

Memo

To: Honorable Mayor and Town Commissioners
From: Thomas J. Baird, Town Attorney
Date: August 21, 2024
Subject: Development Projects Proposed in the PADD
Cc: John O. D'Agostino, Town Manager
Nadia DiTommaso, Director Community Development
Karen J. Golonka, Anders Viane, Planners

Preface

At its July 3, 2024 meeting the Town Commission (Commission) discussed the project known as The Residences at Tenth and Park, which some commissioners learned about from an article in the Palm Beach Post. Commissioners expressed frustration because they believed they were not informed about the project and learned that it had already been presented to the Planning & Zoning Board. The Commission wanted it and the public to be informed, and be more fully engaged regarding the project. I informed the Commission that because the quasi-judicial process had already begun, the Commission was limited to having an informational workshop regarding the intensity of development in the Park Avenue Downtown District (Downtown).

The Town Manager left on vacation, but Community Development Department staff (Staff) and I exchanged outlines on the parameters of the workshop. Based upon conversations I had with commissioners individually, I understood the Commission wanted the workshop to take place in October. Nevertheless, Staff noticed the workshop for August 21, 2024. The notice states that the purpose of the workshop is to present information to the Commission and public regarding two major mixed use projects proposed in the Downtown. As stated in the notice, the workshop is to examine the two major projects in the context of development as it relates to the Town's existing Land Development Regulations (LDRS) and Comprehensive Plan (Plan) objectives and policies for the Downtown. Subsequently, there was confusion as to whether the workshop would take place on August 21 or in October.

This memo follows the notice and addresses the two major projects: The Residences at Tenth and Park Avenue (Tenth) and Kelsey on the Park (Kelsey) in the context of the LDRS and Plan objectives and policies. This memo presents the general metrics of these two major projects based upon the

Commission's vision for the Downtown as expressed by the relevant LDRS and the objectives and policies of the Plan.

The Significance of the Town's Comprehensive Plan and LDRS

Florida courts have likened a Comprehensive Plan (Plan) to a municipality's constitution. The Plan is a legislative document that expresses the Commission's vision for the Downtown and the objectives and policies are subject to the Commission's interpretation of how they are applied to individual projects proposed by developers. It is the vision of the Commission, not the Town Attorney, Town Manager, or Staff that matters when applying the land development regulations (LDRS) and objectives and policies of the Plan to projects. This is particularly the case when waivers to the Plan's objectives and policies and the LDRs are sought for projects. This memo presents the vision of the Commission for the Downtown as currently expressed by the objectives and policies of the Plan and the LDRS governing the Downtown. Importantly, because the Plan is adopted by an ordinance, it is a local law (as are LDRS). Legally, this means that the Commission must strictly construe its LDRS and the objectives and policies of its Plan, meaning that the Commission is somewhat limited in its otherwise broad discretion when granting waivers to these laws.

The Projects

RESIDENCES AT TENTH AND PARK AVENUE (Tenth)

Tenth has requested the approval of a site plan on 2.92 acres, for a 16-story apartment complex with 595 apartments at a density of **208 units per acre**. The density proposed relies on the Commission granting a waiver to substantially exceed the average density of 48 units per acre established for the Downtown, in reliance on the "bucket of units" which is manifested in Policy 12.2 of the Future Land Use Element (FLUE) of the Plan. The project also includes 11,765 of restaurant and some retail. The height of the complex is increased by the proposed reliance on a Town ordinance that exempts four floors of structured parking from the calculation of height. Tenth's plan also relies on an "Air Rights Easement" to develop a pedestrian bridge over Greenbriar Court, a public right of way. Use of this easement requires the relinquishment of the MacArthur Foundation's reversionary rights. In addition there is a need for the abandonment of certain easements. A development of this intensity will also require the new construction of a Master Lift Station to handle the effluent generated by this major project.

KELSEY ON THE PARK (Kelsey)

Kelsey's original project described a 17 story complex featuring 720 residential apartments and 17,998 s.f. of retail / commercial space on 2.5 acres. Staff evaluated this project and in produced some analysis of it in a January 31, 2022 memo. Staff concluded that the project *"does not respect Park Avenue or the residential areas to the south as required by the Comprehensive Plan"*

Objective 12 of the FLUE, entitled "Redevelopment of the Historical Downtown Area" calls for development that is well integrated into the surrounding neighborhoods. Regarding this objective,

Staff wrote *“As presented, the applicant is maximizing density, height, and FAR in a way that is not complimentary to the scale and traditional character of the downtown.” Finally, staff noted that the applicant should “provide ... a detailed justification narrative explaining to the Town Commission how this project is in keeping with the purpose and intent established for the PADD.”*

The current Kelsey proposal is insignificantly reduced in intensity, by reducing its height by one (from **17** stories to **16**), and the number of units from **720** to **500**. The density of Kelsey’s current proposal at **233 units per acre**. Similar to Tenth, this **density** substantially exceeds the average density in the PADD of 48 units per acre. Like Tenth, the application for this substantial increase in density relies on a waiver application¹ based upon the “basket of units” approach contained in Policy 12.2 of the Future Land Use Element (FLUE). The Kelsey project also relies on 4 floors of structured parking being exempt from the calculation of the project’s height.

Similar to Tenth, Kelsey’s development would require the relinquishment of certain rights which inure to the benefit of the public. Kelsey proposes that the Commission abandon an alley dedicated for public use, and allow the developer to purchase² the land to be abandoned for its appraised value. Also similar to Tenth, the abandonment of the alley would require the MacArthur Foundation to relinquish its reversionary rights.

Although the Tenth project must be evaluated based on the same Plan objectives and policies, and LDRS, Staff concluded in its most recent review that unlike the original Kelsey proposal the Tenth project was consistent with the objectives and policies of the Plan, including those discussed below.

The Property Owner’s Density Waivers Are Justified Based On A Train Station

To justify the density of these projects, the developers of the two projects must rely upon the premise that a Tri-Rail station will be constructed. The increase densities based upon a train station, the projects would necessarily have to be developed in accordance with Tri-Rail’s Transportation Overlay District (TOD) policy³. According to the information initially provided by Kelsey to staff, its project will be the central focus of a TOD. The TOD Policy encourages continuous infill development extending ½ mile from the Tri-Rail station that is not yet committed to in this area and may never be. Neither the Plan, nor the LDRs have TOD policies or development standards. To approve increased densities for these two projects, based upon a train station, a TOD policy would have to be reflected in the Town’s Comprehensive Plan and LDRs.

¹ Applying the average density of 48 units per acre to the 2.5 acre property would yield 120 units.

² Caselaw does not support the proposition that land dedicated for a public use can be sold for private development.

³ It does not appear that Staff has examined this policy to determine whether it is feasible or realistic to believe that it could be met by either or both developers at Park Avenue and 10th Street.

It is telling that Staff's January 31, 2022 memo regarding the Kelsey project stated: *"Given the Project's currently proposed size and scope and our pre application discussions, staff is **strongly of the opinion that the project ... requires a dedicated regional and readily-operational transit component in order to service the immediate transportation demands it will create.... Staff is strongly encouraging the applicant to seek out either Brightline or Tri-Rail contacts to establish a partnership that will definitively and contractually secure ... regional transit to service the project.**"*

At present, there is no dedicated regional and readily-operational transit component to service these projects transportation demands. This leads to the question of whether these projects have been prematurely submitted for consideration.

The Projects Don't Seem To Meet the Purpose and Intent of the PADD

The Commission will eventually have to determine whether the proposed projects meet the purpose and intent of Code §78-70, to facilitate the development of **"small scale traditional downtown commercial areas."** The development of 16-story buildings at the densities proposed would **not seem to be compatible** with existing development in the PADD; nor do the 16-story buildings appear to be well integrated with the Town's surrounding single family residential neighborhoods. The Commission should consider the two most recently developed properties in the PADD. The Ahrens project was developed as a 3-story mixed use structure⁴. This project is consistent with "small scale traditional commercial development" as reflected in section 78-70 of the PADD.

The most recent project approved by the Town Commission is the Oceana Coffee project on 10th Street. This project has been successfully planned and developed within approximately ½ mile of the mythical Trial Station without any reliance on the TOD policy. Originally, the Oceana Coffee structure was to include a third floor, but is being constructed as a 2-story structure. The Oceana Coffee project is consistent with the purpose and intent of the PADD because it is being developed as small scale commercial uses.

In contrast to the PADD's purpose of maintaining a "traditional small scale commercial downtown" these two major projects are predominately high density residential apartment buildings with minimal non-residential uses whose massing, densities, and intensities are comparable to high density residential or mixed use developments in the downtowns of Miami, Ft. Lauderdale and West Palm Beach.

Density and Floor area Ratio (FAR)

⁴ The Ahrens project was originally approved as a 4-story mixed use structure, but the Commission's approval was challenged by a neighboring residential property owner. The case was settled resulting in 3 stories.

Policy 12.2 of the Future Land Use Element states: "Within section 3.4.3 'Future Land Use Classification' the Downtown Land Use provides for a FAR of **3.0**. The plans for the two projects submitted to the Town for review do not calculate their FAR, but it is unlikely that their FAR is close to **3.0**. For example, Kelsey's current application, which does not differ significantly in terms of height, massing and density from its original application, produced a FAR of **12.75**. Policy 12.2 of the Future Land Use Element states: "Within section 3.4.3 'Future Land Use Classification System' the Downtown Land Use provides for a ... FAR of 3.0 across the entire contiguous area. Kelsey's FAR not only exceeds a FAR of 3, but also substantially exceeds the FAR of **7** for mixed use projects in downtown West Palm Beach.

The construction of two 16-story buildings exceeding the average FAR established in the Downtown Land Use, creates a massing of buildings in the Downtown which would not meet the purpose and intent of the PADD to maintain the Town's historical downtown which is reflective of the early master plans and envision a **small scale traditional downtown commercial area**.

Density of the Residential Uses and the Bucket of Units For the Downtown

The density of the residential components of the projects overwhelms their commercial components and may not be reflective of a true mixed use project. The Town's Comprehensive Plan was amended not too long ago to increase densities in the PADD. The density for the downtown establishes a cap of 48 units per acre for the *entire PADD*. The densities for the two projects with the waivers requested would be **233 units per acre** for Kelsey and **203.1 units per acre** for Tenth. The downtown encompasses 32.13 acres. Thus, the number of units permitted within the entire downtown is limited to 1,494 units. With the waivers requested, the two projects, totaling 5.42 acres if developed as proposed would use 1,095 units from the Bucket, or 73% of the residential density allocated to the Downtown on only 17% of the properties in the Downtown. The remaining 26.6 acres and 399 units would be allocated to 83% of the remaining Downtown. This illustrates the imbalance created in the PADD by the allocation of substantial density in only two 16-story buildings and leaving much less units in the bucket for other property owners who might also want to redevelop their properties. This is a disincentive to the other property owners who might otherwise seek to redevelop their properties and contributes little to the overall redevelopment of the Downtown.

The Projects' Consistency with The Plan's Objectives and Policies

OBJECTIVE 12

The Commission may find it difficult to determine that the projects are consistent with Objectives 5 and 12 of the Future Land Use Element of the Comprehensive Plan, and their implementing policies. Objective 12, entitled "Redevelopment of the Historical Downtown Area," establishes a Future Land Use (FLU) classification to which is intended to facilitate the redevelopment of the Downtown and **the immediate surrounding area**. This FLU is intended to produce a dense, vibrant, walkable mixed-use downtown with a **balance** of residences, businesses and include civic spaces, and must

be well-integrated into **the surrounding neighborhoods**. Objective 12 is implemented by *Policy 12.1* which seeks to deliver compact residential and **non-residential or mixed used buildings that complement the existing buildings**. The existing commercial or mixed use buildings in the Downtown are predominately 2-story commercial structures and three stories for the Ahrens building; have substantially less FAR and complement or are compatible with the low density character of the surrounding residential structures in the adjacent neighborhoods. The surrounding neighborhoods are largely low density residential neighborhoods. The projects do not seem to implement Objective 12 which seeks to maintain the existing small scale traditional commercial downtown or be **compatible** with the adjacent surrounding single family residential neighborhoods.

POLICY 12.1

The projects do not appear to be consistent with *Policy 12.1* of the Comprehensive Plan because they do not deliver compact residential/nonresidential mixed use buildings that are well-integrated into the surrounding low density residential neighborhoods. On the contrary, the projects would deliver predominantly residential uses at high residential densities dramatically exceeding the average maximum density permitted within the Downtown. The construction of largely residential buildings at heights of 16 stories would tower over the existing commercial buildings within the Downtown would not seem to be well-integrated with the surrounding residential neighborhoods.

POLICY 12.2

Policy 12.2 provides for a density of 48 units per acre and a FAR of 3.0 to be applied throughout the 32.13 acres in the PADD. The projects do not appear to be consistent with Policy 12.2 because they would absorb almost all of the units allocated to the entire PADD area. For example originally Kelsey proposed FAR of 12.75, or more than three times the average maximum FAR for buildings in the Downtown. At the time staff was recommending amendments to the PADD (which was eventually adopted), I questioned whether it was good policy to establish an average density of 48 units per acre through a “bucket of units” approach. I pointed out then and again point out that this approach is not supported by Section 163.3177(6)(a), F.S., which requires that comprehensive plans establish range of densities in the Future Land Use Element. These two proposed projects illustrate the problem with this approach because the allocation of such extreme densities to two properties creates an internal inconsistency with the policies that redevelopment promotes a small scale commercial downtown and compatibility with the surrounding low density residential neighborhoods. The policy is also inconsistent with its objective which calls for redevelopment of the area. Using the vast majority of available units on two sites would seriously hamper redevelopment of other properties whose redevelopment option will be limited.

POLICIES 12.3, 12.4, and 12.5

The projects do not appear to be consistent with **Policy 12.3**. This policy proposes that “buffering” be used to control height and the intensity of 16-story buildings to mitigate impacts. It is doubtful that “buffering” would be able to mitigate the imposing height and mass of 16-story buildings. **Policy**

12.4 which directs redevelopment to be supported by publicly accessible civic space. Projects that together propose to generate 1,095 residential units would certainly generate more than 2,000 residents and produce substantial traffic on Park Avenue and surrounding roads. In this respect, it is questionable whether the two projects would be consistent with the intent of **Policy 12.5** to achieve the safe interconnectivity of vehicular, pedestrian and other non-motorized movement in the Town.

Concurrency

To develop the projects with the waivers, a new Master Life Station must be constructed. Presently, the developer of Tenth is discussing this with Seacoast.

Conclusion

The two projects with the waivers being sought are substantially higher than other properties in the Downtown. Given their heights, massing and densities, they do not seem to meet section 78-70 of the PADD or the objectives and policies of the comprehensive plan referenced herein. These policies and the Objective 12, along with section 78-70 of the PADD contemplate **a small scale traditional commercial downtown that is well-integrated with surrounding neighborhoods**. The average density, or "bucket of units" approach, yields a planning approach which allows these two projects to almost empty the bucket of units resulting in other property owners with substantially diminished opportunities to redevelop their properties potentially leaving the remainder of the Downtown as it is today..