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**MEMO**

Michael E. Roeder, AICP  
Director of Zoning  
and Land Use Planning

**TO:** Herons Glen Recreation District Board of Supervisors  
**FROM:** Tom Hart   
**RE:** Boundary Agreement  
**DATE:** October 19, 2009

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The following is an update on the status of the "Boundary Agreement." The last of the several agreements which together we have called the Boundary Agreement was executed by all of the parties earlier this year. Lynn Nelson, as Chair, signed for the Rec District on 2/26/09. Bert Page, as President, signed on behalf of the HOA. That last agreement referenced the prior versions as well as a prior amendment to the first version and it incorporated all of those prior documents. It is that final agreement which I here refer to as the "Boundary Agreement."

That Boundary Agreement, however, was not signed by Windham. They purchased from Taylor so late in the process that it was decided to leave them out of the Boundary Agreement. (I am referring to Taylor Woodrow and Taylor Morrison interchangeably in this memo.) Instead, Windham signed a separate document, the "Assignment and Assumption Agreement," binding themselves to all of the obligations of Taylor which were contained in the Boundary Agreement, with three exceptions. Those exceptions left Taylor with the following continuing obligation under the Boundary Agreement: a) pay assessments when due for Dennisport cul de sac Lots 743, 744, 749, 750 and 751; b) construct replacement homes for the 3 sets of owners relocating from the cul de sac lots, and: c) pay the costs to modify the big gate at the end of Avenida del Vera where it connects to Magnolia Landing. In the balance of this report when I refer to the Boundary Agreement I am doing so with the understanding that Windham now has certain responsibilities under that agreement by virtue of the Assignment and Assumption agreement.

To the best of my knowledge all obligations of all parties under the Boundary Agreement have been completed at this time with the following exceptions: 1) the Dennisport gate has not been permitted or constructed; 2) the boundaries of the parties have not yet been officially corrected; 3) the Dennisport cul de sac has not been carved out of the Herons Glen communities.

The first item also includes some small land turnovers. The second item refers primarily to the Rec District and CDD boundaries (the HOA boundary is associated with the Rec District boundary). The third item is just a logical result of the second item having not yet been accomplished, but is worthy of

special attention for purposes of clarity. Also, after the third item is accomplished, Windham and/or Taylor are obligated to payoff all Rec District Bonds as well as the balance of that year's annual assessments to the HOA and Rec District.

The starting point for the finalization of item number 2, getting the boundaries corrected, is for the Rec District and the CFM CDD to file petitions with Lee County asking the County Commissioners to change the District charters to the newly coordinated boundaries as described in the Boundary Agreement. The two petitions were contemplated to be filed simultaneously in order to have them make more sense to the County staff and help expedite the process. The Rec District approved the filing of its petition shortly after the Boundary Agreement was signed, back in February of this year. The CDD, however, needed more time for unspecified reasons and then during the summer let us know that it was not going to be able to file the petition exactly as previously contemplated.

Perhaps due to financial concerns, the CDD decided, before its petition to the County was filed, to change its proposed boundaries on its South side to now exclude approximately 400 acres of adjacent land which Windham owns (having purchased it from Taylor Morrison). It was not stated and I do not know the rationale, but it could be the case that Windham did not want to make any additional land subject to the CDD assessments so that it would not become liable at this time for additional CDD assessments.

The CDD, however, did agree to have its engineer revise its proposed boundaries to remove those 400 acres on the South without changing any of the agreed-upon boundaries which were coterminous with the proposed Rec District/HOA boundaries. Their stated intention for making those changes was to allow the CDD to follow through with its obligation to submit boundary changes to the County as contemplated by the Boundary Agreement.

That would have likely resolved the problem and put us on a track to get all of the boundaries resolved including the elimination of the Dennisport cul de sac from Herons Glen. A couple of weeks ago, however, I learned from the CDD attorney that he was not authorized to move forward with that petition to the County and he did not know when such authorization might be given. Windham as the biggest landowner in the CDD, is the primary source of funds for anything which the CDD would need to do. I have heard from various other sources that Windham is having financial difficulty with the Magnolia Landing project, but I do not have first hand information regarding that other than to say that I was present at the CDD Board meeting when it was reported to that Board by its attorney that Windham had not paid some of its assessments and it was suggested that it would be appropriate for the CDD Board to initiate some kind of action to collect those past due obligations.

As for the Dennisport gate, item number one in the list of unfinished Boundary Agreement business, it is my understanding that Taylor Morrison complied with its promise under the Boundary Agreement and timely applied for the gate permit, but the County has determined that it will not issue that permit until the Taylor Woodrow/ Windham re-zoning application is complete. The County Development Review staff, apparently, said that they want the gates (both Dennisport and Avenida del Vera) shown on the zoning Master Concept Plan and they want all of that approved through the public hearing process before they will be able to issue that gate permit.

The Taylor Morrison/Windham re-zoning case that I am referring to is the same one that we have been watching and reporting on for several years. That re-zoning application was originally intended to do four things: 1) disconnect the Glen from Magnolia at the Avenida ("construction") gate; 2) add some multi-family units in Magnolia; 3) realign the Magnolia entry road, and 4) eliminate Nalle Grade Road from the plan. At the insistence of the County, Taylor Woodrow later re-submitted the application (about two years ago) and this time included the 400+ acres which they owned to the South, which land is adjacent to the existing Magnolia Landing parcels. That application has progressed very slowly, for whatever reason, and no activity has occurred on it for several months now.

My concern, given the apparent financial problems at the CDD and given that they have already said they do not presently wish to include those additional 400 acres in the CFM CDD is that the Taylor/Windham re-zoning case will either be withdrawn or die for lack of prosecution. Without that re-zoning going forward and ultimately being approved in some form which authorizes the separation of the communities we are being told that the gate permit cannot be issued.

Under these circumstances it may become important that the HOA or the Rec District or both go to Lee County and ask for direction as to the separation of the two communities. It may be necessary for us to file our own re-zoning application for the sole purpose of separating the two communities. If successfully done, that should solve the problem of getting the Dennisport gate permit. That process would likely be fairly costly and time-consuming. Hopefully, a re-zoning for this limited purpose could be accomplished, but as you know Magnolia Landing and Herons Glen together make up a Development of Regional Impact (DRI) and I am not certain that we could avoid having to also amend the DRI to accomplish what we need and if we have to do that the costs and time involved in the whole process could be greatly magnified.

The situation with Windham and the CDD is difficult to understand or predict at this time, but if matters do not improve soon I think it would be a good idea for us to set up a meeting with County staff to at least discuss all of this and then, if it appears likely to be of value, to explore the costs associated with filing an application to re-zone for these limited purposes.

I recognize also, of course, that there may be recourse in the form of a lawsuit against Windham or Taylor for breach of the Boundary Agreement. I think it is fair to say they have now, or will soon have, failed to meet their obligations under that agreement. Such a lawsuit, however, would not solve the immediate problem, i.e the zoning problem, and might be premature in any case until we find out what the cure process is and what it might cost the Herons Glen community to achieve that cure.

I see all of these issues and contemplated actions as inter-related from the Herons Glen point of view. They are not exclusively Rec District nor exclusively HOA problems. They do, however, lend themselves somewhat to a division of labor at this time because the Boundary approvals are the primary concern to the Rec District and the Dennisport gate is of primary concern to the HOA.