SPIKOWSKI PLANNING ASSOCIATES

MEMORANDUM

TO: Alaina Ray, Director of Planning, Zoning & Building
FROM: Bill Spikowski
DATE: February 5, 2014
SUBJECT: Summary of Changes From April 29 to February 5 Drafts of Ordinance 2013-20

Significant revisions to the April 29 draft of Ordinance 2013-20 are summarized below. These changes are the result of requests from the Planning and Zoning Board at the first public hearing on May 21, other suggestions received from the public, and further internal review.

Changes to existing code language are shown in red. Phrases that have been modified since the April 29 draft are highlighted in yellow in the latest draft of Ordinance 2013-20, which is dated February 5.

TITLE. The title has been amended to include a reference to new Section 24, which now would amend 158.180.

2nd and 4th WHEREAS. Minor changes have been made to grammar and references.

3rd WHEREAS. The prior ordinance that adopted an official zoning map is now identified by number.

5th WHEREAS. The final judgment's case number is now included for reference.

8th, 9th, 11th WHEREAS. The phrase "and Zoning Map amendments" has been added to these clauses, and the adoption year has been changed to 2014.

SECTION 2. The definition of "lot width" has been clarified to be consistent with 157.45, the appendix to chapter 157, 158.006, and 158.147. The same clarification has been made in Sections 3 and 21 of this ordinance.

SECTION 3:

- The zoning code uses three terms interchangeably: lot coverage, land coverage, and building coverage; only the first had been defined. These terms are now being defined as synonymous.

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- The definitions of "Density, overall" and "Departure" have been modified slightly for clarity.

- The definition of "Density, maximum gross residential" has been modified to eliminate the word "residential"; that definition describes both residential density and tourism density.

- At the Planning and Zoning Board public hearing, discussion took place over the terminology and definition of "gross land area," particularly as to potential negative effects on existing development and property rights along the waterfront. This definition was reprinted in Ordinance 2013-20 because the term is used in another definition; no substantive changes had been being proposed to the definition of "gross land area." That term is used a half dozen times in the zoning code; renaming it as "total land area" or any other term would require corresponding changes each time the term is used. If the Planning and Zoning Board wishes to rename this term, the appropriate changes can be added to Ordinance 2013-20 prior to public hearings before the Town Commission. One minor clarification now appears in this definition.

- The definition of "lot width" has been clarified to be consistent with 157.45, the appendix to chapter 157, 158.006, and 158.147. The same clarification has been made in Sections 2 and 21 of this ordinance.

- The new definition of "Planned unit development" now includes a reference to section 158.070 to explain the density reductions mentioned in the definition.

- In the April 29 draft, a definition was proposed for a new term "Existing only." That term was to be used in the schedule of uses in certain zoning districts to identify existing uses that were legal when begun but which deserve a better status than "nonconforming," which implies limitations on the ability to rebuild, expand, or resume operations after a discontinuance.

  In the April 29th Exhibit "B," the phrase "Existing only" would apply only to restaurants in the MUC-1 and MUC-2 districts and to hotel/motels in the MUC-2 district. Two concerns were raised at the May 21st public hearing. One was that the definition of "Existing only" in Section 3 might be read to confer a certain status on properties other than those specifically identified in Exhibit "B"; the other was that "existing only" was an awkward and unusual phrase.

  Both concerns are addressed by the revised phrase "pre-existing legal use" and the revised definition, as follows, which now appears on page 6 of Ordinance 2013-20:

  > *"Pre-existing legal use ~~only~~." A use of land listed in section 158.125 that ~~is permitted only if it~~ lawfully existed on January 1, 2014 ~~2013~~. A use that qualifies as a "pre-existing legal use ~~only~~" may also be ~~is not~~ classified as a nonconforming use, but by virtue of its listing in section 158.125, it will be ~~and is~~ afforded the ~~same~~ privileges of ~~as~~ a permitted use and may be reconstructed up to its pre-existing density in accordance with all applicable current regulations, but only on the specific parcel on which it is located.*

  See also the discussion of the previous phrase "existing only" in Section 18 and Exhibit "B."

- The definition of "Variance" has been amended slightly for clarity.

- The revised definition of "Waiver" has been expanded to refer to parking waivers as authorized by 158.128(O) and dredging waivers as authorized by 152.06.

SECTIONS 5 and 6. These sections have been consolidated into Section 5.

SECTION 7. The footnote to the table in 158.008 has been amended slightly for clarity and to delete the word "existing" in the final clause.

SECTION 8. The town's longstanding practice of updating a land intensity schedule with each MUC amendment is now being referenced in 158.009(L).

SECTION 8. In the April 29 draft, new language for subsection (L) of 158.009 had stated:

> *The approval of additional dwelling units or additional tourism units into any MUC district beyond those units approved by resolution or ordinance prior to January 1, 2013, must be preceded by referendum approval in accordance with section 22 of article II of the town charter.*

Although generalized to all MUC districts, this language was written to comply with the following provision from the amended final judgment:

> *Except for tourism uses or density that may be authorized pursuant to the Town's 2008 referendum for adding 250 tourism units, the court declares that the Town may not approve any tourism uses or density for lands in the MUC-2 zoning district until it secures voter approval for such uses and density pursuant to Article II, §22 of the Town Charter.*

Although the wording is unclear, this provision of the final judgment may apply only to TOURISM density, not to residential density. If that is the case, the town has greater latitude for increasing RESIDENTIAL density.

At the Planning and Zoning Board public hearing, three different concepts were discussed for residential units that had at one time been allowed for each original MUC development but were never assigned to individual sites:

1. The unused units have essentially been waived and no longer exist; requests for construction of additional units will be treated like other property owners on Longboat Key (e.g., requiring a referendum).
2. The unused units are property rights of the original developer and cannot be taken away or reduced in number.
3. The unused units are neither guaranteed nor waived, but may be requested by the developer through the ODP/PUD process, to be placed on any existing vacant sites, on recreation sites such as golf courses or tennis courts, or to increase density during redevelopment of existing buildings.

The following table is an approximate summary of the original overall density allowed, units assigned to date, and residual (unused) units for each MUC district:

DISTRICT:	*ACRES:*	*OVERALL DENSITY:*	*POTENTIAL UNITS:*	*ASSIGNED UNITS:*	*RESIDUAL UNITS:*
MUC-1	725.0	3.26 / ac.	2,363	1,267	1,096
MUC-2	314.6	5.05 / ac.	1,588	892	696
MUC-3	25.4	11.26 / ac.	286	286	0

The question is complicated by recent state legislation that may affect the legality of Longboat Key's referendum requirement, which was put into the town's charter by the voters in 1985: "The present density limitations provided in the existing comprehensive plan as adopted March 12, 1984 shall not be increased without the referendum approval of the electors of Longboat Key."

Florida law on referenda has been in a constant state of flux:

- Before 2011, referenda were forbidden if they affected five or fewer parcels of land (F.S. 163.3167(8), formerly 163.3167(12)).
- In 2011, the "five or fewer parcels" clause was repealed, expanding the prohibition on referenda (Chapter 2011-139).
- In 2012, charter provisions for referenda that were in place before 2011 could be retained and implemented in the future, regardless of current prohibitions (Chapter 2012-75).
- In 2013, the grandfathering provision was removed completely for development order referenda. However, referenda for comprehensive plan amendments affecting "more than five parcels" that were "expressly authorized by specific language in a local government charter" before 2011 (such as Longboat Key's 1985 charter amendment) can still proceed (Chapter 2013-115).

The potential effects of the 2013 legislation shouldn't distract the town from moving forward. The Longboat Key charter requirement merely freezes the density limitations in the comprehensive plan until a referendum is held. Even if the referendum requirement cannot be enforced, the density limitations still apply unless and until the comprehensive plan is changed by the Town Commission

On the tentative assumption that the provision of the final judgment quoted above applies only to tourism density, three separate alternatives for new language for 158.009(L) are being presented in the February 5 draft of Ordinance 2013-20. Each alternative corresponds to one of the three concepts listed above for residential units. The three alternatives in the February 5 draft are:

Alternative 1: The approval of units into any MUC district beyond those units approved by resolution or ordinance prior to January 1, 2014, must be preceded by referendum approval in accordance with section 22 of article II of the town charter.

Alternative 2: The assignment of units into any MUC district beyond those units approved by resolution or ordinance prior to January 1, 2014, will be memorialized through the ODP/PUD process. The number of additional units assigned cannot exceed the assigned overall density for the entire MUC district.

Alternative 3: The approval of units into any MUC district beyond those units approved by resolution or ordinance prior to January 1, 2014, can be made only through the ODP/PUD process. Approval of additional units is not guaranteed, and in no case may the number of additional units exceed the assigned overall density for the entire MUC district.

The restrictions on tourism density should be the same in each version to remain in compliance with the final judgment; the following language has been added to accomplish this change (with conditional language about voter approval that could become unenforceable due to state legislation):

> Except for tourism units that may be authorized pursuant to the Town's 2008 referendum for adding 250 tourism units, the Town will not approve additional tourism units for lands in any MUC zoning district until the comprehensive plan has been amended to allow additional tourism units, an amendment which currently requires voter approval pursuant to Article II, Section 22 of the Town Charter.

SECTION 8. Previously, an MUC district could be expanded onto contiguous land. That provision is being deleted because the MUC concept has essentially become obsolete with the completion of the original master-planned developments.

SECTION 8. A new paragraph beginning "Except for tourism units..." addresses the complex issue of whether additional tourism units could be approved in the MUC-2 zoning district. Policy 1.1.11 of the comprehensive plan may allow these units to be considered in MUC-2 because MUC-2 may be deemed a "residential future land use categor[y]" that contains "an existing legal tourism use." The inclusion of this paragraph would also memorialize a contested issue that was resolved in Judge Haworth's amended final judgement from December 2012.

SECTION 9.

- The title of 158.065 now reads "Overview of planned unit developments (PUD)" to more accurately describe its contents.
- A new sentence has been added to 158.065(A) to clarify that the PUD process, which generally an option to landowners, is the only method for adjusting zoning requirements in the MUC zoning districts.
- The phrase "detailed engineered site plan" that had been proposed for section 158.065(A) has been simplified to "detailed site plan" to avoid the inference that this site plan must be prepared by a licensed professional engineer. The state of Florida authorizes other professionals such as landscape architects to prepare certain types of site plans.
- The previous draft of 158.065(C) would have limited PUD applications to certain zoning districts; that limitation has been removed.

- Numerous minor changes have been made to improve clarity or consistency.
- The heading for 158.065(E) has been changed to more accurately describe its contents.

SECTION 10. Section 158.067(B)(1)(n) has been modified slightly to be consistent with earlier changes to sections 158.065 through 158.071. Other portions of 158.067 have been modified for clarity.

SECTION 10. Near the end of the Planning and Zoning Board public hearing, a discussion began about the proposed restoration of the prior requirement for findings of fact. This requirement had been in 158.067(D)(3) but is now being placed in 158.067(B)(3).

"Findings of fact" were required until Ordinance 2012-08. Judge Haworth, when ruling on the repeal of this requirement, concluded that the repealing ordinance wasn't invalid because the town could still prepare finding of fact despite the requirement having been eliminated from the zoning code. The final judgment reached these conclusions:

> ... The current version of §158.067(D)(3) does not mandate findings in written form. However, neither does it forbid such findings. In other words, the Commission has the option of making written findings should it choose to do so.
>
> Given the due process imperative of providing a clear evidentiary foundation for administrative decision, a commission that opts not to make such findings may find its action consistent with the Longboat Key Zoning Code but running afoul of Irvine and its progeny. However, because the Code grants the Commission the discretion to enter written findings and thus be compliant with the Irvin requirement that the agency provide an acceptable record upon which a reviewing court can make a qualitative assessment of the evidence, this court cannot find §158.067(D)(3) facially unconstitutional on this basis. ... The issue of whether the failure to make such findings provides a viable basis for an "as-applied" constitutional challenge must await an actual decision granting or denying an outline development plan, and cannot be resolved in this action.

The best resolution of this situation is to not require findings of fact in the zoning code, but for the town to routinely prepare and adopt them anyway. This approach would avoid an obvious legal vulnerability if findings of fact were not prepared in a particular case. The town could still prepare and adopt findings of fact as a part of normal business and thus be in a better position to defend its zoning actions from the other potential legal challenges described in Judge Haworth's order. The latest draft of Ordinance 2013-20 follows this approach; the Planning and Zoning Board is encouraged to discuss which approach is in the town's best interest.

SECTION 10. Another question raised by the Planning and Zoning Board was the use of the terms "beach" and "bay" in Section 10, 158.067(D)(7). Neither term is defined in Longboat Key's code of ordinances. The absence of definitions isn't harmful to the use of these terms in Section 10. Definitions can be prepared for both, but because they would affect the use of these terms at least throughout the zoning code, they should be drafted only after carefully evaluating how those terms are used throughout the entire code. Definitions are not being proposed at this time.

SECTION 10. The Planning and Zoning Board also discussed the revised standards for building height departures in 158.067(D)(8) with an eye toward clarifying their intent and application. Concerns expressed were the use of the atypical zoning term "overwhelm," especially coupled with

"structures" potentially being overwhelmed instead of adjoining uses, and the absence of traditional compatibility language. The Planning and Zoning Board should review the revised language in the February 5 draft and discuss potential further revisions. Note that these special criteria for building height departures would apply only in the MUC-2 zoning district.

SECTION 10. Recent amendments to the Comprehensive Plan and to 158.145 allow certain increases in lot coverage and building heights in planned unit developments. Section 158.067(E) has been modified to avoid any confusion between its current wording and 158.145. One substantive change contained in the prior draft of 158.067(E)(2) would require a formal departure for height increases in the MUC-2 zoning district. The latest draft maintains this requirement, except that a single extra story would be allowed without a departure, to be consistent with the other MUC zoning districts.

SECTION 10. Section 158.067(H) has been reworded for clarity and to make it clear that the town reserves the right to modify or reformat regulations applying to PUD property after a PUD approval has expired or after development has been completed.

SECTION 10. Section 158.067(I) has been reworded for clarity.

SECTION 12. The footnote in 158.070 has been modified to correspond to the footnote in 158.008; the word "existing" has been removed from the footnote.

SECTION 16. A typographical error has been fixed in Section 16.

SECTION 17. The phrase "by the Town Commission" has been added to 158.132(a)(4)(b) to clarify its meaning.

SECTION 18. The policies previously affecting "existing only" uses have been modified to use the revised term, "pre-existing legal uses." See the discussion of the previous phrase "existing only" in Section 3 above.

SECTION 21. At the May public hearing, clarification was requested about the effect of the formulas in 158.147 for determining lot widths and depths for lots that aren't rectangular. This subject is addressed in the existing code in an appendix to chapter 157, the town's subdivision regulations. A minor additional change is now being proposed to 158.147 to provide a reference to that appendix. The same clarification has been made in Sections 2 and 3 of this ordinance.

SECTION 22. This section of the ordinance would modify 158.149, which uses the phrase "licensed design professional." At the May public hearing, clarification was requested about the meaning of that phrase. It is defined in 158.006 of the zoning code as follows:

> *"Licensed design professional."* A design professional registered, licensed, and in good standing with the State of Florida and governing professional association board. For the purposes of verifying lot coverage and nonopen space calculations, a licensed design professional shall be limited to architects, landscape architects, engineers and surveyors.

The phrase "licensed design professional" is used in other places in the zoning code, so the definitions section in 158.006 is the proper place to explain its meaning. No further clarification is needed in this ordinance.

SECTION 23. The previously proposed language that would no longer forbid "public beach access parking" from being placed in gulf and pass waterfront yards has been modified so that it now reads "beach access parking on land owned or controlled by the public." The additional phrase avoids any implication that private property owners could build public parking lots in their gulf or pass waterfront yards.

SECTION 24: A new Section 24 has been added to preclude an inconsistency between a new paragraph being added to 158.009(L) and the existing language in 158.180(B)(4).

EXHIBIT "A" Exhibit "A" has been replaced with a higher-resolution version of the same map.

EXHIBIT "B" See the discussion of the previous phrase "existing only" in Sections 3 and 18 above. The uses previously identified as "existing only" have been modified to use the new term, "pre-existing legal uses." A few other changes have been added to keep the language in this table internally consistent.

EXHIBIT "C"

- The density figures for MUC-1, MUC-2, and MUC-3 have been reformatted slightly to match the way they are presented in Exhibit "B" and to avoid any conflict with the column heading.
- The height regulations for the MUC-2 district have been modified slightly to be consistent with the proposed language in 158.067(E).
- Footnote (j), which applies only to tourism units in T-6, was added by Ordinance 2013-10.

cc: Maggie Mooney-Portale, Kelly Fernandez,
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Dave Bullock, Town Manager