have no adverse impact on the project's planned internal roadway network.

¹ Section 163.3167(5), Florida Statutes (2023).

ACR's traffic analysis uses the same methodology (and in some places more stringent methodology) than that used by GL in its prior application for similar changes to its Map H and Figure 1-5, which the City approved in 2020. It is undisputed that the changes will not result in any new external traffic impacts, and, at buildout, the roads will function as planned. Significantly, a monitoring condition already exists in the DRI DO to provide the City with assurances that, in the event a traffic condition needs to be accelerated, it will be. The simple request before the City to change the location of uses cannot be used by the City to coerce ACR to address concerns that **already exist based on the way the vested DRIs are currently written.**

In other words, the applications do not raise a new concern that the City has not had the opportunity to deal with. The function of roads has long been contemplated by both parties as memorialized in the vested DRIs. The existing Wilson Groves DRI DO conditions cannot be renegotiated simply because ACR is requesting a change, where the requested change does not result in an impact to the City. The external trips are the same or fewer, a point no one disputes, and to the extent the function of the roadways internal to the project is impeded, the existing condition deal with it. There is no net impact.

City staff and third-party consultant reached the same conclusion, stating in the June 16, 2023 Memorandum from the Public Works, "The City's 3rd Party Consultant's review found that the proposed changes to Figure 1-6 could be accommodated within the planned roadway network for Wilson Groves at time of buildout and construction of all required transportation improvements."

Thus, the City's only concerns were based on *potential, temporary* impacts. Fortunately, the existing DRI conditions address this. As again explained in the City's June 16, 2023 Memorandum from the Public Works:

The existing Wilson Grove DRI includes a monitoring condition under Section 15.B. Based on this existing condition in the DRI, the City has the ability to require the developer to provide a monitoring analysis of the existing conditions of a roadway section within their DRI roadway obligations to ascertain the level of service on that roadway. This would allow the City to determine if a roadway segment(s) widening or initial 2-lane requirement should be accelerated.

To the extent the City is relying on the June 2, 2023 Shubin Bass letter to justify its position, such reliance is misplaced. Among the many legal deficiencies found in GL's letter, two stand out. First, the implication that the City may use the comprehensive planning process to force ACR to amend its vested DRI when such amendments are not warranted, and second that there is a rational relationship between the applications before the City and GL's proposed conditions. Finally, it cannot go without noting the hypocrisy of GL in advocating that conditions

Mr. James Stokes, City Attorney

August 1, 2023

Page 4

and requirements be applied to Wilson Groves that it expressly refused to allow the City to apply to its Riverland/Kennedy DRI.

The Wilson Groves DRI, as repeatedly acknowledged by the City at its February Workshop, is vested. Importantly, the current applications: 1) do not seek to amend any conditions of approval in the existing DRI; 2) do not seek to amend the Annexation Agreement; 3) do not cause a decrease in level of service at buildout or on any external roadways; and 4) do not seek site plan approval. In short, the mere relocation of approved, vested densities and intensities within the project boundaries in these applications does not justify the imposition of new, amended, or accelerated traffic conditions beyond what is already found in ACR's existing DRI.

GL has repeatedly objected to the City applying the conditions and requirements that it now demands that the City apply to the Wilson Groves DRI. In objection to Staff comments on its Parcel "D" MUPD application, Azalina Goldstein stated that there was no legal basis for the City to advance the Riverland/Kennedy DRI roadbuilding conditions.² Ms. Goldstein was correct, and the same law applies to the Wilson Groves DRI.

Notwithstanding having taken the opposite position with regards to its own project, GL now seeks to have the City amend the Wilson Groves DRI to advance construction of Wilson Groves' internal roadway system where no basis exists to make such a change. GL erroneously asserts that ACR's pending applications "provide the City with the opportunity to achieve the Council's directive to assure the construction of the entire 2-lane roadway network." This misguided advice ignores the well-established constitutional requirement that conditions imposed must have an essential nexus to the application and be roughly proportional to the impact caused by the project. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Here, where the data indicates that there is no alteration in impact, the proposed conditions fail to meet this well-established test of constitutionality. Thus, the imposition of these conditions would be unlawful exactions. Further, the comprehensive planning process cannot be used to alter vested rights. As stated in Section 163.3167(5):

Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380... .

Further, Section 380.06(7), *Florida Statutes*, states clearly that:

Any new conditions in the amendment to the development order issued by the local government may address only those impacts directly created by the proposed change, and must be consistent

² A copy is attached hereto as Exhibit "A."

with s. 163.3180(5), the adopted comprehensive plan, and adopted land development regulations. (Emphasis added).

In support of its absurd demand, GL refers to the February 22, 2023, workshop in which City staff indicated concerns that some roads may – temporarily – not meet the level or service standards if the 2-lane network called for in the various DRIs is not built. At that workshop, the City evaluated recommendations based on Marlin’s analysis of the **existing DRI conditions** regarding road construction triggers and the current conditions in the Southwest Annexation Area. The result of that workshop was the adoption of a Policy directing the City Manager to “take all reasonable steps to: a) eliminate the trip generation trigger option from the existing DRI Development Orders for triggering 2-lane roadway network improvements and require utilization of Dwelling Units for triggering 2-lane network roadway improvements...” At the Workshop, GL representative Kevin Ratterree objected to this Policy stating: “We disagree with and do not support any proposed elimination of the trip generation thresholds established in the DRI DOs.”³ Mr. Ratterree also professed that:

GL Homes is open to discussions and methods of getting the entire two-lane network built provided that the same rules will apply equally to all the developers in the Southwest Annexation area.

Nonetheless, GL now argues that “the existing language in the current Comprehensive Plan and development orders for the DRIs does not adequately ensure the completion of the essential roadway network.” Even assuming that is true, it provides no legal basis to alter ACR’s existing vested DRI because the City’s findings are based on *current* conditions, the *existing* language in the vested DRIs and anticipated development by multiple parties. Thus, ACR’s *proposed* amendments are not the cause of any stated deficiency, and ACR cannot legally be saddled with remedying existing, anticipated deficiencies. Nor can the City reopen the Wilson Groves vested DRI. Importantly, the reliance on the February 22, 2023, Workshop as a basis for imposing conditions on the pending ACR applications is an admission by the City and GL that it is not ACR’s current applications that cause the issue complained of – it is merely an attempt to make ACR remedy a harm that it did not cause. Again, ACR cannot be held responsible for existing deficiencies, or deficiencies that will arise with or without its proposed changes. Nor can it be divested of its vested rights in its existing DRI.

GL’s proposal ignores Section 163.3180(5)(h)(1)(c), which states that the City must allow an applicant to meet concurrency through execution of a binding agreement, which ACR has done. Particularly because ACR has substantially changed its position by paying approximately \$17.5

³ See Exhibit “B,” transcript of February 22, 2023, Workshop at page 1.

Mr. James Stokes, City Attorney

August 1, 2023

Page 6

million dollars to the City for transportation improvements and by posting a \$33 million dollar bond for the accelerated construction of 4 lane miles of Becker Road - all prior to constructing a single unit and in justifiable reliance on its vested DRI and executed agreements with the City and GL, the City is prohibited from imposing the newly proposed conditions.

In other words, GL invites the City to impose illegal exactions contrary to state and federal law, while inexplicably asserting that doing so would “reduce the City’s exposure to litigation and conflict.” Please allow me to assure you that is not the case.

To be clear, ACR’s existing development orders contain the triggers for ACR’s obligations to construct roads. Without a change in impacts, there is no basis, no nexus, to change ACR’s existing obligations concerning timing.

Although GL offers a slew of baseless claims insinuating that somehow the applications before the City mean that ACR will not “honor its prior commitments,” these unfounded statements are simply unwarranted speculation completely devoid of factual support. For example, GL’s assertions that ACR’s road construction will not be “timely” or “will not function as originally contemplated” are without legal or factual merit. ACR is not asking to change the timing of what was originally approved, and ACR will construct the roads at the time required by the existing development orders. No part of any application before the City proposes any change that would suggest otherwise. GL’s assertions that ACR will not “honor its prior commitments” is simply baseless and absurd considering that ACR is currently extending Becker Road for 2 miles – from its entrance to Range Line Road – before it has built a single unit. As GL correctly states, “Objective 1.2.11 of the City’s Comprehensive Plan provides that Wilson Groves shall be developed consistent with the Wilson Groves DRI Development Order and with the Annexation Agreement.” That is all ACR is trying to do.

GL cites to a string of cases, none of which offer the City legal refuge should it choose to impose illegal exactions or violate the limitations imposed by state statutes. Instead, the cases cited by GL simply run through basic principles of land use law and do not tie the standards set forth in those cases to GL’s requests. For example, when GL cites *Pinellas County v. Richman Group of Florida*, 253 So.3d 662 (Fla. 2d DCA 2017) for the proposition that the City may deny comprehensive plan amendments if it has a rational basis to do so, it inexplicably juxtaposes that statement with a request to impose conditions “beyond” those set forth in ACR’s vested DRI. To be clear, the *Pinellas* case offers no authority to impose conditions that bear no essential nexus or rough proportionality to the impacts that would be caused by the application and does not explain how the City will escape the boundaries set by Section 380.06(7), *Florida Statutes*, when it mandates that “[a]ny new conditions in the amendment to the development order issued by the local government may address only those impacts directly created by the proposed change.”

Mr. James Stokes, City Attorney

August 1, 2023

Page 7

Further, GL cites several statutes concerning the consistency of comprehensive plans and the required data and analysis, apparently choosing to ignore the traffic study ACR was required to submit. Again, to be clear, the ACR traffic study proves that there is no adverse impact to the City's planned roadway network, and GL's attempt to attack the methodology it itself used before this same governing body for the same applications is, at best, disingenuous.

GL then cites a number of land use cases that again, offer lessons in basic principles of land use law, but in no way obviate the City's legal obligation to abide by Florida Statutes and refrain from imposing conditions that violate constitutional law as described in the *Nollan* and *Dolan* cases. As GL kindly points out, in citing *Fraternal Order of Police, Metro. Dade Cty., Lodge No. 6 v. Dep't of State*, 392 So.2d 1926 (Fla. 198), legislative power is in fact "subject only to constitutional limitations."

In short, GL's letter does not offer legal or factual support that would allow the City to impose unlawful conditions that lack both a nexus and rough proportionality to the impact caused by the applications before the City.

Finally, please note that, on behalf of our client, we take issue with the disparate treatment ACR is receiving compared to its similarly situated counterparts, specifically GL, particularly in light of the City's obligation as set forth in the Becker Road Agreement to treat all parties equally. As part of its traffic study supporting these applications, the City required ACR to submit a detailed parcel analysis, that it did not require GL to include in its traffic study supporting similar applications. Further, the City required ACR to submit a detailed phasing analysis as part of its traffic study in support of these application, but again, it did not require the same of GL for its traffic study.

In terms of direct, quantifiable differences, to date, GL has been approved to build 4,640 units, and is only being required to build 12 lane miles of its internal road network. By contrast, ACR has already provided the City with \$17.5 million in capital outlay and is building 4 lane miles of Becker Road for a total committed cost of approximately \$50.5 million *without having been approved to construct a single unit*. If the conditions requested by staff are approved, ACR will only be able to build 2,200 units in exchange for constructing 12 lane miles, plus the \$17.5 million in capital outlay. This difference in treatment is simply not rational. GL has constructed roads based on its development orders and has amended its development orders based on identical traffic methodology to that proposed by ACR. ACR is asking for no more and no less than the City has already approved for GL.

There is, however, one point upon which ACR and GL can agree – that the City must treat the parties equitably. In light of the City's past approval of GL's application making essentially the same request using the same methodology, and based on the \$50.5 million dollars ACR has

Mr. James Stokes, City Attorney

August 1, 2023

Page 8

committed to this project to receive substantially less than GL has had approved, the only legal and equitable outcome is to approve ACR's pending applications without imposing the unlawful conditions first urged by GL and now suddenly recommended by Staff. If the City aligns with GL and denies ACR on these grounds, ACR will use all legally available remedies to address these inequalities as it has in the past.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tara W. Duhy".

Tara W. Duhy, Esquire
Executive Shareholder

Enclosures

C: Susan L. Trevarthen
Mayor Shannon M. Martin
Vice Mayor Jolien Caraballo
Councilwoman Stephanie Morgan
Councilman David Pickett
Councilman Anthony Bonna