

M E M O R A N D U M

DATE: October 14, 2013

TO: Town Commission

FROM: Dave Bullock, Town Manager
Maggie Mooney-Portale, Town Attorney

SUBJECT: Request for Authorization To Pursue Litigation associated with HB 537/HB 7019 and Ratify Engagement of Special Litigation Counsel.

At the Town Commission's August 14, 2013, Special Meeting we discussed the conflicting legal interpretations resulting from the Florida Legislature's passage of HB 537 and HB 7019 (hereinafter referred to collectively as "HB 537")¹ that amended Florida Statutes § 163.3167, and the impact such legislation had on the Town's long standing referendum requirement contained within Article II, § 22 of the Town's Charter.² As we discussed, attempts to construe the state law (HB 537) in conjunction with the Town's Charter referendum provision lead to two (2) conflicting interpretations that could reasonably be advanced relating to whether the Town's Charter provision was voided by such legislation, or whether the legislation could be interpreted as only impacting a portion of the Charter provision, resulting in a density cap. Based upon these conflicting interpretations, we advised the Commission that a judicial interpretation was recommended.

Following a discussion on the legal issues, the Town Commission authorized the Town Manager and Town Attorney to engage special litigation counsel to initiate a declaratory relief action and pursue any other related causes of actions relating to the construction of HB 537/Florida Statutes 163.3167 and Article II, Sec. 22 of the Town Charter.

Since receiving that direction from the Town Commission, the Town Manager and Town Attorney have engaged attorneys Hunter Carroll and Arthur Hardy of the Sarasota law firm of Matthews Eastmoore to serve as special litigation counsel in pursuing such litigation. Such engagement is subject to ratification by the Town Commission. A copy of the terms associated with the engagement of this law firm is attached for your review and consideration.

¹ HB 537 provided that local referenda and initiatives on a development order, comprehensive plan amendment and map amendment are prohibited unless they are expressly authorized by specific language in a local government charter that was in effect on June 1, 2011 and they affect more than five parcels of land.

² Article II, § 22 of the Town's Charter mandates a referendum for any density increases beyond the density limits established in the Town's 1984 comprehensive plan.

The Town Manager and Town Attorney have had several meetings and phone calls with Mr. Carroll and Mr. Hardy on the interpretation issues created by the new legislation and the impact that this legislation has had on various property owners, including two (2) Town property owners who already received 2012 voter approval to increase density on their respective properties. We have also discussed the impact of this legislation on other interested parties within the Town. After reviewing relevant background information on HB 537, the Town's Charter, recent court rulings in the matter of *Islander Property Owners Coalition, LLC, et al v. Town of Longboat Key, et al*, recent Town referendums to increase density, and other relevant research, Mr. Carroll and Mr. Hardy have recommended pursuing (2) two separate courses of litigation. A summary of their recommendations are outlined below:

(1) Initiate a Declaratory Relief Action Against the Two (2) Landowners who Obtained Referendum Approval in November 6, 2012 to increase density.

During the November 6, 2012 election, there were two (2) property owners who requested referendum approval from the Town's residents to increase density on their respective properties to a density not to exceed 6 units per acre. The properties are: (a) 5440 Gulf of Mexico Drive owned by Victor Levine, and (b) 521 Broadway owned by First America Bank. Both landowners would like to proceed forward with development on their respective properties. Due to the inclusion of retroactive language in HB 537 that "nullified" and "voided" referendums held after June 1 2011, the referendum approval obtained by these landowners in 2012 and their ability to pursue additional density for their sites is in question.

Accordingly, the Town needs an interpretation on how it should construe the referendum requirement in Article II, § 22 of the Charter as to these landowners and any other property owners that seek density increases while HB 537 is in effect. Without such an interpretation, the Town is not in a position to process their respective comprehensive plan amendment applications absent a determination on the applicable law on this subject.

The Town Manager, Town Attorney and special litigation counsel have met with legal counsel for First America Bank and an agent for Victor Levine to discuss the issues raised by HB 537, the options available to the parties, and the scope of such a lawsuit.

(2) Request the Court Interpret the Town's Obligations in Paragraphs 1 and 2 of the November 13, 2012 Final Judgment in the matter of *Islander Property Owners Coalition, LLC, et al v. Town of Longboat Key, et al*, Case No. 2010 CA 007913 NC, in light of the passage of HB 537.

A portion of the Final Judgment Order in the litigation between *IPOC v. Town of Longboat Key*, recited a requirement that the Town hold a referendum of the

voters for any increases in tourism density. Specifically, in paragraphs 1 and 2 of the November 13, 2012 Final Judgment Order, as amended by the December 4, 2012 Order Granting Motion to Amend Final Judgment, the Court held:

1. The Court grants plaintiff's demand for relief in Count I. 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 land use category until it secures elector approval for such uses and density pursuant to Article II, § 22 of the Town Charter. The court further declares that, except for tourism uses or density that may be authorized pursuant to the Town's 2008 referendum for adding 250 tourism units, the Town may not approve any tourism uses or density for such lands in the CH land use category until it secures voter approval for such uses and density pursuant to Article II, § 22 of the Town Charter.
2. The Court grants plaintiff's demand for relief in Count II. 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. Except for tourism uses or density that may be authorized pursuant to the Town's 2008 referendum for 250 tourism units, the Town may not approve any tourism units or density for lands in the C-3 zoning district until it secures voter approval for such uses and density pursuant to Article II, § 22 of the Town Charter.

It appears that only the above cited 2 paragraphs reference the referendum requirement of Article II, § 22 of the Charter. Nevertheless, the obligation to hold a referendum pursuant to Article II, § 22 of the Town Charter has been compromised by the Florida Legislature's passage of HB 537. Under the legislation, the Town may not have authority under the provisions of its Charter to hold a referendum on density, or alternatively may not have authority to increase density. Under either interpretation it is unclear how the Town can comply with the above cited paragraphs of the Court's Judgment and the provisions of HB 537 at the same time.

Rather than initiating a new lawsuit on this matter, there is a civil rule of procedure, Rule 1.540(b), Fla. R. of Civ. Pro., that permits a party to a final judgment to petition the Court by motion to consider and relieve a party's obligations under such a judgment if the judgment or decree is subsequently rendered void or if there has been a substantial change in circumstances.

Given that the Town is unable to reconcile the newly enacted state law, HB 537, with the directive set forth in paragraphs 1 and 2 of the court's Final

Judgment, litigation counsel has recommended that the Town also seek to clarify the Town's obligation under the November 13, 2012 Final Judgment.

The Town Manager has spoken to a representative of IPOC, and the Town Attorney has spoken to the attorneys of IPOC regarding this recommendation.

RECOMMENDED ACTION:

Should the Town wish to pursue the litigation options outlined above we recommend that the Town Commission specifically authorize the following:

- (1) Ratify the engagement of the law firm of Matthews Eastmoore and attorneys Hunter Carroll and Arthur Hardy to serve as special litigation counsel to the Town and represent the Town's interests in litigation associated with HB 537 and Article II, § 22 of the Town Charter; and
- (2) Authorize the filing of an appropriate lawsuit for declaratory relief and any other related cause of action against First America Bank and Victor Levine for purposes of seeking a judicial interpretation on the ability of landowners to increase density on their property in light of the obligations under HB 537 and Article II, § 22 of the Town Charter; and
- (3) Authorize the pursuit of an appropriate motion and any other related pleadings associated with revisiting the November 13, 2012, Final Judgment Order rendered in the IPOC litigation to reconsider the portion of the Court's judgment requiring a referendum pursuant to Article II, § 22 of the Town Charter in light of the passage of HB 537.



Hunter W. Carroll
Patricia D. Crauwels
E. Keith DuBose
Theodore C. Eastmoore

1777 Main Street, Suite 500
Sarasota, Florida 34236-5841
Telephone: (941) 366-8888
Facsimile: (941) 954-7777
www.MatthewsEastmoore.com
August 30, 2013

Martin Garcia
Margaret Rowell Good
Arthur S. Hardy
A. Lamar Matthews, Jr.

Via Email Only

Town of Longboat Key
c/o Maggie D. Mooney-Portale, Esq.
Town Attorney
1820 Ringling Blvd.
Sarasota, FL 34236

Via Email Only

Town of Longboat Key
c/o Dave Bullock
Town Manager
501 Bay Isles Rd
Longboat Key, FL 34228-3196

Re: Longboat Key Referendum Issues

Dear Mr. Bullock and Ms. Mooney-Portale:

I enjoyed meeting with you last week to discuss the Town's referendum issue as it relates to density. This engagement letter confirms that the law firm of Matthews Eastmoore ("us" or "our") will represent the interests of the Town of Longboat Key as discussed below. I am sending this engagement letter to you for your review and approval.

The Town of Longboat Key ("Town" or "you") has agreed to retain this firm to provide legal services on an hourly basis. The purpose of this representation is to represent the Town's interest in obtaining further clarity of its Charter provision concerning referenda prior to density increases, which process may have been impacted by recent legislation from the Florida Legislature. At this time, the scope of this engagement is limited to recommending one or more courses of action, and, after obtaining your approval, filing or participating in litigation to accomplish the goals you request relating to the referenda matter. The scope of this representation may not be changed unless both you and us agree in writing.

My hourly rate will be \$250 per hour. Any shareholder of our firm who works on this matter will charge \$250 per hour, and any associate who works on this matter will charge \$165. Our paralegal rate is \$100 per hour, and unusual secretarial services will be charged at \$60 per hour. These hourly rates may be revised from time to time, but in no event prior to September 1, 2014. You will also be responsible for all out-of-pocket costs incurred by our firm in pursuing this matter, including, but not limited to, court costs, service of process fees, court reporter fees, hearing transcripts, etc. We do not make any guarantee as to any particular outcome.

We generally bill on a monthly basis, with a statement sent to you on behalf of the Town covering date, time expended, and nature of services. Any statements not paid in full for more than 30 days will accrue interest on the unpaid portion at the lower of 1.5% per month or the maximum interest rate permitted by law. Our services are rendered in Sarasota County, Florida, and payment is to be made to us in Sarasota County, Florida.

Retainer. At present, we are not asking for a retainer. If at some point it becomes necessary to ask for a retainer, the retainer will be deposited into our firm's non-interest bearing trust account. We will

hold this retainer until the conclusion of our representation in this matter. In the event you do not pay the total bill when presented, we have the option, but not the obligation, to pay such outstanding indebtedness from any of your moneys we are then holding in trust. We reserve the right to increase the amount of the retainer and require you to replenish it at any time in the future.

You agree that this engagement letter serves as your written authorization to permit us to pay your bill from our trust account, should the need arise, fifteen calendar days after we email our bill to you, unless you disagree that we performed the services or that they are excessive.

Conflict of Interest. During the term of this engagement, Hunter Carroll and the members of the firm shall observe the requirements regarding conflicts of interest as set forth in Rule 4-1 of the Florida Bar's Rules of Professional Conduct. Unless agreed to in writing by the Town Commission, during this engagement neither Mr. Carroll nor the firm shall undertake representation of any other clients directly adverse to the Town.

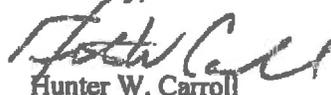
Public Records. Pursuant to applicable Florida law, Matthews Eastmoore's records associated with this engagement may be subject to Florida's public records laws, Florida Statutes 119.01, *et seq.*, as amended from time to time. Matthews Eastmoore shall comply with all public records obligations set forth in such laws, including those obligations to keep, maintain, provide access to, and maintain any applicable exemptions to public records, and transfer all such public records to the Town of Longboat Key at the conclusion of this contract, as provided for in Florida Statutes 119.0701 (2013).

We do not anticipate there will be any disagreements concerning the billing or the services we provide. If you ever have a question or concern, please contact me to discuss them. The sole, exclusive, and mandatory venue involving any disagreement in connection with this engagement letter or the representation we provide in any way connected with this engagement is in the Twelfth Judicial Circuit Court in Sarasota County, Florida.

If the foregoing engagement letter meets with your approval, please sign below, keeping an original copy for your files, and return the other original to me. We look forward to representing you, and we thank you for the confidence that you are placing in us.

In the meantime, should you have any questions, please do not hesitate to call. Thank you.

Sincerely,


Hunter W. Carroll

Engagement Letter approved and accepted:

TOWN OF LONGBOAT KEY



By: Maggie Mooney-Portale, Esq.
Its: Town Attorney

9/3/13

Date



By: Dave Bullock
Its: Town Manager

9/3/13

Date

Attest:



Trish Granger, Town Clerk





End of Agenda Item