



REPLY TO: TALLAHASSEE

November 26, 2024

VIA ELECTRONIC MAIL AND UNITED STATES MAIL

Jeff Childers, Esquire
Childers Law, LLC
2135 NW 40th Terrace, Suite B
Gainesville, FL 32605

Re: *Childers' Letter Dated November 15, 2024*

Dear Mr. Childers:

I have reviewed your letter dated November 15, 2024, in which you request that the City of Alachua, Florida ("City"), schedule a hearing on December 10, 2024, for final approval of the Special Exception Permit for the Tara April Project. In support of your request, you made the following allegations:

1. Pursuant to Section 166.033, *Florida Statutes*, the City is required to schedule a hearing on December 10, 2024, for final approval of the Special Exception Permit for the Tara April Project;
2. Your client "holds enforceable vested rights" "by virtue of its substantial investments in reliance on existing approvals and assurances from the City and other regulatory bodies like the WMD"; and
3. "The County's tardy interference, only arising after the significant investments were made in reliance on prior approvals, is in bad faith."

Each of your allegations is addressed separately below.

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ORLANDO
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1. Whether Pursuant To Section 166.033, *Florida Statutes*, The City Is Required To Schedule A Hearing On December 10, 2024, For Final Approval Of The Special Exception Permit For The Tara April Project

Section 166.033, *Florida Statutes*, states as follows, in pertinent part:

(1) Within 30 days after receiving an application for approval of a development permit or development order, a municipality must review the application for completeness and issue a letter indicating that all required information is submitted or specifying with particularity any areas that are deficient. If the application is deficient, the applicant has 30 days to address the deficiencies by submitting the required additional information. Within 120 days after the municipality has deemed the application complete, or 180 days for applications that require final action through a quasi-judicial hearing or a public hearing, the municipality must approve, approve with conditions, or deny the application for a development permit or development order. Both parties may agree to a reasonable request for an extension of time, particularly in the event of a force majeure or other extraordinary circumstance. An approval, approval with conditions, or denial of the application for a development permit or development order must include written findings supporting the municipality's decision. The timeframes contained in this subsection do not apply in an area of critical state concern, as designated in s. 380.0552 or chapter 28-36, Florida Administrative Code.

Accordingly, pursuant to Section 166.033(1), *Florida Statutes*, with respect to any application for a “development permit or development order” that requires “final action through a quasi-judicial hearing or a public hearing,” the municipality must, within 180 days, “approve, approve with conditions, or deny the application.”

While Section 166.033(1), *Florida Statutes*, sets forth this 180-day provision, it is silent, however, as to the ramifications when a municipality fails to take the required action within 180 days. As such, the statute does not set forth any procedural recourse for an applicant where a municipality fails to “approve, approve with conditions, or deny the application for a development permit or development order” within 180 days. The Florida Legislature adopted the 180-day provision in 2019, pursuant to HB 7103. *See* § 8, 2019-165, Laws of Fla. The legislative history for HB 7103 does not address this issue.

To date, there are no reported cases regarding the 180-day provision. There are a few decisions that are marginally relevant to the extent the courts addressed an applicant's recourse where a municipality failed to adhere to other requirements contained in Section 166.033, *Florida Statutes*.

In *Edgewater House Condominium Association v. City of Fort Lauderdale*, 825 Fed.Appx. 658 (11th Cir. 2007), the United States Eleventh Circuit Court of Appeals stated as follows about the procedural history of the case:

The state court denied Edgewater's Certiorari Action on the merits on May 23, 2019. With respect to Edgewater's statutory claim, *the court agreed with Edgewater that the City Commission did not comply with § 166.033(2), but it decided that the statute provided no remedy for this violation.* Instead, the court instructed Edgewater to request "an amended written notice citing to the specific basis" for the Commission's decision. The court did not explicitly discuss Edgewater's due process claim but noted that it had "carefully considered the briefs, the record, and the applicable law" in denying Edgewater's Certiorari Action on the merits.

Id. at 661 (emphasis supplied). The court's assessment of the trial court's order is accurate. Therein, the trial court stated as follows:

In its petition, Edgewater contends the City's Resolution No. 18-160 does not cite to specific provisions of the City's Unified Land Development Regulations ("ULDR"), Comprehensive Plan, or Downtown Master Plan, upon which the denial was based, as is required by section 166.033(2), Florida Statutes. In its Response, the City acknowledges its Resolution No. 18-160 does not cite specific provisions of its plans or codes upon which the denial was based. Section 166.033(2), Florida Statutes, requires that "[t]he notice must include a citation to the applicable portions of an ordinance, rule, statute, or other legal authority for the denial of the permit." § 166.033(2), Fla. Stat. *However, section 166.033, Florida Statutes, does not provide any procedure or remedy to address the City's undisputed failure to comply with section 166.033(2), Florida Statutes. Instead, Edgewater may request and the City may issue an amended written notice citing to the specific basis of its denial of Edgewater's site plan application.* Accordingly, having carefully considered the briefs, the record, and the applicable law, this Court

dispenses with oral argument and the Petition for Writ of Certiorari is hereby **DENIED on the merits**.

Edgewater House Condo. Ass'n, Inc. v. City of Fort Lauderdale, Case No. 18-022278 (Fla. 7th Cir. Ct. May 23, 2019) (“Final Order Denying Petition for Writ of Certiorari”) (emphasis supplied).

Similarly, in *Mills v. Town of Windermere*, 23 Fla. L. Weekly Supp. 678a (Fla. 9th Cir. Ct. Nov. 30, 2015) (“Final Order Denying Second Amended Petition for Writ of Certiorari”), the petitioner in a certiorari case alleged that the town deprived him of due process based upon a violation of Section 166.033, *Florida Statutes*. The petitioner based this contention on the fact that the town provided written notice of its decision, as required by Section 166.033, *Florida Statutes*, more than fourteen (14) months after the town council had voted to deny his variance request.

In rejecting this argument, the circuit court recognized that “it is rare for a court to reverse an agency’s order due to a delay in rendering a final decision,” and that “Florida courts are reluctant to do so even when statutory deadlines were violated.” (Emphasis supplied). Moreover, in light of these principles, the court explained that “Florida courts only reverse orders based on this argument when the aggrieved parties demonstrate how the delays prejudiced them.” Applying this standard, the court ruled that the petitioner had failed to demonstrate how the town’s delay had resulted in any prejudice. Moreover, the court found that the petitioner had not explained “how he was prevented from pursuing a petition for writ of mandamus forcing the Council to enter an order.”

Thus, Section 166.033, *Florida Statutes*, does **not** require the City to schedule a hearing on December 10, 2024, for final approval of the Special Exception Permit for the Tara April Project. *Cf. Caliente Partnership v. Johnston*, 604 So. 2d 886, 888 (Fla. 2d DCA 1992) (“the statute is silent on specific remedies and we decline to fashion one”). Moreover, it cannot be refuted that your client has caused extensive delays in the City’s ability to process your client’s application for a Special Exception Permit for the Tara April Project and, by its conduct, has waived any 180-day requirement even if applicable.

2. Whether Your Client “Holds Enforceable Vested Rights” “By Virtue Of Its Substantial Investments In Reliance On Existing Approvals And Assurances From The City And Other Regulatory Bodies Like The WMD”

As an initial matter, your November 15 letter fails to identify any “investments in reliance on existing approvals and assurances from the City and other regulatory bodies like the WMD.” Additionally, you fail to identify any purported “vested rights.” Moreover, as a matter of law, your client cannot have a vested right which compels the City to approve a pending application for a Special Exception Permit for Tara April. Rather, the determination of whether to approve your client’s pending application for a Special Exception Permit for Tara April will be made during a quasi-judicial hearing and will be based upon competent, substantial evidence.

Your client's vested rights' contention also ignores certain statements by the City Manager in his letter dated June 29, 2022, to Sayed Moukhtara in which the City Manager stated as follows:

It has come to the attention of City staff ("Staff") during review of development applications involving the above three referenced projects that were submitted at various times, that numerous aspects and requirements for them are inextricably intertwined or dependent on other prerequisites before they can be considered for final approval. In other words, none of the above projects stands on their own merit, but instead, they are dependent on the approval of the other applications.

As such, Staff, including Planning & Community Development and Public Services, will not be proceeding with further review of each of these projects in their current form, as it does not appear that any of them can receive ultimate final approval standing individually on their own merit. *As Staff has been reviewing the viability of the above referenced projects, the interdependency of one project on the other or on other applications has become readily apparent.* Staff does not wish to mislead any applicant regarding the success of an application.

(A copy of the City Manager's June 29 letter is attached hereto as Exhibit "A.") (emphasis supplied).¹ The City Manager's June 29 letter pertained to Tara Forest West, Tara April, and Tara Phoenicia.

Thus, your client does not hold "Enforceable Vested Rights" which would compel the City to approve your client's pending application for a Special Exception Permit for Tara April.

3. Whether "The County's Tardy Interference, Only Arising After The Significant Investments Were Made In Reliance On Prior Approvals, Is In Bad Faith"

At this juncture, the City's Planning and Zoning Board has not yet conducted a quasi-judicial hearing on your client's pending application for a Special Exception Permit for Tara April. Similarly, the City Commission has not conducted a quasi-judicial hearing on your client's pending

¹ The Tara Forest West Project is dependent upon two (2) new roads to be located in the Tara Phoenicia Project over and adjacent to the Mill Creek Cavern and Cave System. The Tara April Project is dependent upon the Tara Forest West Project's residents utilizing the recreational trails to fulfill the recreational enhancement requirement. The Tara Phoenicia Project is dependent upon the Tara April Project for flood plain compensation.

application for an Infrastructure Plan. Thus, your contention that the County's concerns constitute "tardy inference" is nonsensical. It is well established in Florida law that affected parties and members of the public have the right to raise concerns with pending applications.

Moreover, the County has provided the City with evidence that your client failed to provide regarding the Mill Creek Cavern and Cave System. For example, the County has provided to the City a document which overlays your client's proposed projects over the Mill Creek Cavern and Cave System. (A copy of this document is attached hereto as Exhibit "B."). To date, your client has failed to provide evidence which demonstrates that your client's proposed projects will not adversely impact the Mill Creek Cavern and Cave System or that your client's proposed projects can be safely developed over and/or adjacent to the Mill Creek Cavern and Cave System.

Objective 1.7 of the Conservation and Open Space Element of the City's Comprehensive Plan states as follows:

Objective 1.7: Geological Resources

The City shall identify, protect and conserve significant geological resources and their natural functions.

"Geological resources" are defined as follows in the City's Comprehensive Plan:

Geological resources: a general reference category that includes the geologic features defined herein.

(See Administration and Implementation Element at "DEFINITIONS.").

A "Geologic feature" is defined as follows in the City's Comprehensive Plan:

Geologic feature: prominent or conspicuous characteristics of naturally occurring materials in the landscape. These features include, but are not limited to sinkholes, caves, stream bluffs, escarpments, outcroppings and springs.

(See *id.*) (emphasis supplied).

Thus, the City's Comprehensive Plan mandates that the City shall "protect and conserve" the Mill Creek Cavern and Cave System. Yet, to date, your client has failed to provide any ground penetrating radar or electromagnetic imaging to demonstrate that your client's proposed projects will not adversely impact the Mill Creek Cavern and Cave System or that your client's proposed projects can be safely developed over and/or adjacent to the Mill Creek Cavern and Cave System.

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Your client has also failed to demonstrate compliance with Policy 5.1.a of the Future Land Use Element of the City's Comprehensive Plan, which states as follows:

Policy 5.1.a: *Topography*:

The City shall protect the natural topography of the City, including steep and seepage slopes, by requiring new development to include techniques to minimize negative impacts on the natural terrain. An emphasis will be placed on retaining the natural function of seepage slopes during development. Additionally, retention of existing native vegetation will be encouraged as one method of protecting slopes.

Based upon information provided by your client, the Tara Phoenicia Project proposes to add approximately 9,000 truckloads of cut and fill which will total approximately 130,000 cubic yards. Similarly, the Tara April Project also proposes a substantial change in the topography of the subject property. Thus, the Tara Phoenicia Project and the Tara April Project propose to substantially alter, not protect, the natural topography of the City.

The above-referenced provisions of the City's Comprehensive Plan are just a few examples of deficiencies associated with your client's pending applications.

In conclusion, all of the allegations in your November 15 letter are without merit. Please do not hesitate to contact me if you have any questions or need further information.

Sincerely,



David A. Theriaque

Enclosures

cc: Mike DaRoza, City Manager
Marian Rush, City Attorney
Kathy Winburn, City Planning and Zoning Director



City of Alachua

MAYOR GIB COERPER
Vice Mayor Jennifer Blalock
Commissioner Shirley Green Brown
Commissioner Dayna Miller
Commissioner Edward Potts

OFFICE OF THE CITY MANAGER
MIKE DAROZA

June 29, 2022

Sayed Moukhtara
7717 NW 20th Lane
Gainesville, Florida 32605

RE: TARA FOREST WEST, TARA APRIL & TARA PHOENICIA

Dear Mr. Moukhtara:

This letter is in regards to the above referenced projects.

It has come to the attention of City staff ("Staff") during the review of development applications involving the above three referenced projects that were submitted at various times, that numerous aspects and requirements for them are inextricably intertwined or dependent on other prerequisites before they can be considered for final approval. In other words, none of the above projects stands on their own merit, but instead, they are dependent on the approval of the other applications.

As such, Staff, including Planning & Community Development and Public Services, will not be proceeding with further review of each of these projects in their current form, as it does not appear that any of them can receive ultimate final approval standing individually on their own merit. As Staff has been reviewing the viability of the above referenced projects, the interdependency of one project on the other or on other applications has become readily apparent. Staff does not wish to mislead any applicant regarding the success of an application.

If you wish to discuss the above, a meeting with City staff can be arranged.

Regards,

Mike DaRoza
City Manager

Cc: Kathy Winburn, Planning & Community Development Director
Rodolfo Valladares, Public Services Director
Justin Tabor, AICP, Principal Planner
Adam Hall, AICP, Principal Planner

EXHIBIT

A

Aug. 18, 2022 - Meeting

City of Alachua

Adam Hall	Planning
Maria B. Rush	city attorney
MIKE DAROZA	CITY MANAGER
Kathy Winburn	Planning
Justin Tebar	Planning

Applicant

Adam Boukar
Jay Brown, JBPro
Chris Potts, JBPro
Cole Barnett, Salter Fleiber, PA
Denise Hutson, Salter Fleiber, PA
SAYED MOWKHETARA
SILVIA MOWKHETARA
Clay Sweger, eda
SERGIO REYES, eda

