

M E M O R A N D U M

Date: September 18, 2012

TO: Town Commission

FROM: Dave Bullock, Town Manager

SUBJECT: Resolution 2012-07
Extension of Nonconforming Use or Structure Abandonment Period –
Colony Beach and Tennis Resort, 1620 Gulf of Mexico Drive

At its September 4, 2012 Regular Meeting the Town Commission discussed possible extension of the abandonment period beyond December 31, 2012. The staff memo from the September 4, 2012 Regular Meeting is attached for background purposes. This memo offers several observations, options, and recommendations for consideration by the Town Commission.

Observations

1. Colony was approved as a 237 unit resort and is currently zoned Tourism-6 and is basically a transient accommodation (hotel).
2. Control of site is in question.
3. There are a number of interests holding or claiming to hold different elements of interest and/or oversight in the facilities.
4. Who actually controls what part of the geography, building space, infrastructure, or other facilities within the entire complex known as the Colony may change owing to issues being litigated. Therefore these Observations and Recommendations address the Colony as an entity assumed to have legal control over all elements related to planning, financing, and developing the site.
5. Individual owners are currently trying to do things themselves including water meter installation and requests for how to open individual units.
6. Various inspections have revealed numerous concerns with the buildings, infrastructure, and grounds.
7. Neighbors have expressed concerns about elements of the facility.
8. Much of the grounds are not visible to the general public but are to the neighbors.
9. Due to limited visibility the Town has been extremely lenient with application of Town Codes.
10. Plans to rebuild or renovate as presented by the Association to date do not seem to address the complex code conditions that will apply to the development.

Options for Development of the Colony:

There are a wide variety of options for the Commission to exercise its authority under Section 158.138 (B)(8)(b) of the Zoning Code:

Section 158.138 (B)(8)(b) of the Zoning Code states; “However, should the period of nonuse or vacancy be caused by legal restraints upon the owner or lessee, the owner or lessee may set forth such grounds in a petition to the town commission and serve such petition on the planning and zoning official. The time may be extended by the town commission for good cause shown. The town commission may require the petitioner to decrease the nonconformity of the building or structure in one or more aspects of its nonconformity.”

Some Options:

- **Option 1, The Town Approves the Colony Request to Extend the Nonconforming Rights**

The Town Commission could approve the Colony’s request to extend the nonconforming use abandonment date until June 30, 2014, as requested by the Association.

- **Option 2, The Town Denies the Request to Extend the Nonconforming Use Rights**

If the Town denies the petition, the Colony will need to be reopened by December 31, 2012, or lose its rights to reopen or reuse all uses and structures not in compliance with today’s Zoning Code.

- **Option 3. The Town could grant an extension to the Colony for such time needed for the court(s) to decide on control of the site through all appeals**

Following a final court ruling or as a result of some negotiated settlement where site control is determined the Town could grant a three (3) year extension and require the responsible entity to submit a complete development plan for re-opening the Colony. The plan must be submitted within 3 months of site control determination. Such a plan shall include in form acceptable to the Town:

- schedules for all phases (planning, financing, design, and construction),
- specific time frame for submittal of site plans and building permit applications,
- financing plan, and
- a construction plan.

Compliance with such plan, once approved by the Town, would become a condition for the extension. If the Colony failed to meet any key scheduled milestone(s) a public hearing would be scheduled to consider whether to continue the extension.

Under this option the Colony must submit quarterly updates on progress of all these planning elements and on any pending litigation.

- **Option 4. The Town could grant an extension to the Colony under conditions intended to decrease the nonconformity of the building**

If the Colony intends to reopen the existing buildings the extension would be until December 31, 2013. If the Colony intends to construct all, or substantially all, new buildings in compliance with all Federal, State, and local codes the extension would be until December 31, 2015.

Recommendation:

Staff recommends Option 4 with the following conditions.

Colony shall be required to comply with all Federal, State, and local laws. Within ninety (90) days of approval of the Resolution, the Colony shall:

1. Maintain vermin and pest control programs approved by the Town;
2. Secure all unsafe buildings and stairways in compliance with Section 150.04 – Minimum Housing Standards, 150.21, Procedure for dangerous or unsanitary buildings, 150.22 – Procedures for buildings which are nuisances, and 150.71;
3. Maintain all landscaping and irrigation in pre-shutdown condition;
4. Submit to the Town quarterly reports describing progress in settling pending litigation and progress toward construction/redevelopment; and
5. Provide the Town with a \$50,000 cash bond, approved by the Bankruptcy Court if necessary, in a form acceptable to the Town guaranteeing the conditions set forth herein.

Please don't hesitate to contact me if you have any questions.

MEMORANDUM

DATE: August 24, 2012

TO: David Bullock
Town Manager

FROM: Robin Meyer, AICP, Director
Planning, Zoning and Building Department

RE : Resolution 2012-07
Extension of Nonconforming Use or Structure Abandonment Period
Colony Beach and Tennis Resort – 1620 Gulf of Mexico Drive

The Colony Beach and Tennis Resort, a longstanding tourism resort hotel development located at 1620 Gulf of Mexico Drive, has been closed since August 15, 2010. The Resort has density and structures that are legally nonconforming under the current Town Zoning Code. In accordance with Section 158.138 (B)(8)(a) of the code, a nonconforming use or structure that is no longer used shall be deemed abandoned after 12 months of non-use. Consequently, the nonconforming use and structures that make up the development known as the Colony would have become abandoned on August 15, 2011.

Section 158.138 (B)(8)(b) of the Zoning Code states: “However, should the period of nonuse or vacancy be caused by legal restraints upon the owner or lessee, the owner or lessee may set forth such grounds in a petition to the town commission and serve such petition on the planning and zoning official. The time may be extended by the town commission for good cause shown. The town commission may require the petitioner to decrease the nonconformity of the building or structure in one or more aspects of its nonconformity.”

On April 13, 2011, the Colony Beach and Tennis Club Association, Inc., a not-for-profit corporation formed in 1973 (“the Association”), submitted to the Planning, Zoning and Building Director a request for an extension of time to comply with the regulations governing nonconforming uses and structures. The Town Commission subsequently granted an extension of the one year abandonment period to December 31, 2012, through Resolution 2011-17. The Resolution recognized that an additional extension of time may be requested. On July 27, 2012, the Planning, Zoning and Building Department received a letter from Donald E. Hemke, attorney for the Association, petitioning the Town of Longboat Key to approve a request for a second extension of time. The extension would allow the Colony until June 30, 2014, to reopen or redevelop the property in order to maintain, without question, the “grandfathered status” of the 237 tourism units at the Colony.

The current underlying zoning of the subject property is Tourist Resort Commercial (T-6), which allows the development of a maximum of six dwelling or tourism units per acre. Based upon 14.3 acres of land owned or controlled by the Association

abandonment of the nonconforming use or structure would reduce the maximum density that could be redeveloped or reopened to approximately 85 units, a loss of approximately 152 units. Based on 17.3 acres of land under single control or ownership, abandonment of the nonconforming use or structure would result in the allowable density -- being approximately 103 tourism units, but would still decrease the number of tourism units by approximately 134 units.

On August 24, 2012, the Town Attorney, David Persson, sent a letter (attached) to the Town Commission that provided a summary of the legal issues that have faced the Colony since the Town's prior extension. Staff has reviewed the options available to the Commission and provides a summary below.

The Commission may approve, approve with conditions or deny the request. Should the Commission deny the request, the Colony would have until December 31, 2012, to redevelop or use the nonconforming uses and structures without having been deemed abandoned in accordance with Section 158.138(B)(8)(a). In other words, the resort would need to be reopened in order to preserve the future use of its nonconformities.

The Association's experts and others have identified numerous problems and concerns regarding the existing structures and infrastructure. In order to reopen the resort, the applicant would be required to demonstrate compliance with all applicable codes including but not limited to Building Code, Life Safety Code, and Sanitary Code. Numerous issues have been previously identified and others may be revealed by subsequent inspections. Additionally, there are state laws that govern transient accommodations that must be met. Upon request, the Town has provided unit owners, (with a copy to the Association), a list of problems that needed to be successfully addressed prior to reoccupancy. The list of repairs to be done prior to use and occupancy is based upon the information that the Town has previously received regarding the structure in which the unit being requested to be occupied is located. Additional code requirements may be necessary once permit applications are submitted and inspections conducted.

Option 1, The Town Approves the Colony Request to Extend the Nonconforming Rights

Should the Town Commission approve the Colony's request to extend the nonconforming use abandonment date, staff recommends conditions that within thirty (30) days of adoption of this Resolution the Colony shall: 1) secure any unsafe buildings and stairways in compliance with Sections 150.04 - Minimum housing standards, 150.21 - Procedure for dangerous or unsanitary buildings, 150.22 - Procedure for buildings which are nuisances, and 150.71 - Requirements not covered by Code; 2) maintain the landscaping and irrigation on the portions of its property that are visible to the public and neighbors to a pre-shutdown condition; and 3) maintain the property free of all pests and vermin. If the Town believes that any of the conditions have not been met, it shall notify the Colony in writing and grant it a reasonable time to cure the deficiency. If the deficiency is not cured in a timely manner, a public hearing shall be held before the Town Commission to determine compliance with the requirements of

this Resolution. After receiving all evidence and testimony at the public hearing, if the Town Commission determines that the requirements of this Resolution have not been met, the Town Commission may take all necessary and appropriate actions including, but not limited to, upon sixty (60) days' notice, terminate the extension of time granted herein.

Option 2, The Town Denies the Request to Extend the Nonconforming Use Rights

If the Town denies the petition, the Colony will need to be reopened by December 31, 2012, or lose its rights to reopen or reuse all uses and structures not in compliance with today's Zoning Code.

Other Issues

In reviewing the Colony's request to extend its nonconforming use rights, staff has noted that during the time the resort has been closed the dunes and associated vegetation have taken over the site in front of the resort. Staff recommends that the representatives of the Colony contact the Florida Department of Environmental Protection (FDEP) prior to undertaking any action in this area. Beach vegetation and dunes are under jurisdiction of state law. The Town's previous approval of the continuation of nonconforming use rights or any subsequent approval does not affect state law regarding the dunes and associated vegetation. In addition, FDEP needs to approve plans for all construction that occurs to the gulf side of the Coastal Construction Control Line. State approval is also required by the Town Code

Recommendation

It is staff's opinion that multiple legal restraints have prohibited the timely redevelopment or reopening of the Colony. Staff has concerns regarding the continued deterioration of the Colony property while the legal issues are being resolved. Denial of this petition may add another layer of legal restraint that may further delay opening of the Colony. Therefore, staff recommends that the Town Commission grant the extension by the adoption of proposed Resolution 2012-07 subject to the conditions listed in the resolution, and if the conditions are not met, a hearing be held before the Town Commission to determine if the extension of time should be terminated prior to June 30, 2014.

RESOLUTION 2012-07

A RESOLUTION OF THE TOWN OF LONGBOAT KEY, FLORIDA, GRANTING THE REQUEST OF THE COLONY BEACH AND TENNIS CLUB ASSOCIATION, INC., FOR AN EXTENSION OF TIME TO COMPLY WITH THE REGULATIONS GOVERNING NONCONFORMING USES AND STRUCTURES FOR THE COLONY BEACH AND TENNIS CLUB, LOCATED AT 1620 GULF OF MEXICO DRIVE, ALLOWING ADDITIONAL TIME TO REOPEN THE TOURISM RESORT DEVELOPMENT IN ACCORDANCE WITH SECTION 158.138 (B)(8)(b) OF THE TOWN OF LONGBOAT KEY ZONING CODE; PROVIDING FOR CONDITIONS; PROVIDING FOR SEVERABILITY; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, at the request of Colony Beach Associates Ltd., the Town of Longboat Key ("the Town") at a special meeting of the Town Commission on November 21, 1972, approved the plot plan for the development of a 237 unit tourism resort hotel ("the Colony") on the land that consists of approximately 17.3 acres of land, located at 1620 Gulf of Mexico Drive; and,

WHEREAS, the zoning of the subject land at the time of the plot plan approval was H-2, which allowed for a maximum density of 14 units per acre of land; and,

WHEREAS, the current zoning for the Colony is T-6, allowing up to 6 units per acre; and,

WHEREAS, the Town issued a building permit for the construction of the tourism resort hotel on February 20, 1973, and the Colony was subsequently constructed; and,

WHEREAS, construction of the Colony occurred prior to current Federal, State, and local Flood Regulations as well as the current State Building Code; and,

WHEREAS, on November 30, 1973, approximately 15 acres of the site were submitted to condominium ownership; and,

WHEREAS, the remaining approximately 3 acres were not dedicated to condominium ownership ("the Out Parcels"); and,

WHEREAS, the Colony Beach and Tennis Club Association, Inc. ("Association") is a not-for-profit corporation formed in 1973 and its membership is made up of the 237 tourist condominium units within the Colony; and,

WHEREAS, 232 of the 237 units entered into a Certificate of Agreement of Limited Partnership ("the Limited Partnership") dated December 27, 1973; and

WHEREAS, beginning in 1973, the Limited Partnership managed the Colony as a condominium resort hotel under the Agreement of Limited Partnership; and,

WHEREAS, the Limited Partnership filed for Chapter 11 under Federal bankruptcy codes and was converted on August 9, 2010, to Chapter 7 liquidation; and,

WHEREAS, the Colony closed on August 15, 2010; and,

WHEREAS, the Association was placed in possession and control of the Association property pursuant to the Bankruptcy Court order and final judgment; and,

WHEREAS, the Association Board and representatives from the Town met on October 7, 2010, to discuss the future of the tourism resort development; and,

WHEREAS, Section 158.138 (B)(8)(a) of the Town's Zoning Code provides that a nonconforming use or structure not used for a period of one year shall be considered abandoned and therefore all nonconforming uses or structures within the Colony could be deemed abandoned after August 15, 2011; and,

WHEREAS, the Association received a number of development proposals and worked diligently with the Town, but by April 2011 it became apparent that multiple legal restraints would prevent the Colony from reopening prior to the time of abandonment under the Town's Zoning Code; and,

WHEREAS, the Association therefore petitioned the Town for an extension of the one year period pursuant to Section 158.138 (B)(8)(b) of the Town's Zoning Code; and

WHEREAS, the owners of the Out Parcels did not object to the requested extension; and,

WHEREAS, after a public hearing on May 2, 2011, the Town Commission passed Resolution 2011-17 granting an extension of the abandonment provisions of the zoning code until December 31, 2012; and,

WHEREAS, on July 27, 2011, the United States District Court for the Middle District of Florida ("the District Court") reversed the Bankruptcy Court's prior final judgments and remanded the matter back to the Bankruptcy Court for further deliberations ; and,

WHEREAS, the District Court's order raised questions about whether the Partnership or the Association was in control of the Association property and whether the Partnership was entitled to significant damages against the Association; and,

WHEREAS, on October 14, 2011, the Association appealed the District Court's orders to the United States Eleventh Circuit Court of Appeals ("the Eleventh Circuit"); and,

WHEREAS, on March 2, 2012, the Eleventh Circuit dismissed the appeal without prejudice; and,

WHEREAS, on March 26, 2012, the Bankruptcy Trustee filed a motion in the Bankruptcy Court to return control of the Association property to the Partnership Trustee; and,

WHEREAS, the Association had previously selected a developer of the property but that relationship was terminated in May 2012 after the District Court's and Eleventh Circuit's rulings and the subsequent motion filed by the Bankruptcy Trustee; and,

WHEREAS, on July 13, 2012, the Bankruptcy Court conducted a full day hearing on this matter to consider, among other things, whether the Partnership or the Association should be in control of the Association property and the amount of damages that should be awarded to either party; and,

WHEREAS, no order has been issued by the Bankruptcy Court; and,

WHEREAS, an order issued by the Bankruptcy Court is subject to subsequent appeal; and,

WHEREAS, the Association believes the tourism resort cannot be redeveloped or reopened in a manner fitting to the resort prior to December 31, 2012; and,

WHEREAS, on July 30, 2012, the Association submitted a request for an extension of time to comply with the regulations governing nonconforming uses and structures for the Colony; and,

WHEREAS, the request for the extension is consistent with the provisions of the Zoning Code Section 158.138 (B)(8)(b), which allows the Town Commission to grant an extension of the period of time a nonconforming use or structure can remain unused or vacant if the nonuse or vacancy is caused by legal restraints upon the owner or lessee; and,

WHEREAS, pursuant to Section 158/138(B)(8)(b), the Town Commission may require the petitioner to decrease the nonconformity of the building or structure in one or more aspects of its nonconformity; and,

WHEREAS, abandonment of the nonconforming use or structure would result in the loss of tourism units that could be redeveloped or reopened in the future to approximately 85 units, a loss of approximately 152 units, if redevelopment is based on 14.3 acres of land currently controlled by the Association; and,

WHEREAS, under single control or ownership abandonment of the nonconforming use or structure would result in the loss of tourism units that could be redeveloped or reopened in the future to approximately 103 units, a loss of approximately 134 units, based on 17.3 acres of land; and,

WHEREAS, the Town Commission has determined that multiple legal constraints have prohibited the timely redevelopment or reopening of the Colony, and deems it in the public interest to grant an extension of the abandonment provision of Section 158.138(B)(8) to provide additional time to redevelop or reopen the Colony.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF LONGBOAT KEY, FLORIDA, THAT:

SECTION 1. The above Whereas clauses are true and correct and are hereby ratified and confirmed.

SECTION 2. The Town Commission pursuant to 158.138 (B)(8)(b) of the Town's Zoning Code hereby grants an extension of time to redevelop or use the nonconforming uses and structures at the Colony without being deemed to have abandoned the nonconformities in accordance with Section 158 (B)(8)(a) as provided herein. If the Colony elects to reutilize and reopen its existing buildings, the extension granted hereunder is until December 31, 2013. If the Colony elects to construct all or substantially all new buildings, the extension granted hereunder is until December 31, 2015. The Colony must notify the Town in writing of its election no later than November 1, 2013. In either case, all improvements must comply with all applicable Federal, State and local laws.

SECTION 3. Within ninety (90) days of adoption of this Resolution, the Colony shall:

- 1) Maintain vermin and pest control programs reviewed and approved administratively by the Town;
- 2) Secure all unsafe buildings and stairways in compliance with Sections 150.04, 150.21, 150.22, and 150.71 of the Longboat Key Code of Ordinances as well as the Florida Building Code;
- 3) Restore and maintain the landscaping and irrigation on the portions of its property that are visible to the public and neighbors in a pre-shutdown condition;
- 4) Submit to the Town quarterly reports beginning January 1, 2013, describing progress in settling pending litigation and progress towards construction/redevelopment;
- 5) Provide the Town with a cash bond in the amount of fifty thousand dollars (\$50,000.00), approved by the Bankruptcy Court if necessary, in a form acceptable to the Town, guaranteeing the performance of conditions 1 through 4 above.

SECTION 4. If either the Colony or the Town Manager seeks clarification of Section 2 or believes that any of the conditions set forth in Sections 2 or 3 have not been met, that party may request a public hearing to be held before the Town Commission to determine compliance with the requirements of this Resolution. After receiving all evidence and testimony at the public hearing, if the Town Commission determines that the requirements of this Resolution have not been met, the Town Commission may take all necessary and appropriate actions including, but not limited to, upon ninety (90) days notice, terminate all or a portion of the extensions of time granted herein.

SECTION 5. In accordance with the terms of this Resolution, the subject property may be redeveloped or maintained at the existing density of 237 tourism units as tourism units are defined by the Town's Zoning Code, as may be amended.

SECTION 6. Effective Date. This Resolution shall become effective immediately upon adoption.

Passed by the Town Commission of the Town of Longboat Key on the ____ day of _____, 2012.

James L. Brown, Mayor

ATTEST:

Trish Granger, Town Clerk