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Reply to: ***Lakewood Ranch***

M E M O R A N D U M

TO: Town Commission and Planning Zoning Board

FROM: Maggie Mooney-Portale, Town Attorney

CC: Dave Bullock, Town Manager
Alaina Ray, Planning Director
Trish Granger, Town Clerk

DATE: October 26, 2015

SUBJECT: Response to Legal Questions Posed at September 21, 2015 Joint Meeting of the Town Commission and Planning Zoning Board

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At the September 21, 2015 Joint Meeting of the Town Commission and Planning Zoning Board, I was asked to research and advise on the legal feasibility of certain suggested approaches to addressing density non-conformities within the Town's Land Development Code ("LDC") and Comprehensive Plan re-write efforts. The following shall serve as my response to the questions posed. Included in this response are Exhibits A – D, that are incorporated by reference into this Memorandum.

The purpose of this Memorandum is to only discuss the legal questions posed by Commissioner Younger (as set forth in his September 21, 2015 proposal) and Planning and Zoning Board Chairman Brown. Specifically, Commissioner Younger proposed and suggested that all of the non-conforming density properties within the Town were moved into a conforming overage zoning district with variable densities that reflect the actual as built density on each site by virtue of the 2008 Referendum's passage. Chairman Brown asked whether a floating/PUD zoning district could be utilized by the Town. Available

planning options to address resolving the non-conforming density issues within the Town, will be address by the Town's Planning Director.

The questions asked at the Joint Meeting can be summarized as follows:

Question 1. Whether Commissioner Younger's recommendations as set forth in a Position Statement he distributed at the September 21, 2015 could legally be implemented? Additionally, if it is determined to be legally feasible, can Commissioner Younger's approach to conform the non-conforming properties be accomplished through a legislative, rather than quasi-judicial, process?

Short Answer: Generally, Commissioner Younger's concept of legalizing the existing densities on non-conforming properties (but not giving any extra density) and rezoning those properties into zoning district(s) reflecting the actual present, onsite density is an available approach the Town Commission/PZB could pursue through Comprehensive Plan and LDC revisions. Notwithstanding the foregoing, the method Commissioner Younger has suggested to accomplish his proposed approach is not permitted under applicable Florida law. Comprehensive plan amendments and LDC revisions that create new zoning district(s) to recognize existing density can be established by legislative action. The rezoning of individual properties into any such created zoning district(s) requires quasi-judicial action and all procedural due process formalities will need to be observed to actually move properties into such zoning district(s).

QUESTION 1 ANALYSIS:

The Town Commission made a policy decision to take up the issue of non-conformities as an initial step in the Town's efforts to revise its Comprehensive Plan and LDC.[1] At the September 21, 2015 meeting, Commissioner Younger introduced an approach that essentially legitimizes the existing densities on various non-conforming properties. Commissioner Younger's proposal generally seeks to resolve the non-conformity density issue by rezoning these properties with the densities that they currently have in place. A Copy of Commissioner Younger's recommendations are attached as Exhibit A.

[1] For purposes of this Memorandum, unless otherwise noted, the discussion contained herein relating to "nonconformities" relates to density non-conformities within the Town in the underlying zoning district.

Commissioner Younger's proposal introduced two (2) main concepts to implement his recommendation: (1) that the passage of the 2008 Referendum (Ordinance 2007-48) was self executing and made all non-conforming properties conforming upon affirmative passage by the Town's electorate, and (2) by virtue of that referendum's passage the non-conforming properties should/could be reclassified within an existing "conforming overage" zoning district category, where the properties would be assigned a base density (as provided for in an existing zoning district) with an notation reflecting a density enhancement corresponding to the actual density on the particular site. A detailed discussion of Commissioner Younger's proposal in consideration of existing law is below:

A. The 2008 Referendum

The Town's Charter limits how density increases may occur within the jurisdictional limits of the Town and requires a referendum to increase density beyond the cap provided for in the 1984 Comprehensive Plan.[2] In an effort to "stabilize the existing residential and tourism densities by allowing redevelopment while maintaining the current density of the property" the Town Commission adopted Ordinance 2007-48 (hereinafter "2008 Referendum") that posed the following question to the Town's electors:

> For the properties that have more dwelling or tourism units than currently allowed, but which were legal at the time they were created, may the Town consider and grant approval to allow those properties to rebuild to their current dwelling or tourism unit levels in the event of involuntary or voluntary destruction?

In March 2008, the majority of the Town's electors affirmatively approved the 2008 Referendum question. In accordance with the plain meaning of Ordinance 2007-48, the Town Commission was granted authorization in 2008 to enact local laws (ordinances) that allow non-conforming property owners to rebuild to the density that they currently have irrespective of the 1984 Comprehensive Plan's density cap. Since the Charter's land use restriction only regulates increases in density, once affirmatively passed, the 2008

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[2] Specifically, Art II Sec. 22 of the Town Charter states:

> Sec. 22. - Comprehensive plan for town.
>
> (a) The town commission shall cause plans to be developed on a continuing basis for the future development and maintenance of the town, considering the health, safety, morals, environmental protection, aesthetics, convenience and general welfare of the town and its residents.
>
> **(b) 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.**

Referendum provided an avenue for the Town Commission to give properties that were non-conforming as to density an opportunity to conform the density on their properties.

In response to the 2008 Referendum's approval, the Town Commission subsequently made changes to the non-conforming LDC provisions to permit reconstruction of non-conforming properties in a manner that maintained existing density despite its zoning designation. Since that approval, neither non-conforming properties owners nor the Town took action *to reclassify and rezone* these non-conforming properties through Comprehensive Plan amendments or LDC changes, in large part, because many of the non-conforming properties could not be reclassified and rezoned into existing Town zoning districts without losing density and potentially creating additional nonconforming site conditions.

B. Redevelopment of Density Non-Conformities

The concept of "non-conforming" properties is a legal concept in land use and zoning laws. The term, which is often attached to structures or uses, means that a particular structure or use was lawful at the time it was built but due to subsequently enacted land use or zoning regulations, the structure or use is no longer lawful. The law recognizes that the property owner of a non-conforming structure or use has certain vested rights to that structure/use as long as the property owner maintains that structure/use. The general law on non-conformities also recognizes that once the structure or use is discontinued or destroyed, the replacement structure or use on the subject property should conform with current laws. Accordingly, the law on non-conformities has essentially developed into a balancing act that offers some protection to private property owners by recognizing certain vested rights to maintain the non-conformity, and some protection to the government's interest in regulating planning so that future compatible uses can be grouped together and incompatible uses can be separated. In most circumstances the local regulatory/government seeks to eliminate non-conformities by legislating in their local land development codes that attrition, abandonment, or acts of God that destroy the non-conforming structure/use, end the ability of the property to perpetuate the non-conformity; such that any reconstruction must occur in conformance with existing laws (including existing zoning districts). A comprehensive discussion on applicable Florida case law interpreting the legal principles surrounding nonconformities is set forth in an article entitled "Nonconforming Uses and Structures" written by Sidney Ansbacher and published in the Florida Bar's Environmental and Land Use Law Treatise (June 2014) which is attached as Exhibit B.

Because of the 2008 Referendum and the subsequently enacted LDC provisions allow for the rebuilding/reconstruction of non-conforming structures to preserve their existing status, generally speaking, the Town's current Code provisions <u>does not</u> implement

traditional principles relating to non-conformities. Meaning, that the Town does not appear to follow the general practice of sunsetting non-conforming structures/uses to encourage conformity with the underlying zoning district; to the contrary, the Town seeks to preserve non-conformities. Consequently, as currently written, it is difficult for a property owner to actually re-develop their property beyond what is in currently in place, as the existing underlying zoning districts do not contemplate a property owner having "extra" density beyond that established within the zoning district. This has been determined to be a problem for future revitalization and redevelopment of these non-conforming properties and the Town Commission has made a policy decision to correct this problem. Due to the large number of non-conforming as to density properties/structures within the Town, it was determined that the Town would rezone these properties to eliminate the non-conforming status to the greatest extent possible and afford these properties an opportunity to redevelop, rebuild and modernize their properties within a newly created zoning district that recognizes the existing density.

C. The 2008 Referendum Did Not Amend the Town's Comprehensive Plan or Rezone the Non-Conforming Properties.

Commissioner Younger has suggested that the 2008 Referendum relating to non-conforming densities was self-executing and that the affirmative passage of that referendum question converted all non-conforming density properties to a single "conforming overage" category/zoning district. In otherwords, the 2008 Referendum effectively modified the non-conforming properties' zoning classifications to become conforming.

First, there is no recognized legal mechanism in Florida to rezone properties or amend a comprehensive plan through a public referendum. To the contrary, Florida Statutes 163.3167 specifically prohibits "hometown democracy" referendum votes relating to development orders, which includes rezoning authorizations. While that statutes carves out a limited exception for certain grandfathered jurisdictions to maintain such local referendum processes for comprehensive plan amendments, Florida law prohibits rezonings by referendum approval. See, Fla. Stat. 163.3167(8)(prohibiting referendums in regard to 'any development order' unless the comprehensive plan amendment is authorized by a specific charter provision effective on June 1, 2011)[3]; see also, Fla. Stat. 163.3164(15), (16) (setting forth the definitions of "development order" and "development permit")[4].

[3] In relevant part, Florida Statutes § 163.3167(8) states:

Florida Statutes specifically provides for public adoption processes for rezoning proceedings and comprehensive plan amendment modifications. See, Fla. Stat. §§ 166.041 (procedure for adoption of ordinances and resolutions), 163.3184 (process for comprehensive plan or plan amendment), 163.3187 (process for adoption of small-scale comprehensive plan amendment). Florida Statutes § 166.041 outlines the process by which all municipal laws (ordinances and resolutions) are adopted and provides for a heightened public hearing and notice process whenever there is a change in the actual list of permitted, conditional or prohibited uses within a zoning category or change the actual zoning map designation by a municipality.[5] Fla. Stat. § 166.041(3). The adoption procedures included within this statute have repeatedly been construed by the courts as required conditions before any zoning can be deemed effective. *See*, *Sanibel v. Buntrock*, 409 So. 2d 1073 (Fla. 2d DCA 1981) (stating that local government actions that substantially affects land use must be enacted under the statutory procedures which govern zoning and rezoning which include specific requirements for notice and public hearing); *see also*, *Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996) (providing that the power to enact and amend zoning regulations requires due process, notice, and hearings as set forth within the statute.) Comprehensive plan amendment adoption is also regulated by the Florida Legislature who has established by statutes the adoption process for plan amendments. With respect to comprehensive plan amendments, the process varies depending upon the size/scope of the

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(8) (a) An initiative or referendum process in regard to any development order is prohibited.

(b) An initiative or referendum process in regard to any local comprehensive plan amendment or map amendment is prohibited unless it is expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011. A general local government charter provision for an initiative or referendum process is not sufficient.

(c) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order. It is the intent of the Legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment, except as specifically and narrowly allowed by paragraph (b). Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and applies retroactively to any initiative or referendum process commenced after June 1, 2011, and any such initiative or referendum process commenced or completed thereafter is deemed null and void and of no legal force and effect.

[4] Florida Statutes § 163.3164(15) and (16) states:

(15) "Development order" means any order granting, denying, or granting with conditions an application for a development permit.

(16) "Development permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

[5] The Town has adopted all of these statutory ordinance and resolution requirements in its Code.

plan amendment and requires the involvement of the local planning agency for "at least one public hearing, with public notice" on any proposed plan or plan amendments. Fla. Stat. §§ 163.3184, 163.3187, and 163.3174(4).

The above cited statutory framework established by the Florida Legislature pre-empts the manner by which Florida municipalities rezone properties and adopt comprehensive plan amendments and the Town is required to observe the statutorily enumerated processes. Accordingly, any rezoning method that seeks bypasses these statutory mandated steps cannot be sustained.

The Town's Charter and Code does not treat referendum approval as a de facto comprehensive plan or rezoning change either. The Town's Charter and Code mirrors the requirements of Florida Statutes outlined above and specifically incorporates the public hearing process for rezones and comprehensive plan amendments. For example, the Town Code incorporates notice and public hearing process requirements for all comprehensive plan and zoning changes. See, Town Code §§ 30.01(E)(3), (4) (requiring public hearings for comprehensive plan and zoning changes, respectively). The Town Code also requires the involvement of the Planning and Zoning Board (the Town's designated local planning agency) in such adoption processes. See, Town Code §33.22 (A)(identifying duties of the Town's Planning and Zoning Board); Town Code §§ 32.01-32.02 (designating the Town's Planning and Zoning Board as the local planning agency and providing for duties). Accordingly, the Town Code recognizes that something more than just referendum approval is needed and mandated <u>before</u> a comprehensive plan amendment is deemed approved or a rezoning occurs within the Town. The Town Code recognizes that public hearings, notice and procedural due process is afforded in all of these proceedings.

Finally, the Town's historic treatment of referendum approval to increase density has consistently been construed as a condition precedent to filing and pursuing any comprehensive plan amendment or rezone change to allow for such a density increase. Accordingly, the Town Commission has never been "obligated" to automatically grant a landowner's comprehensive plan amendment request or rezoning request following a referenda vote. The Town has always retained discretion over these matters. All past density increase requests to amend the comprehensive plan and rezone property, have all required subsequent legislative and quasi-judicial action of the Town Commission following the affirmative approval to approve the increase in density (ie, Moore's Stone Crab March 2006 approval, Victor Levine's November 2012 approval, and First American Bank's November 2012 approval) rezone and comprehensive plan request following the March 14, 2006 and November 6, 2012 affirmative votes. The Town has historically required that any applicant seeking an increase in density conduct the referendum first before filing any comprehensive plan or rezoning request with the Planning Department.

Accordingly, based upon all of the above referenced state and local laws and precedent, I respectfully disagree with Commissioner Younger's assertion that the 2008 Referendum was self executing and that upon the affirmative passage of that referendum, all non-conforming properties as to density became conforming. The Town's non-conforming properties have not become conforming because there has not been a zoning change or a change to the Town's Comprehensive Plan to make such properties conforming. Pursuant to the above cited Florida Statutes and Town Code provisions, comprehensive plan amendments and rezones must follow the adoption processes established by law.

D. Modifications to the LDC are Legislative, Rezoning Decisions Are Quasi-Judicial Proceedings.

Board of County Commissioners of Brevard Co. v. Snyder ("*Snyder*"), is generally regarded as the seminal case in Florida that sets forth when local government board action triggers quasi-judicial treatment as opposed to legislative or executive consideration. *Bd. of Co. Comm'rs of Brevard Co. v. Snyder*, 627 So. 2d 469 (Fla. 1993). *Snyder* was a land use decision in which a property owner filed a writ of certiorari seeking review of the Brevard County Commission's decision to deny the property owner's request to rezone a one-half acre site. In its consideration over whether a rezoning action was legislative or quasi-judicial (which implicated the appropriate method of court review and legal challenge), the Florida Supreme Court enunciated the rule that a local government's adoption of an ordinance is legislative because it is the "formulation of a general rule of policy," and specifically delineated that the "*application* of a general rule of policy" by a local government body is judicial in nature. *Snyder*, 627 So. 2d at 474. The Florida Supreme Court continued articulating the following test with respect to rezoning matters:

> **[R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of…quasi-judicial action**…
> [Emphasis supplied].

Snyder at 474.

It is this *Snyder* decision that has been attributed with settling the law in Florida that comprehensive plan amendments are legislative actions and rezoning proceedings are quasi-judicial. *Snyder* at 474-75. Since *Snyder*, Florida Courts have repeatedly continued to uphold the determination that rezoning decisions are quasi-judicial and comprehensive plan amendments are legislative actions. See, *Park of Commerce Assocs. v. City of Delray Beach*, 636 So. 2d 12, 15 (Fla. 1994) (reaffirming that rezoning actions are quasi-judicial under *Snyder)*; *Martin Co. v. Yusem*, 690 So. 2d 1288 (Fla. 1997)(amendments to comprehensive plans are legislative activities).

The quasi-judicial versus legislative distinction is important as quasi-judicial hearings are conducted with more formality than legislative proceedings and require certain procedural "safeguards" which satisfy basic due process. Those safeguards which are hallmarks of a quasi-judicial proceeding include a requirement that the parties be afforded notice of the hearing, a fair opportunity to be heard, the right to present evidence, the right to cross-examine witnesses, and the right to be informed of all of the facts upon which the commission acts. *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648, 652 (Fla. 3d DCA 1982); *Jennings v. Dade County*, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991). Furthermore, legislative decisions are reviewed in a de novo court proceeding under a "fairly debatable" standard, while quasi-judicial proceedings are reviewed through a writ of certiorari where the court determines whether the decision was supported by substantial competent evidence in the record before the deciding body. See, *Hirt v. Polk County Bd. of County Comm'rs,* 578 So. 2d 415 (Fla. 2d DCA 1991).

When a governing body adopts or amends a zoning code, such actions are a legislative function. *State v. Roberts*, 419 So.2d 1164, 1167 (Fla. 2d DCA 1982). When a governing body applies a zoning code to particular parcel such actions are a quasi-judicial function. *Park of Commerce Assocs. v. City of Delray Beach*, 636 So.2d 12, 15 (Fla. 1994).

The Town Commission can amend the Town's LDC and Comprehensive Plan through the legislative process. However, based upon the holding in *Snyder* and its progency, proceedings to rezone property into a new zoning district are quasi-judicial.

E. Creation of a "Conforming Overage" Zoning District(s) [6]

As long as a proposed zoning district is consistent with the Town's Comprehensive Plan, the Town has legal authority to legislate the creation of either a single or multiple zoning districts that defines what land uses are permitted in such zones. *State v. Roberts*, 419 So.2d 1164, 1167 (Fla. 2d DCA 1982)(stating zoning code adoption is a legislative function).

As mentioned above, Commissioner Younger's approach to resolving the non-conforming (density) property issue suggests that all of the non-conforming properties were automatically reclassified (rezoned) into a single "conforming overage" zoning district by virtue of the 2008 Referendum. Notwithstanding the legal prohibitions associated with rezoning by referendum that are discussed in detail above, the underlying rationale behind Commissioner Younger's proposal to "give the properties exactly what they have" approach to density in which non-conforming properties are rezoned to a conforming zoning district(s) is a sustainable option available to the Town Commission.

Commissioner Younger's approach of using the Town's existing base zoning districts (R-1 through R-6 and T-3/T-6) for the single zoning district is problematic. Conforming non-conforming properties to an existing Town zoning classification has the potential to expose the Town to legal and practical challenges. Several concerns with respect to Commissioner Younger's proposal include: (a) the Town's existing zoning classifications do not recognize density overages, and it is conceivable that an argument could be made that reclassifying a non-conforming property downward into an existing zoning classification (i.e., 12 units per acre into T-6) will result in property owners' losing some pre-existing right of use, setback, density, etc.; (b) conversely, some individual properties may get a "windfall" of greater available uses and/or rights granted to them if they become categorized in the same zoning district as other non-conforming properties; (c) the Town's records relating to the existing densities on non-conforming properties appears to have inaccuracies and accurate records relating to densities would have to be confirmed to establish the base density entitlement through some verification process; and (d) properties would still need to be rezoned through a quasi-judicial proceeding into this single zoning district category.

In scenarios where the "conforming overage" exceeds the maximum allowable density of an existing density zoning district, there will need to be at least one new zoning district (and corresponding comprehensive plan amendment) created to accommodate that

[6] The discussion of a single zoning district or multiple zoning districts within this section should not be construed and is not intended to be a discussion of all of the options available to the Town Commission/PZB in addressing the non-conformity issue within the Town. This is intended to only respond to questions asked at the September 21, 2015 Joint Meeting.

additional density. Depending on the uses permitted and the criteria established for that district, in theory, a single zoning district could be developed to provide a zoning category for non-conforming properties to rezone into within the Town. The Town could also legally consider the creation of multiple zoning districts that correspond to the existing densities of the non-conforming properties within the Town. Multiple zoning districts could be created in a similar manner to the proposal advanced by the Town's Consultant University of Florida/Florida Resilient Communities Initiative, and properties would need to be rezoned into the appropriate zoning district category through a quasi-judicial hearing process. Under this later option, the potential number of zoning districts created by this approach may lead to concerns about "spot zoning."[7] If a proper foundation is established within the Town's Comprehensive Plan, spot zoning arguments can be minimized and refuted. See, Exhibit C, for a general discussion provided in "Spot Zoning" article by Sidney Ansbacher and David Layman contained within the Florida Environmental and Land Use Law Treatise (June 2015).

Based upon the foregoing, the Town Commission and PZB should be aware that it can legitimize the existing density of the non-conforming properties through the establishment of zoning district(s) that represent the actual present density of such properties, and such zoning district(s) will then be available for any future rezones by non-conforming properties. In any scenario in which the Town Commission establishes new zoning district(s), the creation of such district(s) by ordinance is a legislative action. Any required modifications to the Town's Comprehensive Plan to accommodate such new zoning districts will also be considered legislative action. Any actual rezoning of non-conforming properties into a new zoning district(s) is quasi-judicial and the rezonings have to observe the statutory and procedural safeguards established by Florida law.

QUESTION 2 ANALYSIS:

Question 2 Whether a Planned Unit Development ("PUD") zoning district as suggested by PZB Chairman Jim Brown could be integrated into the Town's LDC and utilized to rezone and redevelop certain non-conforming properties located throughout the Town? If it is determined to be legally feasible, can a PUD concept be applied through a legislative, rather than quasi-judicial process?

[7] During a prior Joint Public Meeting of the Town Commission and Planning and Zoning Board, this option indicated that over 30+ different zoning districts could be created throughout the Town and the majority of the non-conforming properties could be classified into one of these newly created districts.

Florida law recognizes the value of planned unit developments ("PUDs") and they have been judicially recognized as a zoning classification that "permits a flexible approach to the regulation of land uses." See, *Hirt v. Polk County Bd. of County Comm'rs*, 578 So. 2d 415 (Fla. 2d DCA 1991). PUDs are also recognized and encouraged within Florida Statutes as a type of "innovative land development regulation". Fla. Stat. § 163.3202(3). Like other traditional zoning districts, PUD zoning districts must be consistent with the local government's comprehensive plan. *Saadeh v. City of Jacksonville*, 969 So. 2d 1079 (Fla. 1st DCA 2007); *Jensen Beach Land Co. v. Citizens for Responsible Growth of Treasure Coast*, 608 So. 2d 509 (Fla. 4th DCA 1992). A comprehensive discussion on applicable Florida case law interpreting the legal concept and planning principles surrounding PUDs is included in an article entitled "Planned Unit Developments" written by James Brindell, Linda Hake, and Robert Raynes and published in the Florida Bar's Environmental and Land Use Law Treatise (June 2014) which is attached as Exhibit D.

There is no legal impediment prohibiting the Town from incorporating PUD zoning district concepts into the Town's LDC and Comprehensive Plan. A PUD zoning district is legally feasible. The creation of a PUD zoning district for the non-conforming properties to rezone into within the Town Code would be a legislative act. Modifications to the Town's Comprehensive Plan to provide for the creation of a PUD zoning district for non-conforming properties would also be considered legislative action. The rezoning of a specific property into a PUD zoning district would be site specific, and the reclassification of a site specific property/properties into a PUD district would need to occur though a quasi-judicial process.

Should you have any questions regarding the legal principles set forth in this memorandum, please do not hesitate to contact me at (941) 306-4730.

Attachments:

Exhibit A – Commissioner Phill Younger's September 21, 2015 proposals.
Exhibit B – "Nonconforming Uses and Structures" written by Sidney Ansbacher and published in the Florida Bar's Environmental and Land Use Law Treatise (June 2014).
Exhibit C –"Spot Zoning" article by Sidney Ansbacher and David Layman contained within the Florida Environmental and Land Use Law Treatise (June 2015).
Exhibit D – "Planned Unit Developments" written by James Brindell, Linda Hake, and Robert Raynes and published in the Florida Bar's Environmental and Land Use Law Treatise (June 2013)

EXHIBIT “A”

Zoning Issues Currently Under Review (Position Statement) - Summary

After several requests prior to and since the joint May meeting to correct the data in the spreadsheets for the proposals we supported, discrepancies continue.

Some glaring discrepancies are:

Property	Units Built: Shown	Actual	Error
Windward Bay	296	152	+ 144
Longboat Harbour	488	303	+ 185
Longbeach Village Condo	204	91	+ 113
Total of 3 above	**988**	**546**	**+ 442 ***

* Enough errors to build 3 more Windward Bays

Property	Units Built: Shown	Actual	Error
Pelican Harbour	128	66	+ 62
Banyan Bay Club	100	45	+ 55
Positano	7	29	- 22
Aria (Shown as Benedict Estates)	2	16	- 14
Infinity (Shown as Shore Acres)	1	11	- 10

Other concerns:

- Double counting
- Mislabeling
- Other acreage/unit errors
- Exacerbation of existent inequities
- Wrong addresses
- Relevance
- Placeable in existing zones
- Incorrect inclusion as tourism

Proposal(s) concerns:

- Taking us down wrong path
- Constituent opposition to increased densities
- Over complication
- Avoidable confusion
- Inaccurate terminology
- Misperception of situation
- Rezoning ahead of actual need not adequately covering updating of data or a specific situation, which could be better addressed with small case-by-case referendums that stand a greater chance of approval.

Findings:

Section 4 of Ordinance 2007-48 preceding the March 2008 Referendum stated:

"If a majority of the qualified electors of the Town of Longboat Key actually voting on the Referendum shall vote for adoption of the proposed modification to the Town's density, said modification shall become effective at 12:01 a.m. on the day following the day of the Commission's canvass of the Referendum results on the next day after the Referendum. .....

The March 2008 Referendum approved by the voters stated:

"For the properties that have more dwelling or tourism units than currently allowed, but which were legal at the time they were created, may the Town consider and grant approval to allow those properties to rebuild to their current dwelling or tourism levels in the event of involuntary or voluntary destruction?"

Ordinance/Referendum results

1. Referendum approval was approval for a density increase for those properties then non-conforming.
2. "Current" became interpreted as cubic volume, instead of density, and restrictions were put in place accordingly. (These restrictions could be removed in any event.)
3. Actually, all previously non-conforming units became conforming and should be entitled to all rights thereby, including the right to rebuild subject to compliance only with normal building codes.
4. The property units should no longer be referred to as "non-conforming", but rather as "conforming overage".

Recommendations to address "conforming overage" units are:

1. Remove the cubic volume rebuild restrictions for properties/units that have a "conforming overage"
2. Change codes to reflect the right to rebuild commensurate with any other conforming unit
3. Create single new categories, R-CO and T-CO, for all properties that have a "conforming overage" and denote the units allowed for each property, e.g., R-CO-24, R-CO-192, T-CO-38, etc. or
4. Move to the zoning category closest to the actual density, up to the R-6MX or T-6 maximum, and attach an addendum designating the total number of units allowed, e.g., R-6MX* 2008RCO-57 (Indicates property zoned R-6MX, but a max of 57 units are allowed and conforming per the 2008 Referendum)

Either option would clearly identify all properties that have a "conforming overage", and would allow for sufficient flexibility if further acreage or unit adjustments (i.e., data corrections, aka scrivener's errors) are required.

Other recommendations:

1. Tourism expansion to occur strictly from the pool of 250 units (165 remaining).
2. Entice Residential properties functioning as tourism to change to T zoning to become eligible for expansion from the pool of 250 tourism units (165 remaining).
3. Address requests for density increases with individual referendums on a case-by-case basis
4. Refocus to address changes that must be made to comply with Judge Hayworth's Court Order arising out of the Longboat Key Club suit mandating that our codes provide more specific criteria and controls for determining what can and cannot be allowed when granting approval to construct facilities.

Summary:

- The R-1 thru 6 and T-3/T-6 zoning categories have served us well and best reflect community preferences.
- Easy and simple resolution can occur by "tagging" properties that have a "conforming overage" as above described.
- Allow properties that have a "conforming overage" all rights associated with other conforming properties.

Phill Younger, Commissioner – LBK

Zoning Issues Currently Under Review (Position Statement)

Before I get too deep into the subject I want to say that there has been a lot of work and effort with good intentions by everyone involved in this project and that should not go unrecognized. When we ended the May joint meeting, I, as did almost all of us, supported the proposals staff and the consultant were directed to pursue over the summer. However, much has happened since then. I now have many concerns, and I would be remiss in not sharing them with you. So, here we go.

I have been expressing concerns about the need for accurate data for over a year. Since the May joint meeting, I ramped this concern up. Just like staff and the consultant, having also worked on this all summer, I know first hand how hard it is to get accurate data. Although it may sound like it, my intent is not to criticize what has been presented to us, but to illustrate the extreme difficulty in getting "our ducks in a row" prior to embarking on proposals that may and seemingly will pose issues down the line.

Unfortunately, inaccuracies in the data backing the proposals continue to exist. Some appear minor, maybe a unit or two here or there and maybe slight adjustments to property acreage, but others appear glaring. Some properties may be double counted, some appear no longer relevant, but persist due to mislabeling. Others have been included as tourism, in conflict with indications that they are not subject to multi-rental within a 30-day period.

Some glaring discrepancies are:

Property	Units Built: Shown	Actual	Error
Windward Bay	296	152	+ 144
Longboat Harbour	488	303	+ 185
Longbeach Village Condo	204	91	+ 113
Total of 3 above	**988**	**546**	**+ 442 ***

* Enough errors to build 3 more Windward Bays

Property	Units Built: Shown	Actual	Error
Pelican Harbour	128	66	+ 62
Banyan Bay Club	100	45	+ 55
Positano	7	29	- 22
Aria (Benedict Estates)	2	16	- 14
Infinity (Shown as Shore Acres)	1	11	- 10

I cannot say for certain why the above numbers are so far off. They were off on the initial documents I obtained from the Town last year and for whatever reason they continue to be so.

Unfortunately, this is not all. Other possible spreadsheet concerns are:

- Double counting
- Mislabeling
- Other acreage/unit errors
- Exacerbation of existent inequities
- Wrong addresses
- Relevance
- Placeable in existing zones
- Incorrect inclusion as tourism

Someone might ask, if I know the answers, why did I not just give them to staff and the consultant? First off, I did not vet each and every property and still have not, but began with data sampling, which expanded with time. I provided marked-up spreadsheets to staff, to be passed on to the consultant, who was allegedly doing the research, noting corrections were still needed. I did this several times, noting more work by them was needed, but this soon became a Catch-22 situation. On one side of the equation I was not the one being paid to perform this task, and was it really my place to do all or, for that matter any of their work for them? Even I know that the answer to that is no, but on the other side of the equation I, like all of us sitting here, have a responsibility to ensure that in the long run the best interests of our Town are served, and we all have skills that we use to do so. Whatever we decide, we and our Town must live with for better or for worse. Finally, I stopped the back and forth to wait for their final effort, which has been placed before you, and as I have already stated, unfortunately, it is still lacking in accuracy.

Apart from inaccuracy, the Residential Scenario is a mish-mash of densities per acre wherein densities are assigned by property to match or slightly better existing densities, regardless of lot size. About 56% of the properties would gratuitously gain units, and become what I call lucky "winners", in spite of the fact that some of them might already have a sizeable number of units and an extremely high density per acre. The others would not gain units, exacerbating inequities already existent. The proposal that those gaining units they may not choose to build be allowed to sell their excess units to other properties is in my mind, totally unacceptable in that it would bestow even more benefits, and profitable ones at that, to the lucky "winners" and be contrary to the intention and fairness of our zoning ordinances.

About two dozen properties in the Residential Scenario have the correct or greater density and should not be included, period, any more than either of my single family houses in Country Club Shores and Bay Isles. Another dozen or so could be placed in existing zones R-1 thru 6, leaving about 90 properties with addressable residential zoning. Including duplexes, triplexes, etc., which have not been included in the data file and should be for reasons to soon be disclosed, would up the list to about 140 properties.

While a concept may be developed using inaccurate data, inaccuracies could pose issues upon implementation, in this case such as if a given property's density later proves greater than surmised and Referenda have not provided an adequate unit allowance to cover the situation. We cannot afford to seek Referenda approvals to increase density and then find ourselves short of the mark due to later corrected data. On the flip side, overreaching on Referenda could pose other problems. This is not a well that can be revisited. Whatever concept is eventually selected should have a certain degree of flexibility. But, there is a silver lining to all of this.

EXHIBIT “B”

Nonconforming Uses and Structures

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I. Definition of Nonconforming Use or Structure.

A nonconformity is generally defined as something that once was lawful prior to the adoption or amendment of a land use or zoning regulation but is no longer lawful due to the adoption or amendment of the regulation. Most planning and zoning ordinances allow nonconformities to continue lawfully, as long as the nonconformities are not expanded. People refer generally to these situations as a "nonconforming use," but the term should be used only when the use is nonconforming, such as when a grocery store is located in an area that is later zoned residential. Nonconformities relate often to structures, lot size, or configuration. Most Florida planning and zoning ordinances provide for the continuing lawful existence of uses and structures that were legally in existence prior to the adoption of a zoning ordinance or amendment that would prohibit the existing use or structure. In *Fortunato v. Coral Gables*, 47 So. 2d 321, 322 (Fla. 1950), the Supreme Court of Florida discussed the logic behind such ordinances:

> [Z]oning regulations do not generally operate to limit the right of a landowner to continue such uses of land and structures as were in existence at the time of the adoption of the regulations, on the theory that it would be an injustice and unreasonable hardship to compel the immediate removal or suppression of an otherwise lawful business or use already established in the district.

Id.(emphasis added) Ordinances provide typically that a nonconforming use or structure may remain, but it may not be increased or extended. *Compare Milling v. Berg*, 104 So. 2d 658 (Fla. 2nd DCA 1958) (previously lawful use allowed to continue, and even to modify its prior, grandfathered use under certain circumstances), *with Marine Attractions v. City of St. Petersburg Beach*, 224 So. 2d 337 (Fla. 2nd DCA 1969) (nonconforming, grandfathered aquarium expanded unlawfully by adding an amusement park). Nonconforming uses must have been lawful at the time they initially existed. Likewise, nonconforming structures must have been lawfully erected. The Fifth District Court of Appeal in *Lake Rosa & Lake Swan Coalition, Inc., v. Board of County Commissioners*, 911 So. 2d 206 (Fla. 5th DCA 2005), analyzed what was allowed in a church camp before and after Putnam County amended its comprehensive plan. The court

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explained the significance of the impact of the timing of the amendments on vesting of various phases of the development. This opinion provides an outstanding analysis of how nonconforming uses vest against plan amendments. The Third District Court of Appeal has multiple times addressed the law of nonconforming uses in the context of short-term rentals, as exemplified in *Allen v. City of Key West*, 59 So. 3d 316 (Fla. 3d DCA 2011).

II. Typical Ordinance.

A good example of an ordinance is as follows:

ARTICLE 1.3: NONCONFORMING USES, LOTS, AND STRUCTURES:

Section 1.3.1 Purpose:

(A) Within the zoning districts established by Chapter Four, there exist lots, structures, uses of land and structures, and characteristics of use, which were lawful before the passage of said Chapter Four but are not prohibited, regulated, or restricted. It is the intent to allow such nonconformities to continue until they are removed, but not to encourage their continuation. Nonconformities shall not be enlarged upon, expanded, or used as grounds for adding other structures or uses prohibited elsewhere in the same zoning district.

. . . .

Section 1.3.4 Nonconforming Structures: Where a lawful structure existed on September 1, 1990, that could not now be built, such structure may be continued, subject to the following provisions:

(A) A nonconforming structure shall not be altered or enlarged in any way which increases its nonconformity. Any structure may however, be altered to decrease its nonconformity.

(B) Except as provided in Section 1.3.8, should the nonconforming structure be destroyed by any means to an extent exceeding 50% of its replacement cost, the structure shall only be reconstructed in conformance with the requirements for the zoning district in which it is located. **[Amd. Ord. 17-95 03/21/95]**

Section 1.3.5 Nonconforming Uses of Structures and Land: Where lawful use of a structure and land existed on September 1, 1990, that would not now be allowed, such use of a structure and land may be continued, subject to the following provisions:

(A) The nonconforming use may be extended internally throughout any part of the structure, provided the use is not extended to occupy any land outside the existing structure.

(B) When a nonconforming use is discontinued or abandoned for a continuous period of 180 days, every subsequent use shall be in conformity with the requirements for the zoning district in which it is located.

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(C) Except as provided in Section 1.3.8, should the structure involving a nonconforming use be destroyed by any means to an extent exceeding 50% of its replacement cost, the structure shall only be reconstructed in conformance with both the development and use requirements for the zoning district in which it is located. **[Amd. Ord. 17-95 03/21/95]**

Section 1.3.6 Repairs and Maintenance:

(A) On any nonconforming structure or on a structure containing a nonconforming use, work may be done on ordinary repairs, or on repair or replacement of fixtures, nonbearing walls, plumbing, or wiring, provided the repair work does not exceed 10% of the current replacement cost of the structure in any 12 month period, unless the damage is caused by an act of God in which case Section 1.3.8 shall apply. In addition, the Site Plan Review and Appearance Board (SPRAB) or Historic Preservation Board (HPB) may approve exterior modifications to a nonconforming structure or a structure containing a nonconforming use, provided the modifications do not exceed 15% of the current replacement cost of the structure in any 12 month period, unless the damage is caused by an act of God in which case Section 1.3.8 shall apply. However, improvements to contributing structures within historic districts or to individually listed historic structures can exceed the established 10% interior and 15% exterior maximum thresholds. **[Amd. Ord. 55-06 10/17/06]; [Amd. Ord. 62-04 11/16/04]; [Amd. Ord. 28-94 5/17/94]**

(B) If the Chief Building Official declares a nonconforming structure or structure containing a nonconforming use to be unsafe or unlawful due to its physical condition, such structure shall not be rebuilt, repaired, or restored, except in conformance with the requirements for the zoning district in which it is located.

Section 1.3.8 Reconstruction Necessitated by An Act of God: [Amd. Ord. 17-95 3/21/95]

(A) If a lawful nonconforming residential or commercial structure is damaged or destroyed by an Act of God (the event), the owner shall be permitted to rebuild the structure in accordance with the use and number of units and square footage permitted by the certificate of occupancy in existence prior to the occurrence of the event. Where necessary, in order to accommodate the use or the same number of such units, structures may be reconstructed to heights previously established on building permit plans approved prior to the occurrence of the event. All rebuilding shall comply with fire and building codes in effect at the time of reconstruction, and shall comply to the greatest extent possible with applicable provisions of the Land Development Regulations **[Amd. Ord. 36-08 8/19/08]; [Amd. Ord. 81-06 1/2/07]; [Amd. Ord. 17-95 3/21/95]**

(B) In order to receive approval for rebuilding pursuant to this section, applications for building permits must be submitted within one year of the date on which the

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> event occurred and all reconstruction must be completed within three years from the date of the event. **[Amd. Ord. 17-95 3/21/95]**

DELRAY BEACH, FLA., LAND DEVELOPMENT REGULATIONS art. 1.3 (2013), *available at* http://mydelray beach.com/planning-and-zoning/ldr. The above are fairly typical regulations, and they are written more clearly than many.

III. Components of a Typical Ordinance.

A. *Use or Structure Lawful before Passage.*

The use has to be lawful upon the passage of the more restrictive ordinance, and the use must continue to exist at the time of passage. In *Bemas Corp. v. City of Jacksonville*, 298 So. 2d 467, 467-68 (Fla. 1st DCA 1974), the owner of a property removed ten loads of dirt to commence use as a borrow pit immediately prior to the effective date of an ordinance that would prohibit such use. The court found that the project was in active, bona fide operation prior to the effective date of the new ordinance. *See id.*

The Court of Appeals of New York similarly analyzed a vesting claim in *Glacial Aggregate, LLC v. Town of Yorkshire*, 924 N.E.2d 785 (N.Y. Ct. App. 2010). Glacial obtained mining permits and made all required improvements to mine the site, but for a haul road and bridge, before a town zoning ordinance was adopted that prohibited mining on the site. The court found that the landowner's expenditures of over $500,000 in obtaining permits and improving the parcel constituted good faith reliance on the absence of zoning. Accordingly, the court found the mining rights were vested nonconforming uses.

B. *Nonconformities May Not Be Expanded.*

Section 1.3.1(A) of the Typical Ordinance, *supra*, provides that nonconformities may continue but may not be expanded. An example of the prohibition of expansion is found in *Bixler v. Pierson*, 188 So. 2d 681, 682 (Fla. 4th DCA 1966), which stated that replacing an existing permitted nonconforming mobile home with a larger mobile home constituted a prohibited enlargement of a nonconforming structure. *Cf. Johnston v Orange Cnty.*, 342 So. 2d 1031, 1033 (Fla. 4th DCA 1977) (holding that the owner of a mobile home park could replace existing single wide mobile homes with double wide mobile homes, as long as the density of the population of the mobile home park did not increase).

3M National Advertising Co. v. City of Tampa Enforcement Bd., 587 So. 2d 640, 641 (Fla. 2nd DCA 1991), held that a prohibited enlargement of a nonconforming use does not result in loss of the entire use. Instead, the owner should return the property to the previous use. Another court held that conversion of an apartment complex to a condominium does not result in an expansion of a nonconforming use. *See City of Miami Beach v. Arlen King Cole Condo. Ass'n*, 302 So. 2d 777, 779 (Fla. 3rd DCA 1974) (Note, however, that the change might be a prohibited <u>alteration</u> under some ordinances).

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Finally, in *Milling v. Berg*, 104 So. 2d 658, 663 (Fla. 2nd DCA 1958), the court concluded that a boatyard that changed from working on wooden boats to metal boats was not an expansion of the use.

C. *Rebuilt Only in Accordance with Law.*

Generally, as provided in Section 1.3.4(B) of the Typical Ordinance, if a nonconforming structure is destroyed to an extent exceeding a designated percentage of the replacement cost, the structure must be rebuilt so that it complies with the existing law. For example, if an existing structure encroaches ten feet on a twenty foot front yard setback, the building, when reconstructed, must not encroach on that setback. As noted below, the example ordinance contains an Act of God exception, which is not universal.

D. *Repairs Allowed*

As provided in Section 1.3.6(A) of the Typical Ordinance, *supra*, certain repairs are permitted. This is consistent with Florida caselaw. The Second District Court of Appeal found in *Sarasota County v. Bow Point on the Gulf*, 974 So. 2d 431 (Fla. 2d DCA 2007), that a nonconforming motel did not lose its grandfathered rights by ceasing operations for sixteen months to perform necessary repairs and renovations. Otherwise, nonconforming structures could soon become eyesores. Repair work may sometimes require that nonconformities be altered in order to comply with the new or revised regulation. Ordinarily, this requires compliance with later adopted "life safety" standards. For example, the Federal Emergency Management Agency requires that buildings within flood hazard areas be built at certain elevations but permits local communities to develop their flood plans in accordance with federal regulations. *See* FED. EMERGENCY MGMT. AGENCY, ANSWERS TO QUESTIONS ABOUT THE NATIONAL FLOOD INSURANCE PROGRAM 31 (2011). Typically, buildings constructed prior to the flood regulations are not required to conform to the standards. If substantial improvements are made to the previously existing buildings, however, then the floor elevations must either meet or be raised to meet the new or revised regulation. *See generally* PALM BEACH, FLA., CODE OF ORDINANCES § 134-419(1)-(3) (2012).

E. *Act of God Exception.*

Unlike most ordinances, Section 1.3.8 of the Typical Ordinance, *supra*, contains an Act of God exception that was adopted after Hurricane Andrew. The Typical Ordinance allows an exception to the normal requirement that if the nonconforming structure is damaged to an extent exceeding 50% of its replacement cost, then the rebuilding must conform with the new or amended regulation. The Act of God exception allows the same number of units and height restrictions to violate the new or amended regulation in accordance with the previous use when ordinarily the building would have to conform to the new regulations.

The Third District Court of Appeal in *Miami-Dade County v. Redland Estates, Inc.*, 964 So. 2d 701 (Fla. 3d DCA 2006), dealt with a post-Andrew ordinance. The County passed an

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amnesty ordinance that allowed all nonconforming structures to be rebuilt in compliance with zoning plans that were of record by August 23, 1992, and applied for by August 30, 1993. The subject mobile home park was allegedly a vested nonconforming use, but the owners did not apply by the deadline. The appellate court upheld the circuit court determination that the park was not legally nonconforming for two reasons: (1) due to Hurricane Andrew, no mobile home structures remained on-site, nonconforming or otherwise; and (2) the new setbacks the county sought to impose were not passed until five (5) years after the operative date the ordinance set to determine when structures or uses became nonconforming.

IV. Elimination of Nonconforming Uses.

Generally, "nonconforming uses may be eliminated by attrition (amortization), abandonment, and acts of God, as speedily as is consistent with proper safeguards and the rights of the persons affected." *Lewis v. City of Atlantic Beach*, 467 So. 2d 751, 755 (Fla. 1st DCA 1985). Abandonment occurs only if the landowner acquiesces intentionally and voluntarily to cease further nonconforming use of the property. *See id.* If use is hindered or discontinued involuntarily as a result of compulsion by a governmental action, then neither attrition nor abandonment occurs. *See id.* In *Lewis*, involuntary suspension of a nonconforming use of premises for the sale of alcoholic beverages due to the loss of beverage license did not constitute abandonment and did not terminate the grandfathered status of nonconforming use. *See id.*

Amortization is the gradual elimination of the use by setting a termination date. Some courts have held that amortization of nonconforming uses or structures may be a valid alternative to compensation for an elimination of use, if the period permits the owner to recover its investment. *See Lamar-Orlando Outdoor Adver. v. City of Ormond Beach*, 415 So. 2d 1312, 1319 n.24 (Fla. 5th DCA 1982) (amortizing signs).

In addition, unlike the Typical Ordinance, *supra*, zoning ordinances often provide that nonconforming structures, once destroyed, may only be rebuilt in conformance with existing law. Most ordinances allow some repairs and necessary maintenance to such property. *See Sarasota Cnty. v. Bow Point on the Gulf Condo. Developers, LLC*, 974 So. 2d 431 (Fla. 2d DCA 2007) (allowing sixteen month period to conduct necessary repairs and renovations without triggering abandonment provisions of zoning ordinance).

V. Bert J. Harris, Jr., Private Property Rights Protection Act, as Applied to Vested Rights.

The Bert J. Harris, Jr., **Private Property Rights Protection** Act, section 70.001, Florida Statutes, provides a statutory remedy for property owners whose property has been "inordinately burden[ed]" by government acts that do not rise to the level of a constitutional taking. The Act was assumed to expand available remedies upon its passage. *See, e.g.*, David A. Powell, Robert M. Rhodes & Dan R. Stengle, *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 257-59 (1995) (stating that the Act establishes a "new cause of action providing

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judicial relief to landowners who suffer inordinate burdens on the use of their land"). The judiciary has limited substantially the apparently broad statutory intent of this Act. For example, in *M&H Profit, Inc. v. City of Panama City*, 28 So. 3d 71 (Fla. 1st DCA 2010), the court held that no facial challenge could be brought under the Act; in *City of Jacksonville v. Coffield*, 18 So. 3d 589 (Fla. 1st DCA 2009), the court construed narrowly the remedies available under the Act; and in *Holmes v. Marion County*, 960 So. 2d 828 (Fla. 5th DCA 2007), the court held that a time limited permit conveyed no reasonable expectation of permit renewal. In addition, the Fifth District Court of Appeal held in *Wendler v. City of St. Augustine*, 108 So. 3d 1141 (Fla. 5th DCA 2013), that the four year statute of limitations to bring a Harris Act claim ran from the date of permit denial rather than date of ordinance adoption, where the ordinance being implemented did not establish a facially, readily ascertainable impact. The appellate court emphasized the ordinance's grant of discretion in implementation. It distinguished a self-executing ordinance, which might be challenged upon adoption.

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EXHIBIT “C”

Spot Zoning

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I. Introduction.

There are both broad and narrow definitions of spot zoning. The broad definition refers to either a valid or invalid rezoning that singles out a small area for a use classification that is different from the surrounding area. The narrow definition involves a rezoning that is invalid because it is not in accordance with a comprehensive zoning scheme. ANDERSON, AMERICAN LAW OF ZONING § 5.08 (Lawyers Co-op Pub. Co. ed., 2d ed. 1976).

Spot zoning has no application to anything other than rezonings. It does not apply to an original, legislative zoning ordinance or to the various administrative forms of relief from the strict application of zoning ordinances, such as variances. *Harris v. City of Piedmont*, 42 P.2d 356, 359 (Cal. Ct. App. 1935); *Van Sant v. Bldg. Inspector of Dennis*, 225 N.E.2d 325, 327 (Mass. 1967); ROHAN, ZONING & LAND USE CONTROLS § 38.0I[l][a] (Matthew Bender & Co. ed., 1986); YOKELY, ZONING LAW AND PRACTICE § 13 (The Michie Co. ed., 4th ed. 1978).

Special exceptions, special use permits, and conditional use permits may not be attacked as invalid spot zoning. *Rocchi v. Zoning Bd. of Appeals of Glastonbury*, 248 A.2d 922, 925 (Conn. 1968); *City of Lake Lotawana v. Lehr*, 529 S.W.2d 445, 449 (Mo. Ct. App. 1975); *Appeal of Kates*, 393 A.2d 499, 501 (Pa. Commw. Ct. 1978). These terms are generally synonymous, and such devices allow a landowner to use property in a manner expressly permitted by ordinance upon proof that certain facts and conditions exist, without altering the underlying zoning classification. *Neighborhood Bd. No. 24 v. State Land Use Comm'n*, 639 P.2d 1097, 1102 (Haw. 1982); ROHAN, *supra*, § 44.01 [I]. The term "spot zoning" is applicable only to a rezoning of property.

Notwithstanding the above, courts and administrative bodies often deny variances as *de facto* illegal spot zoning. The Mississippi Supreme Court recently held that its prior use of the term "spot zoning" in denying a variance was descriptive, but the two processes

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differ. Accordingly, while an improper variance may create a *de facto* rezoning, "[t]he grant of a variance or special exception that has the same effect as a small parcel rezoning cannot be attacked as spot zoning." *Harrison v. City of Batesville*, 73 So. 3d 1145, 1151-52 (Miss. 2011).

II. Factors Courts Use to Determine Spot Zoning.

A. *In General.*

The crux of invalid spot zoning is that the rezoning favors private interests without relating to or being consistent with a local government's comprehensive zoning scheme. YOKELY, *supra*, at § 13.

Although other factors may be determinative, none provides courts with a satisfactory analytical basis for determining spot zoning issues, and these factors are not determinative for Florida courts. The nonexclusive factors are discussed below.

B. *Size of Area.*

One factor considered by many courts to be important in determining whether a rezoning of a parcel constitutes invalid spot zoning is the size of the area rezoned. *Citizens Ass'n of Georgetown, Inc. v. D.C. Zoning Comm'n*, 402 A.2d 36, 39 (D.C. 1979); *Boyles v. Town Bd. of Bethlehem*, 718 N.Y.S.2d 430 (N.Y. App. Div. 2000) (holding that size is not determinative in a finding of spot zoning); *Cleaver v. Bd. of Adjustment of Tredyffrin Twp.*, 200 A.2d 408, 415 (Pa. 1964); *Burkett v. City of Texarkana*, 500 S.W.2d 242, 244 (Tex. Civ. App. 1973); *Wiggers v. Cnty. of Skagit*, 596 P.2d 1345, 1350 (Wash. Ct. App. 1979). Spot zoning by definition refers to the rezoning of small areas. There are no criteria, however, for how large a rezoned area must be before it is not subject to attack as invalid spot zoning.

For example, the Montana Supreme Court in *Little v. Board of County Commissioners of Flathead County*, 631 P.2d 1282 (Mont. 1981), established a three part test: (1) does the use differ substantially from others nearby; (2) is the rezoning small, "although not solely in physical size"; and (3) does it appear to be special legislation for a small group. In *Little*, the Court found spot zoning occurred when one party benefited from its 56 acre parcel being rezoned commercial, which was inconsistent with the surrounding residential zoning.

C. *Public Interest.*

Zoning ordinances must serve the public health, safety, and welfare to be upheld under the police power of the state. In considering whether a particular rezoning constitutes invalid spot zoning, courts have inquired as to whether the zoning change will benefit the public or whether it will benefit solely the landowner requesting the change. In determining whether the public is benefited, some courts interpret and apply this question to mean a benefit to the entire

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community. *Mansfield & Swett v. Town of W. Orange*, 198 A. 225, 276 (N.J. 1938). Other courts have limited the public benefit analysis to the area immediately surrounding the rezoned parcel. *Damici v. Planning & Zoning Comm'n of Southington*, 256 A.2d 428, 431 (Conn. 1969); *Allapattah Cmty. Ass'n v. City of Miami*, 379 So. 2d 387, 392 (Fla. 3d DCA 1980), *cert. denied*, 386 So. 2d 635; *Appeal of Benech*, 368 A.2d 828, 831 (Pa. Commw. Ct. 1977).

A rezoning will not be overturned, however, simply because the proponent landowner benefits from the requested action as long as the rezoning is not otherwise objectionable. *Morningside Ass'n v. Planning & Zoning Bd. of Milford*, 292 A.2d 893, 898 (Conn. 1972); *Citizens Ass'n of Georgetown*, 402 A.2d 36; *Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp.*, 364 A.2d 1016, 1023 (N.J. 1976), *cert. denied*, 430 U.S. 977 (1977); *Riverview Farm Assocs. v. Bd. of Supervisors of Charles City Cnty.*, 528 S.E.2d 99 (Va. 2000); *Wilhelm v. Morgan*, 157 S.E.2d 920, 924 (Va. 1967). *See also Helena Sand & Gravel, Inc. v. Lewis & Clark Cnty. Planning & Zoning Comm'n*, 290 P.3d 691 (Mont. 2012) (finding that while the county could deny mining in a special district, only the affected landowner could assert takings claim).

D. *Character of Land.*

Some courts have reviewed the character of the land rezoned to determine if it was being treated in the same way as similar land. If the land was not treated the same as similar property, invalid spot zoning is the result. Courts in some states uphold a possible spot rezoning only if it can be shown there was a mistake in the original zoning or there was a change in circumstances. YOKELY, *supra*, at § 11-8 at 137. However, courts in other jurisdictions, including Florida, have stated that a change in the circumstances affecting the property is not necessary for a rezoning. *Oklahoma v. Cole*, 145 So. 2d 233, 235 (Fla. 1962), *aff'd on remand*, 145 So. 2d 900 (Fla. 3d DCA 1962); *Cent. Bank & Tr. Co. v. Bd. of Comm'rs of Dade Cnty.*, 340 So. 2d 503, 505 (Fla. 3d DCA 1976), *cert. denied*, 354 So. 2d 979 (Fla. 1977). Furthermore, the topography of a parcel may sometimes render it unsuitable for the existing zoning and require a change to a more compatible zone. ROHAN, *supra*, at § 38.04 at [2][a]. In Massachusetts, preserving the historical residential character of the land is a factor in determining whether a rezoning is permissible. *Fabiano v. City of Boston*, 730 N.E.2d 311 (Ma. 2000).

The South Carolina Supreme Court weighed both the subject property and surrounding uses in *Historic Charleston Foundation v. City of Charleston*, 734 S.E.2d 306 (S.C. 2012). The majority held that a change in use classification to a use that was common in the neighborhood was not spot zoning. Additionally, it was not spot zoning to change the lower height for the rear 40% of the building to match the higher front 60%. Even though the change benefitted one parcel, many nearby structures had the higher height limitation. A strongly worded dissent accused the majority of a pinched interpretation of the neighborhood. The dissent argued that the majority disregarded the historic preservation duties under the Charleston Code, as well. The two opinions give a good insight into the fact-specific analysis necessary to determine whether spot zoning exists.

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E. *Character of Surrounding Land.*

In reviewing an alleged case of spot zoning, some courts look to the character of the land surrounding the area rezoned. ANDERSON, *supra*, at § 5.12 n.2; ROHAN, *supra*, at § 38.04[4] n.1; YOKELY, *supra*, at § 13. This review generally includes an investigation of whether the rezoning is consistent with the comprehensive zoning plan for the area.

In *Burritt v. Harris*, 166 So. 2d 168 (Fla. 1st DCA 1964), *quashed* 172 So. 2d 820 (Fla. 1965), the plaintiff unsuccessfully attempted to rezone his property from single family residential to industrial. The property was bound on two sides by an airport and on the other sides by mixed, vacant, industrial, and residential areas. The lower court found the requested rezoning should not be granted because the failure to rezone was fairly debatable. The Florida Supreme Court quashed the decision because the denial of the petition was arbitrary under the facts. The site was unfit for residential use because of the airport noise, adjacent pulp mill, and related factors.

Other courts also have looked to the use of the surrounding property as a factor to determine whether a rezoning constitutes spot zoning. *See Langer v. Planning & Zoning Comm'n of Westport*, 313 A.2d 44, 49 (Conn. 1972); *Schubach v. Silver*, 336 A.2d 328, 334 (Pa. 1975); *Wiggers*, 596 P.2d 1345; Annot., *Spot Zoning*, 51 A.L.R.2d 263 (1957).

F. *Enlargement of Zoning District.*

Court decisions are not consistent regarding proposed rezoning in order to add adjacent property to an existing zoning district. Some courts have approved proposed rezonings that add relatively small adjacent areas to a relatively large zoning district. *Waterstradt v. Bd. of Comm'rs of Leavenworth*, 454 P.2d 445, 449 (Kan. 1969); *Peters v. City of Westfield*, 234 N.E.2d 295, 299 (Mass. 1968); *State ex rel. Gutkoski* v. *Langhor*, 502 P.2d 1144, 1146 (Mont. 1972); *Lurey v. City of Laurens*, 217 S.E.2d 226, 227 (S.C. 1975); *McNaughton* v. *Boeing*, 414 P.2d 778, 789 (Wash. 1966).

Other courts have found such proposed rezonings to be spot zoning and thus invalid. *Woodford v. Zoning Comm'n of Ridgefield*, 156 A.2d 470, 472 (Conn. 1959); *Miller v. Town Planning Comm'n of Manchester*, 113 A.2d 504, 506 (Conn. 1955); *Beal v. Bldg. Comm'r of Springfield*, 234 N.E.2d 299, 302 (Mass. 1968); *Oklahoma City* v. *Barclay*, 359 P.2d 237, 242 (Okla. 1960). If the proposed rezoned property use is compatible with the uses allowed on adjacent property, the rezoning is more likely to be validated. See, for example, *North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County*, 137 P.3d 557 (Mont. 2006), where the Montana Supreme Court rejected a spot zoning challenge to a single-owner zoning amendment expanding commercial use where the prevailing surrounding uses were likewise commercial.

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G. Majority View - Consistency with Comprehensive Zoning Scheme or Plan.

The main factor the majority of courts use to determine whether a rezoning constitutes spot zoning is consistency with the comprehensive zoning plan applicable to the subject property. This view is strongly supported by the major commentators on zoning law. ANDERSON, *supra*, at § 5.08; ROHAN, *supra*, at § 38.01. The "comprehensive plan" referred to is not the specific comprehensive plan required in Florida by the Local Government Comprehensive Planning Act as amended in 2011 by the Community Planning Act; rather, it is the general common law comprehensive plan with which zoning must be consistent to be valid. Ch. 163, part II, Fla. Stat. This general plan was defined as follows:

> Without venturing an exact definition, it may be said for present purposes that "plan" connotes an integrated product of a rational process and "comprehensive" requires something beyond a piecemeal approach . . . . Such being the requirements of a comprehensive plan, no reason is perceived why we should infer the Legislature intended by necessary implication that the comprehensive plan be portrayed in some physical form outside the ordinance itself. A plan may readily be revealed in an end-product—here the zoning ordinance—and no more is required by the statute.

Kozesnik v. Twp. of Montgomery, 131 A.2d 1, 7-8 (N.J. 1957) (internal citation omitted).

A leading case is *Rogers v. Village of Tarrytown*, 96 N.E.2d 731 (N.Y. 1951). The Village of Tarrytown amended its zoning code to provide for a floating zone that could be approved anywhere within the village. A neighboring property owner challenged a rezoning under the floating zone provision, arguing that the rezoning was invalid spot zoning. The court upheld the rezoning and noted:

> The charge of illegal "spot zoning"—levelled [sic] at the creation of a Residence B-B district and the reclassification of defendant's property—is without substance. Defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . . , "spot zoning" is the very antithesis of planned zoning. If, therefore, an ordinance is enacted in accordance with a comprehensive zoning plan, it is not "spot zoning," even though it (1) singles out and affects but one small plot . . . , or (2) creates in the center of a large zone small areas or districts devoted to a different use.

Id. at 734-35 (internal citations omitted).

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The majority of courts in the United States have ruled that a rezoning of a small parcel constitutes invalid spot zoning only when the rezoning is inconsistent with the comprehensive plan for the affected area. These holdings traditionally have been based on the general view of what constitutes a comprehensive zoning plan, that is, pre-Local Government Comprehensive Planning Act. *See Langer*, 313 A.2d 44; *Life of the Land, Inc. v. City Council of Honolulu*, 606 P.2d 866, 890 (Haw. 1980); *Goffinet v. Cnty. of Christian*, 357 N.E.2d 442, 449 (Ill. 1976); *MBC Realty, LLC v. Mayor & City Council of Baltimore*, 864 A.2d 218 (Md. Ct. Spec. App. 2004); *Tennison* v. *Shomette*, 379 A.2d 187, 192 (Md. Ct. Spec. App. 1977); *Allgood v. Town of Tarboro*, 189 S.E.2d 255, 263 (N.C. 1972); *Wiggers*, 596 P.2d 1345.

III. Florida Courts' View of Spot Zoning.

Florida courts have frequently used the term "spot zoning." *See, e.g.*, *City of Miami Beach v. Manilow*, 226 So. 2d 805, 806 (Fla. 1969), *cert. denied*, 397 U.S. 972 (1970); *Allapattah Community Ass'n*, 379 So. 2d 387. Few Florida cases, however, contain a detailed analysis of when invalid spot zoning occurs. Most Florida courts have used the term "spot zoning" in a pejorative manner to describe zoning that is defective. In *Oka v. Cole*, 145 So. 2d 233, Justice Thornal, in dissent, decried the Florida case law on the subject by stating: "We have been referred to no prior decision of this Court clearly defining 'spot zoning' . . . ." *Id.* at 237 (Thornal, J., dissenting). Some Florida cases, however, discuss the importance of minimizing spot zoning to maintain a "comprehensive plan."

In *Oka*, the majority stated that "there was at least a fair dispute as to whether the amendatory ordinance was harmonious with the comprehensive plan for municipal zoning." *Id.* at 236 (majority opinion). In *City of St. Petersburg v. Aikin*, 208 So. 2d 268, 273 (Fla. 2d DCA 1968), *rev'd on other grounds*, 217 So. 2d 315, the court analyzed whether the approval of construction of a convenience store and a filling station would "result in 'judicial erosion of the master plan and would, like a "cancer," enervate the master zoning plan.'" Again, a Florida court used a comprehensive plan analysis to review a case of alleged spot zoning in *Hart Properties, Inc. v. Metropolitan Dade County*, 346 So. 2d 1199 (Fla. 3d DCA 1977), in which it approved the following: "Amendments which reclassify residentially zoned land to permit the construction of shopping centers have been upheld on the ground that they permit a use which is needed, and which serves the comprehensive plan for community development." *Id.* at 1201 (citing ANDERSON, *supra*, at § 5.06 at 248).

The above cases show that although Florida courts have followed the majority of courts in determining whether a rezoning is consistent with the applicable comprehensive plan, Florida courts have not enunciated a clear statement about the analysis to be used regarding spot zoning.

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IV. Reverse Spot Zoning.

"Reverse Spot Zoning" is defined as the situation that arises when a governmental authority persists in enforcing a long-ago imposed zoning restriction against a property owner although the government has rezoned most of the adjoining area and relieved virtually all owners therein of the zoning restriction. *City Comm'n of Miami v. Woodlawn Park Cemetery Co.*, 553 So. 2d 1227, 1231 (Fla. 3d DCA 1989), *reh'g denied*, 563 So. 2d 631 (Fla. 1990). The "Reverse Spot Zoning" theory has been successful on several occasions in striking down zoning restrictions. *See Tollius v. City of Miami*, 96 So. 2d 122 (Fla. 1957); *Olive v. City of Jacksonville*, 328 So. 2d 854 (Fla. 1st DCA 1976); *Manilow v. City of Miami Beach*, 213 So. 2d 589 (Fla. 3d DCA 1968), *cert. discharged*, 226 So. 2d 805 (Fla. 1969); *Kugel v. City of Miami Beach*, 206 So. 2d 282 (Fla. 3d DCA 1968), *cert denied*, 212 So. 2d 877 (Fla. 1968). This majority rule analysis is also applicable to these decisions.

Palmer Trinity Private School, Inc. v. Village of Palmetto Bay, 31 So. 3d 260 (Fla. 3d DCA 2010), was a textbook spot zoning decision. The school sought rezoning of a house and mango grove on 32.5 acres to allow a density of one home per 15,000 square feet. While the surrounding lands were originally zoned for agriculture or estate homes, the village had rezoned to greater intensities and densities "as the agricultural character of the area has changed over the years." *Id.* at 262. Additionally, the school wanted to expand its educational plant. The appellate court held that the village's refusal to rezone rendered particularly the portion of the parcel on which the home and grove lay an "island" or "peninsula" that resulted in reverse spot zoning. *Id.* at 262 (citing *City of Miami Beach v. Robbins*, 702 So. 2d 1329, 1330 (Fla. 3d DCA 1997)).

Judge Scott Makar cited the predecessor to this treatise in comparing the Bert J. Harris Act claim there to reverse spot zoning in a lengthy dissent in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015). Judge Makar contended that the city's rezoning of an adjacent parcel for a regional fire station made the Smith parcel "not unlike the 'literal peninsula' complained of in *Olive v. City of Jacksonville*, 328 So. 2d 854 (Fla. 1st DCA 1976), after the lot there was surrounded on three sides by commercial zoning. *Smith*, 159 So.3d at 909 f.n. 28 (Makar, J., dissenting), citing, *inter alia*, Terry E. Lewis, Steve Lewis & David Laymon, *Spot Zoning, Contract Zoning, and Conditional Zoning, 12 Fla. Envtl. & Land Use L. (1994).*

V. Strengthening the Majority Rule in Florida by the Local Government Comprehensive Planning Act.

The Local Government Comprehensive Planning Act (LGCPA), chapter 85-55, Laws of Florida, codified at chapter 163, part II, Florida Statutes, is referred to as the Growth Management Act of 1985. The Act became effective October 1, 1985, and required each local government within Florida to adopt a detailed comprehensive plan. The specific contents of the comprehensive plan

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were mandated by the LGCPA. Once the plan is adopted, local government decisions concerning zoning must be consistent with the plan. *See* ch. 163, part II, Fla. Stat. Thus, the Florida Legislature required rezoning and a detailed comprehensive plan. This strengthened to be "consistent with" the applicability of the majority rule in Florida. The 2011 Legislature amended chapter 163, part II, Florida Statutes, in passing chapter 2011-139, Laws of Florida, known as the "Community Planning Act." § 163.3161(1), Fla. Stat. While the 2011 legislation reduced substantially state control of land use planning, the act retained the obligation that "no public or private development shall be permitted except in conformity with comprehensive plans, or elements thereof, or prepared and adopted in conformity with this act." *Id*. § 163.3161(6). There is no reason to expect that future Florida courts will examine variances without considering the comprehensive plan.

For example, the Florida Fourth District Court of Appeal held in *Town of Juno Beach v. McLeod*, 832 So. 2d 864 (Fla. 4th DCA 2002), that a rezoning from residential to commercial office was not spot zoning because it was consistent with a comprehensive land use map amendment of the parcel to commercial. Additionally, the parcel across the street contained a 60,000 square foot shopping center. But see *Allapattah Community Ass'n*, 379 So. 2d 387, which held that boundaries have to be placed somewhere, and streets are logical zoning boundaries.

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EXHIBIT “D”

Planned Unit Developments

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I. Derivation and Objectives.

A. *Background.*

Traditional zoning strictly segregates uses. Planned Unit Developments (PUDs) provide for a mixing of uses and provide the approval format for neo-traditional and new town projects. The location and identification of the permitted uses are provided on the PUD master plan. Development approval is generally granted for multiple development parcels in a PUD at one time rather than on a lot-by-lot basis. Some PUDs may contain only residential uses and some only commercial uses. However, the organization of those single-use PUDs are expected to be more innovative than the normal subdivision approach.

Although available since the 1920s, PUD provisions were not widely utilized until the 1960s. The new-found popularity of PUDs coincides with large scale development in the post-World War II era. By the early 1960s, the incompatibility of traditional zoning and larger residential developments was recognized, and the push for the adoption of PUD ordinances began. Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959). The current vogue of "traditional neighborhood development" (TNDs) is a form of PUD, as are mixed use developments (MXDs).

The PUD concept in many ways is the antithesis of traditional Euclidean zoning. In other ways, however, the PUD concept is a logical outgrowth of Euclidean zoning. The term "Euclidean zoning" has its roots in the 1926 United States Supreme Court case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where the Court legitimatized zoning as it is known today. In *Euclid*, the Court upheld an ordinance that divided a municipality into districts

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and imposed land use restrictions based on district classifications as being within the police power.

B. *Definitions.*

A PUD may be defined as "a district in which a planned mix of residential, commercial, and even industrial uses is sanctioned subject to restrictions calculated to achieve compatible and efficient use of the land." Salkin, 3 Am. Law of Zoning § 24:7 (5th ed. 2011). The PUD concept appears to have grown out of a provision contained in Section 12 of Bassett's Model Planning Enabling Act of 1925. HAGMAN & JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 7.15 (West Pub. Co. 1986).

> That section provided that the legislative body [could] authorize the planning board to make . . . changes upon approving subdivision plats when the owner [submitted] a plan designating the lots on which apartment houses and local shops are to be built and indicating the maximum density of population and the minimum yard requirements per lot. Section 12 also limited the average population density and the total land area covered by buildings in the entire subdivision to that permitted in the original zoning district. . . . Upon the approval of the planning board following a public hearing with proper notice, the changes were to become part of the municipality's zoning regulations.

Id. Another frequently cited definition of a PUD is:

> "Planned unit development" means an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk, or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created, from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.

U.S. Advisory Comm'n on Intergov'tl Relations, *1970 Cumulative*, ACIR ST. LEGIS. PROGRAM, 31-36-00-1, -5 (1969). For a judicial definition of PUDs, see *Hirt v. Polk County Board of County Commissioners*, 578 So. 2d 415 (Fla. 2d DCA 1991).

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C. *Objectives, Advantages, and Disadvantages.*

The objectives and advantages of PUDs include:

- Achieving planning and regulatory flexibility for more variety in development patterns.
- Providing a more efficient use of the land and more desirable living environment than possible with the strict application of zoning ordinance requirements.
- Acquiring open space for the public and preserving natural topography and other environmental and geologic features.
- Enhancing development control by the planning authorities with project-specific conditions formulated to ensure the implementation of the PUD master plan concepts and compatibility with adjacent land uses.
- Increased development rights in exchange for increased open space, recreational areas, preserves, and architectural controls.

Disadvantages of PUDs include:

- Exactions by the local government in exchange for providing relief from strict performance standards under traditional zoning.
- Greater discretion by the local government in the approval process resulting in uncertainty during the review and approval stage.
- Greater uncertainty in the appeal process, whether the project is approved or denied by the local government, due to the discretionary authority of the local government in PUD zoning.

The rules of traditional zoning are more precise, and experienced practitioners are familiar with local interpretation and application of these rules. The PUD zoning process, in contrast, introduces unpredictability in how the local government will view the site design and commitments offered by the property owner in exchange for the PUD zoning.

This unpredictability can sometimes result in the developer being unable to "close" the PUD transaction. An example would be a PUD application for a moderate-sized residential property containing sensitive environmental features on portions of the property. The owner seeks PUD zoning to allow clustering of smaller lots on the remaining usable portions of the

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property so that the gross density of residential lots can be maintained. The owner reasonably expects to offer public benefits in exchange for being able to maintain the same number of lots on the property, despite the requirement to preserve the sensitive natural areas. The owner offers greater open space within the project, enhanced treatment of the on-site natural resources, dedication of the sensitive environmental land to the public, and contribution of funds for public facilities commensurate with the value of the project. Discussions with staff indicate that such offerings are appropriate, and the staff recommends approval of the PUD contract. At the public hearing on the project, residents comment that the project should accommodate a public dog park on the usable portions of the property because area residents have long used the property to walk their dogs. Besides pointing out that the neighbors' use has been unauthorized, the developer argues that the project size is too small to accommodate this use and that a dog park is inconsistent with the vision for the project. Under pressure from the public, the elected officials exercise their discretion to require the developer to incorporate the much needed dog park into the design of the property.

The design of the development plan, the creation of the benefit package, and the pursuit of the PUD contract is a considerable and costly effort for an owner, who may not discover until the end of the public hearing process that the expectations of decision-makers vary greatly from the proposal. Elected officials may require contributions and exactions at the final hearing on a PUD that exceed the owner's economic based expectations. Without knowing more about the property, decision-makers can demand commitments from the owner that are not commensurate with the scale of the project or that unreasonably exceed the project's impact on the surrounding area. When these exactions come at the eleventh hour of the process, the bargaining leverage of the owner is often greatly compromised, and many developers are unwilling to risk being put in this position.

D. *Establishment of Planned Unit Developments.*

PUD ordinances generally provide a comprehensive review procedure that requires the developer to submit detailed information on the project, including a concept or master plan, and also allow the municipality to condition approval on changes made in the project during the review and hearing process. Because of the flexibility of the procedure and the opportunity for negotiation between local government and prospective developers, PUD ordinances have been criticized for institutionalizing the bargaining process of land development. N. WILLIAMS, AMERICAN LAND PLANNING LAW § 48.02 (1st ed. 1987). However, the flexibility of planned unit development ordinances does allow local government and members of the community to have input in the development process. Furthermore, by structuring a PUD ordinance to encourage beneficial uses and development attributes, a municipality can better develop its own future image.

PUDs are created in several different ways. They may be established through floating zone procedures, special exception or permit, or special provision in the subdivision control regulations. Although PUD ordinances vary, the most common type provides for a PUD district

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through a two-step process ("floating zone" approach). A general ordinance describes a PUD district and outlines the enactment procedure but does not locate the district on the zoning map of the municipality. The actual creation of the district must be accomplished by a second act, establishing the PUD on a specific parcel of land. This second step usually is preceded by a full review of the plans by a planning board or commission and a recommendation by that body to the local elected legislative body. Once the PUD is approved for a particular parcel, the PUD plan becomes the zoning classification for that parcel and establishes special requirements for the development of that parcel. *See City of New Smyrna Beach v. Andover Dev. Corp.*, 672 So. 2d 618 (Fla. 5th DCA 1996). Alternatively, some zoning ordinances provide for establishing a PUD by a special permit or exception. A few courts have upheld this method. *See*, *e.g.*, *Caruso v. Pastan*, 294 N.E.2d 501 (Mass. App. Ct. 1973).

II. Legal Status.

A. *Florida Constitutional and Statutory Enabling Provisions.*

Florida has no express constitutional provision specifically approving the use of PUDs. The Florida Constitution has separate provisions concerning the powers of counties and municipalities. *See* art. VIII, §§ 1-2, Fla. Const. These constitutional provisions give local governments rather broad powers in relation to the conduct of their governmental authority. They are supplemented by several statutes; some expressly refer to zoning. With respect to counties, although chapter 125 refers to zoning, §125.01(1)(h), Florida Statutes (2012), it does not mention the specific format zoning may take. Similar powers are given to municipalities pursuant to section 166.021, again with no specific mention of PUDs. However, the Growth Policy; County and Muncipal Planning: Land Development Regulation, chapter 163, part II, Florida Statutes (2012), which is sometimes referred to as the Community Planning Act, encourages the use of "innovative land development regulations," and lists, inter alia, the use of PUDs. § 163.3202(3), Fla. Stat. (2012). The statute does not define the term nor provide any regulatory guidelines. The development of the regional impact (DRI) statute provides for consideration by the state land planning agency of whether a local government has a PUD ordinance when evaluating requests for variations of DRI thresholds. § 380.06(3)(a)3, Fla. Stat. (2012).

B. *Judicial Recognition.*

1. *IN GENERAL.*

The courts of many states, including Florida, have judicially approved the use of PUDs. The judicial history of PUDs and some of the arguments offered against their validity are discussed in the following sections.

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2. *OUT-OF-STATE COURTS.*

a. Lack of Specific Enabling Legislation.

Although PUDs have been in use for many years, most states have no specific enabling legislation. ANDERSON, 1 AMERICAN LAW OF ZONING § 11.12 (Lawyers Co-op. Pub. Co. 3d ed. 1986). Regardless of this lack of specific statutory authority, the courts of most states have upheld PUDs based on general zoning enabling statutes. *See Orinda Homeowners Comm. v. Bd. of Supervisors, Contra Costa*, 90 Cal. Rptr. 88 (Cal. Ct. App. 1970), *Chandler v. Kroiss*, 190 N.W.2d 472 (Minn. 1971); *Alexandria Lake Coalition Inc. v. Douglas Cnty.*, 348 N.W.2d 369 (Minn. Ct. App. 1984); *Cheney v. Village 2 at New Hope, Inc.*, 241 A.2d 81 (Pa. 1968). The first clear-cut and still leading case upholding a PUD ordinance despite the lack of enabling legislation is *Cheney*.

b. Unlawful Delegation of Legislative Authority.

PUD ordinances have been attacked as constituting an unlawful delegation of legislative authority. This argument has been used in several cases by plaintiffs challenging PUDs. The main criterion used in these cases is whether the administrative agency is provided with adequate standards to guide its decisions.

In *Lutz v. City of Longview*, 520 P.2d 1374 (Wash. 1974), the developers of a PUD applied to the planning commission of the city for permission to construct a residential PUD on land zoned single-family residential. The city had delegated to the planning commission the authority to approve an application for a PUD. The major issue in the case was whether the city council had the authority to delegate to the planning commission final approval of a PUD. No guidelines for approval were provided by the city council. The court noted that the PUD in question was a floating zone, that is, one that hovered over the entire municipality until subsequent action caused it to embrace an identified area. The court further noted that the legal nature and effect of the act of imposing a PUD on a specific parcel was a rezoning, which must be done by the city council. Because of this, the court invalidated the ordinance. Some courts, however, have even upheld a delegation to a planning board of the power to locate a planned development district when adequate standards were provided. *Bellemeade Co. v. Priddle*, 503 S.W.2d 734 (Ky. 1973).

In *Cheney*, 241 A.2d 81, the borough council enacted a PUD ordinance that did not involve a floating zone, and it simultaneously applied the PUD designation to a specific tract. The borough planning commission was given the

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power to approve the particular land uses within a PUD, subject to standards concerning density, height limits, and space between structures. The court held that the planning commission was properly delegated the authority to perform the function of approving specific uses within a PUD. For other cases concerning delegation of legislative authority regarding PUDs, see *Centrulo v. City of Park Hills*, 524 S.W.2d 628 (Ky. 1975); *Prince George's Countv v. M & B Construction Corp.*, 297 A.2d 683 (Md. 1972); and *Mountcrest Estates, Inc. v. Mayor and Township Committee of Rockaway*, 232 A.2d 674 (N.J. 1967).

c. Spot Zoning.

Many courts have held that PUDs do not constitute invalid spot zoning even though they involve the rezoning of a small parcel to a type of use different from the surrounding properties. Most PUDs are floating zones. Floating zones have been defined as follows:

> "The phrase 'floating zone' has been coined to designate a method of zoning whereby selected uses of property are authorized in districts devoted to other uses under terms and conditions laid down in the ordinances themselves." Zoning Law and Practice, Yokley, 3d Ed., p. 133, Sec. 3.7. A floating zone is differentiated from a fixed ("Euclidean") zone in that the latter is a specifically defined area under the zoning ordinance, while the boundaries of the former are undefined and it "floats" over the entire district until by appropriate action the boundaries are fixed and it is anchored. Furthermore, it is the landowner who instigates the procedure which results in the settling of the floating zone.

Bellemeade, 503 S.W.2d at 738 (citing *Bigenho v. Montgomery Cnty. Council*, 237 A.2d 53 (1968)).

A leading case is *Rodgers v. Village of Tarrytown*, 96 N.E.2d 731 (N.Y. 1951). The Village of Tarrytown had amended its zoning code to provide for a PUD, which could be approved anywhere within the village. Certain property was rezoned pursuant to this amendment. A neighboring property owner challenged the rezoning, arguing that it constituted invalid spot zoning. The court answered the spot zoning argument as follows:

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> The charge of illegal "spot zoning"—levelled at the creation of a Residence B-B district and the reclassification of defendant's property—is without substance. Defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners[,] . . . "spot zoning" is the very antithesis of planned zoning. If, therefore, an ordinance is enacted in accordance with a comprehensive zoning plan, it is not "spot zoning," even though it (1) singles out and affects but one small plot[,] *see*, *e.g.*, *Shepard v.Village of Skaneateles*, 300 N.Y. 115, 89 N.E.2d 619, or (2) creates in the center of a large zone small areas or districts devoted to a different use. . . . Thus, the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community. Having already noted our conclusion that the ordinances were enacted to promote a comprehensive zoning plan, it is perhaps unnecessary to add that the record negates any claim that they were designed solely for the advantage of defendant or any other particular owner.

Rodgers, 96 N.E.2d at 734-35 (emphasis added) (internal citations omitted).

Another excellent case is *Lutz*, 520 P.2d 1374. In that case, the developers applied to the city for permission to construct a PUD of two separate buildings totaling twenty-eight units on a tract of land of about four and a half acres. The tract was zoned low density residential and the ordinance provided that the planning commission could approve PUDs. The proposed project was approved. The court discussed the flexibility provided by PUDs and noted that this specific ordinance constituted a floating zone. It then considered the allegation that the approval of the PUD was spot zoning.

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The court in *Lutz* quoted from *Smith v. Skagit County*, 453 P.2d 832 (Wash. 1969), in which the court defined spot zoning as follows:

> Spot zoning has come to mean arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan.

Id. at 848. The *Lutz* court noted that the only reference in the comprehensive plan to the PUD method was that it was an item in need of reconsideration in the future. Since the PUD was consistent with the comprehensive plan, the court ruled that no illegal spot zoning had occurred. Many other cases have held that the use of PUDs does not constitute spot zoning. *See, e.g.*, *Pace Resources, Inc. v. Shrewsbury Twp. Planning Comm'n*, 492 A.2d 818 (Pa. Commw. Ct. 1985); *Wiggers v. Cnty. of Skagit*, 596 P.2d 1345 (Wash. Ct. App. 1979).

d. Contract and Conditional Zoning.

A third party might challenge an approved PUD on the basis that it constitutes contract zoning. Contract zoning occurs when a landowner and a zoning authority enter into an agreement under which the zoning authority agrees to enact a proposed zoning change contingent on the landowner agreeing to make certain concessions. In other words, the zoning change is supported only by the developer's concessions and not independently of them.

Contract zoning often is distinguished from conditional zoning. Conditional zoning may be defined as a "zoning reclassification subject to conditions not generally applicable to land similarly zoned." The landowner must restrict the use of the land to receive the requested rezoning. JUERGENSMEYER & WADLEY, ZONING ATTACKS AND DEFENSES: THE LAW IN FLORIDA § 13-1 (1980).

Some courts have found contract zoning to be unlawful and conditional zoning to be acceptable. Many PUD ordinances require the developer of a PUD to enter into a "development agreement" in which the developer is bound to develop the PUD in accord with various conditions. *See* Silvan, *Negotiating the Public Interest: California's Development Agreement Statute*, 37 LAND USE L. & ZONING DIG. 3, 5 (1985).

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The law in Florida concerning contract zoning is vague. *See* Note, *The Validity of Conditional Zoning: A Florida Perspective*, 31 U. FLA. L. REV. 968 (1979). The leading Florida case on contract and conditional zoning is *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956), in which the court invalidated a zoning ordinance that required contracts between the zoning authority and the applicant because rezonings based on contracts would eliminate "[b]oth the benefits of and reasons for a well-ordered comprehensive zoning scheme . . . ." *Id.* at 89.

Subsequent Florida cases have weakened the broad holding of *Hartnett*. For example, in *Housing Authority of Melbourne v. Richardson*, 196 So. 2d 489, 493 (Fla. 4th DCA 1967), a cooperation agreement between the public housing authority and a developer did not constitute an illegal contract that delegated police power to zone; in *Walberg v. Metropolitan Dade County*, 296 So. 2d 509, 511 (Fla. 3d DCA 1974), the court dismissed the appellant's claim that the county entered into a prohibited zoning contract when its commissioners were only influenced by a developer's representations; and, in *Broward County v. Griffey*, 366 So. 2d 869, 871 (Fla. 4th DCA 1979), the court found that a county's acceptance of a deed of land for road construction did not create an illegal contract because the county did not negotiate private contracts or bargain away police power. *See also* JUERGENSMEYER & WADLEY, *supra*, at § 13-4. The law in Florida appears to be that the courts will sustain a conditional zoning ordinance as long as (1) the conditions are reasonable and (2) the ordinance has a valid basis aside from the conditions. *Hartnett*, 93 So. 2d at 92. However, in *Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996), the Court rejected as invalid contract zoning an agreement to settle pending litigation that was approved by the County Commission at a public meeting and which required the county to rezone the disputed property. The Court noted that the notice of the public meeting to approve the settlement agreement did not meet the more stringent notice and hearing requirements for a rezoning. See also *Morgran Co. v. Orange County*, 818 So. 2d 640 (Fla. 5th DCA 2002), where the Court rejected a developer's claims for breach of contract and promissory estoppel involving a development agreement deemed contract zoning.

It should be noted that as in some other statutes, the Florida Legislature has granted broad authority to local governments to enter into "development agreements" with developers. Section 163.3220, Florida Statutes, encourages this type of "agreement," which may be indistinguishable from the outlawed contract zoning. *See* Curtin & Edelstein, *Development Agreement Practice in California and Other States*, STETSON L. REV. (1993); Rhodes, *The Florida Local Government Development Agreement Act*, FLA. BAR J. (Oct. 1988). *See also* § 380.032(3), Fla. Stat.; *Compass Lake Hills Dev. Corp. v. State*, 379 So. 2d 376, 382 (Fla. 1st DCA 1979).

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3. FLORIDA COURTS' VIEW OF PUDS.

A number of Florida appellate cases have involved PUDs. *See*, *e.g.*, *Markham v. Fogg*, 458 So. 2d 1122 (Fla. 1984); *Harbor Ventures, Inc. v. Hutches*, 366 So. 2d 1173 (Fla. 1979); *Porpoise Point P'ship v. St. Johns Cnty.*, 532 So. 2d 727 (Fla. 5th DCA 1988); *Exchange Invs. v. Alachua Cnty.*, 481 So. 2d 1223 (Fla. 1st DCA 1985); *BML Invs. v. City of Casselberry*, 476 So. 2d 713 (Fla. 5th DCA 1985); *East Naples Water Sys., Inc. v. Collier Cnty.*, 473 So. 2d 309 (Fla. 2d DCA 1985); *Upper Keys Citizens Ass'n, Inc. v. Monroe Cnty.*, 467 So. 2d 1018 (Fla. 3d DCA 1985); *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. 4th DCA 1983).

Before 1985, however, no Florida court discussed the question of whether PUDs are valid in Florida without specific enabling legislation. Moreover, none of the appellate cases involved the major arguments brought by persons challenging specific PUDs discussed above. In 1985, the Florida Legislature, in an effort to give more flexibility to local governments struggling with comprehensive planning problems, passed chapter 85-55, section 14, Laws of Florida. That bill, in pertinent part, added section 163.3202(3), Florida Statutes, encouraging the use of "innovative land development regulations," including PUDs.

Before enactment of section 163.3202(3), the only case indicating court approval of the use of PUDs was *Hillsborough County v. Ralston*, 284 So. 2d 456 (Fla. 2d DCA 1973). In *Ralston*, the court noted in dicta that a landowner challenging zoning as too restrictive did not properly exhaust all available administrative remedies by failing to applying for a PUD, which "would allow a proper degree of negotiation for the protection of interests of the general public consistent with the recognition of the constitutional rights of the landowners . . . ." *Id.* at 459.

Since the passage of the enabling statute, several cases have dealt with matters involving PUDs. *See, e.g.*, *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14 (Fla. 1992) (operation of PUD); *Carabelle Properties, Ltd. v. Pendleton,* 10 So. 3d 1118 (Fla. 1st DCA 2009) (county property appraiser cannot use a property as comparable that does not have restrictions similar to the PUD property being appraised); *City of Ft. Myers v. Splitt,* 988 So. 2d 28 (Fla. 2d DCA 2008) (cannot use the more liberal standing test in section 163.3215, Florida Statutes, in a certiorari challenge of the validity of a PUD ordinance); *Saadeh v. City of Jacksonville*, 969 So. 2d 1079 (Fla. 1st DCA 2007) (PUD cannot allow a use otherwise not allowed by comprehensive plan); *St. Johns/St. Augustine, Comm. v. City of St. Augustine,* 909 So. 2d 575 (Fla. 5th DCA 2005) (can amend annexed PUD prior to modifying comprehensive plan to address annexed area); *New Smyrna Beach*, 672 So. 2d 618 (approved PUD plan became a part of residential resort PUD classification and the classification does not exist separate from the approved PUD plan); *Jensen Beach Land Co. v. Citizens for Responsible Growth of Treasure Coast*, 608 So. 2d 509 (Fla. 4th DCA 1992) (consistency with comprehensive plan); *ABG Real Estate Dev. Co. of Florida v. St. Johns Cnty.*, 608 So. 2d 59 (Fla. 5th DCA 1992) (modification of development PUD); *Garden Country Club, Inc. v. Palm Beach Cnty.*, 590 So. 2d 488 (Fla. 4th DCA 1991) (denial of PUD

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application); *Gilmore v. Hernando Cnty.*, 584 So. 2d 27 (Fla. 5th DCA 1991) (consistency with comprehensive plan); *City of Mount Dora v. JJ's Mobile Homes, Inc.*, 579 So. 2d 219 (Fla. 5th DCA 1991) (right of utility to provide service); *Hirt*, 578 So. 2d 415 (granting of PUD application); *Acquisition Corp. of America v. Markborough Props., Ltd.*, 568 So. 2d 1350 (Fla. 4th DCA 1990) (operation of PUD); *Glisson v. Alachua Cnty.*, 558 So. 2d 1030 (Fla. 1st DCA 1990) (enabling ordinance).

Florida district courts are split over whether rezoning is a quasi-legislative or a quasi-judicial act. However, the trend is toward the latter. The Florida Supreme Court, in *Board of County Commissioners of Brevard v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993), classified rezoning actions that can be viewed as policy applications (e.g., rezonings that affect a limited number of property owners), as opposed to adoption of general zoning ordinances that affect all similarly situated property owners equally, as quasi-judicial in nature and, thereby, subject to a strict scrutiny standard of review and the substantial evidence standard. Consequently, if the approval of a PUD is contingent upon a rezoning order that is defined as a quasi-judicial decision, a court is more likely to review such a decision by way of certiorari, rather than injunctive or declaratory relief. *Hirt*, 578 So. 2d at 416. Moreover, in such cases, courts will apply the strict scrutiny standard of review and will only uphold the determination of the local government if it is supported by "substantial, competent evidence."

The *Snyder* rule was modified to some degree by the 1997 Florida Supreme Court decision in *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997). In *Yusem*, the Court held that all amendments to comprehensive land use plans are legislative decisions, subject to the more deferential "fairly debatable" standard of review, even if the amendment is part of a rezoning application in respect to only one piece of property. *Id.* at 1293. *See also Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach,* 788 So. 2d 204 (Fla. 2001); *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838 (Fla. 2001). Thus, the state of the law in Florida today is that quasi-judicial decisions by local governments must be supported by substantial, competent evidence and are subject to strict judicial scrutiny. However, a decision amending local comprehensive plans, regardless of the reach of the impact of the amendment, is considered to be a legislative decision that does not require the support of substantial, competent evidence and is only reviewable by the fairly debatable standard of review. This line of case law demonstrates the critical importance of whether a PUD approval is characterized as a legislative decision or a quasi-judicial decision.

In 2007, the First District Court of Appeals of Florida issued an analysis of the *Snyder* decision that further distinguished quasi-judicial from legislative matters. In *D.R. Horton, Inc.-Jacksonville v. Peyton*, 959 So. 2d 390 (Fla. 1st DCA 2007), the court was asked to consider whether the mayor of a municipality had the power to veto a development agreement approved by the city council. The city charter gave the mayor the authority to veto legislative decisions of the council, but not quasi- judicial decisions. The development agreement before the city council involved proposed contributions from a developer for roadway improvements necessitated by the

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impact of its associated development. The city council had to evaluate the impact of the agreement on the city's provision of local services, capital expenditures, and its overall plan for managed growth and future development of the area, as well as apply existing regulations that set minimum standards for such development agreements. The court held that the contract approval was a legislative action because the approval did not merely involve the application of city regulations to the facts, but required the council, and later the mayor, to make policy decisions that effected the future development of the surrounding area. The court quoted from *Coastal Dev. of N. Fla.*, 788 So. 2d 204, where the Florida Supreme Court found that even a small-scale comprehensive plan land use amendment that does not require state review is a legislative decision because it requires a determination as to " 'whether it is socially desirable to reformulate the policies previously formulated for the orderly future growth of the community.' " *Id.* at 209 (quoting the First District Court's opinion).

The *D.H. Horton* decision clarifies what the Court originally hinted at in *Snyder*—that it is the nature of the decision, not the subject of the decision, that determines whether it will be characterized as legislative or quasi-judicial. More so, *D.H. Horton* clarifies that it is not the designation of the decision by the local government as either legislative or quasi-judicial that is determinative but, again, the nature of the decision itself. For a discussion of a formalistic approach to the distinction between quasi-legislative and quasi-judicial actions, see *Shaheen v. Cuyahoga Falls City Council*, No. 24472, 2010 WL 625828 (Ohio Ct. App. Feb. 24, 2010).

III. Discretionary Authority to Approve PUDs.

Florida local governments often establish minimum criteria for Planned Unit Developments such as minimum acreage, minimum density, open space, and land use areas where PUDs can be located. In addition, section 163.3194(1)(a), Florida Statutes, requires that all development orders be consistent with local comprehensive plans for future land use. Failure to meet these minimum standards will subject the PUD to challenge by a petition for certiorari filed in the circuit court for review of the local government's quasi-judicial decision. The "strict scrutiny" standard of review will be applied, and the decision of the zoning body will be upheld, only if supported by substantial competent evidence contained in the record of the hearing below. *Snyder v. Brevard Cnty.*, 595 So. 2d 65 (Fla. 5th DCA 1991), *decision quashed*, 627 So. 2d 469 (Fla. 1993).

The real crux of PUD zoning, however, lies in the discretionary decision-making aspect of the PUD agreement. The fact that most performance standards are subject to negotiation between the local government and the property owner allows development configurations that can considerably increase the productivity of the property. Once minimum standards are complied with, significant components of the PUD development plan such as minimum lot sizes, building set-backs, the transfer of density from one area of the property to the other, the mix of uses, the provision of amenities, and clustering of buildings are all up for discussion. Local governments may require the PUD to provide a "public benefit," but the type and extent of the

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public benefit is also negotiable. Dedication of land, contribution of funds, and construction of public facilities unrelated to the project are often provided by the PUD developer, in addition to the payment of standard impact fees for public facilities, in exchange for approval of a development plan that does not meet traditional zoning performance standards. Local government entities acquire many of their school sites, fire stations, parks, and roadways through this process.

The negotiable components of the Planned Unit Development are approved at the discretion of the county or municipality. Elected officials are called upon to consider whether the proposed PUD plan for development, combined with the commitments of the owner, are superior to, or provide greater public benefit, than would occur under traditional zoning standards. For elected public officials, the ability to obtain commitments from the land owner for the public benefit is an important incentive for approving a PUD and will greatly influence the exercise of their discretion. Not demonstrating on the record how a particular PUD plan achieves the general objectives for PUDs set forth in the enabling legislation (e.g., a plan with improved design, character, and quality; a mix of uses; and more open space as contrasted to that which could be obtained under the existing zoning) may lead to a successful challenge by third parties. *Sinkler v. Cnty. of Charleston*, 690 S.E.2d 777 (S.C. 2010).

IV. Typical Requirements and Approval Process.

A. *Typical Requirements.*

1. APPLICATION FEE.

The application fee for a PUD normally is substantially higher than for an ordinary rezoning or building permit application. The application fee tends to reflect the larger magnitude of PUDs in terms of acreage, density, demands on public services, and the professional skills, outside consulting services, and time required of the reviewing agency. There usually is a base fee of several hundred dollars. There also may be an additional fee dependent on the number of acres, number of dwelling units, or square footage proposed in the PUD application.

2. MINIMUM AREA.

One of the main objectives of a PUD ordinance is to encourage the imaginative and comprehensive land use planning of parcels of property. In return, a developer does not have to adhere strictly to the normal zoning requirements, but is allowed some flexibility based on a rational and integrated development plan.

To achieve that plan, it is assumed that a relatively large tract of land will be assembled. Consequently, PUD ordinances establish minimum area requirements. The minimum area required usually must be contiguous land. *See*, *e.g.*, *United Teachers of Dade v. Save Brickell*

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Ave., Inc., 378 So. 2d 1348 (Fla. 3d DCA 1980) (involving minimum area requirements for Planned Area Developments). Exceptions to the contiguity requirement may be provided regarding parking areas and intervening public roads. The minimum area required also may vary according to the type of PUD. For example, a residential PUD is expected to have a larger minimum acreage requirement than a commercial PUD, and a commercial PUD a larger minimum acreage requirement than a downtown PUD. The assemblage of property encouraged by a minimum area requirement provides a mechanism to ensure the comprehensive development of land with a balance between open space and buildable area.

Variances from the minimum area requirements may be granted, but such a determination must be based upon consideration of all the applicable variance criteria, including the hardship criterion. That consideration must be reflected in the record to withstand judicial review. *See Weil v. City of North Miami*, 10 Fla. L. Weekly S775a (Fla. 11th Cir. Ct. 2003). Some jurisdictions provide for a waiver of the minimum area requirement instead of variances. That approach avoids the hardship test, which is difficult to meet and generally irrelevant to this issue. *See Bernard v. Town of Palm Beach*, 569 So. 2d 853 (Fla. 4th DCA 1990).

3. UNIFIED CONTROL.

The applicant for a PUD must demonstrate its control of the area proposed for the PUD. This does not mean that the applicant must have fee simple title to the entire area, but rather that there are legally binding instruments that place control of the PUD property in the applicant. The applicant ordinarily does not have to be one individual or entity, but may be a group of individuals, partnerships, or corporations linked together so that all of them are subject to the PUD approval.

The purpose of this requirement is to ensure that the terms, conditions, and land use plan of an approved PUD can be effectuated. This also requires the consent of the property owner to have the property bound by the approved plan and conditions. Changes in ownership during the approval process will require new owner consents. An approved PUD could be frustrated later by failure to obtain the owner's consent to include within the PUD a parcel of property on which the efficacy of the land use plan hinges.

4. AGREEMENT TO DEVELOP AND BINDING SUBSEQUENT OWNERS.

A corollary to the unified control requirement is the requirement that the developer agree that if the developer proceeds with the proposed development, it will be in accord with the approved PUD master plan, the conditions or modifications imposed on it by the approving body, and other applicable regulations.

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In addition, the developer must agree to provide any agreements, contracts, deed restrictions, or sureties necessary to complete the PUD as planned, and to provide for the continuing operation and maintenance of those portions of the PUD not to be operated or maintained at public expense. This may require the posting of performance bonds to ensure the completion of necessary utility or roadway expansions and the formation of a property owners' association to maintain certain facilities such as retention ponds, drainage ways, parks, signs, internal roadways, and recreation facilities.

A developer of a PUD can be sued for breach of implied warranties of fitness for a particular purpose; merchantability; and habitability for basic infrastructure such as private roads, drainage systems, septic tanks, and water wells. This liability may be imposed even if all control of the PUD has been turned over to the homeowners association. *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, 48 So. 3d 902 (Fla. 5th DCA 2010). The court in Lakeview disagreed with a contrary ruling by the Fourth District in *Port Sewall Harbor & Tennis Club Owners Association, Inc. v. First Federal Savings & Loan Association of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985). The Lakeview Court certified the conflict to the Florida Supreme Court. At the same time, the approving governmental unit may be sued for damages by the developer for failure to meet its commitment to provide certain infrastructure in a timely fashion. *Chelsea Inv. Group, LLC. v. City of Chelsea*, 792 N.W.2d 781 (Mich. Ct. App. 2010).

The owner/developer must agree to bind the development successors-in-title to any of the commitments made in the agreement to develop. Subsequent property owners may not be bound by PUD conditions if they are not recorded, even if the owners have knowledge of the restrictions. S*ee Story Bed & Breakfast, LLP v. Brown Cnty. Area Plan Comm'n*, 794 N.E.2d 519 (Ind. Ct. App. 2003). Property owners adjacent to an approved PUD may have standing to enforce certain conditions of the PUD. *Wagers v. Adventist Health Sys.*, 11 Fla. L. Weekly S512a (Fla. 9th Cir. Ct. 2004). In the Wager case, Wager attempted to enforce a stormwater retention requirement in the Adventist PUD approval as a result of a fuel spill from the Adventist facility into the lake adjacent to which Wager lived.

5. PROFESSIONAL SERVICES CERTIFICATION.

To reinforce the concept that the PUD is to be the product of a land use plan, the PUD ordinance may require that the applicant certify the use of at least two types of professionals: (a) land planning or architecture and (b) engineering. The professionals usually must be licensed by the state or eligible for membership in a professional organization such as the American Institute of Planners or the American Society of Landscape Architects. If out-of-state consultants or in-house corporate personnel not licensed in the state are to do the bulk of the land planning and engineering work, it may be necessary to retain the services of some in-state consultants to meet a state registration requirement.

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6. MARKET ANALYSIS.

Because PUDs generally are large-scale developments, they have the potential to produce a significant impact on the local or regional economy. Therefore, local governments often have an interest in knowing these potential effects. Basically, the purpose of the market analysis is to determine whether there is or will be a sufficient market to purchase or use the development product, whether it be for housing, office or retail space, or commercial or industrial areas. Also of interest is the absorption time frame in which a sufficient market may develop in relation to any proposed phasing of the construction of the project or support services and utilities.

A market analysis must tread a fine line between providing information necessary for determining impacts on the public interest and information that typically is considered proprietary. To the extent possible, a market analysis should not become an economic analysis of the profitability of the proposed project. At the same time, it probably is in the developer's interest to include information that may not be requested in the market analysis such as the generation potential of the project regarding jobs, payrolls, and taxes. This information can demonstrate compliance with the economic element of the local government comprehensive plan.

If the proposed project also is a DRI, it may be impossible to avoid a more extensive economic analysis of the project, since the Strategic Regional Policy Plan of the controlling regional planning council will have policies and objectives on economic development. The application for development approval for a DRI may request a great deal of information about the projected expenditure of money for construction, payrolls, jobs, job skill requirements, public service and facilities requirements, ad valorem and intangible personal property tax yields, and marketability.

7. MASTER PLAN AND SUPPORTING STUDIES AND REPORTS.

At the heart of the PUD ordinance is the master plan of development. It is the master plan that sets forth the rationale for the variations, inherent in PUDs, from the normal land use restrictions applying to individual lots. A master plan generally must provide a written legal description of the property proposed for the PUD and its relationship to other surrounding properties, streets, watercourses, easements, buildings, and other important physical features.

Regarding the project site, the master plan normally must describe the existing topography and land use as well as the proposed land uses, structures, amenities, lighting, signage and landscaping, open spaces, and preserves. Supportive reports and studies usually are required regarding projected impacts and demands on natural resources, water, sewer, electric, solid waste, stormwater, schools, fire, police, emergency medical, and transportation utilities, services, or systems. The master plan may also include sufficient architectural drawings to

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illustrate typical floor plans, elevations and perspectives of proposed structures, and improvements on the site.

8. LAND COVERAGE RESTRICTIONS, AREA USE LIMITATIONS, AND FLOOR AREA RATIOS.

a. Land Coverage Restrictions.

A land coverage restriction places a maximum limit on the total amount of building footprint and other hardscapes that can be placed on the property within the PUD. Its objective is the establishment of a minimum relationship between landscaped open space and covered area on a tract of land. Part of this objective is to limit the obstruction potential of structures to the passage of light and the movement of air. This limitation may provide one coverage limitation up through a certain number of floors, with a greater restriction on any floors constructed above. It is important to determine whether the most restrictive coverage limitation applies only to floors above the first zone of restriction or whether it applies all the way to the ground if the structure exceeds the first zone of restriction in height.

For example, an ordinance may provide that the buildable area may be covered ninety-five percent for a height not in excess of eight stories, but that above eight stories, the buildable area must not be covered in excess of fifty percent. It is questionable whether this means that the first eight stories of a ten-story building may cover only fifty percent of the buildable area of the site, or whether it means that stories one through eight may cover ninety-five percent of the buildable area and floors nine and ten must be stepped in to cover only fifty percent of the buildable area. The answer to this question clearly has a major impact on the development value of the property. It is vital, therefore, to determine early in the planning process the interpretation given to such a requirement by the approving agency if the ordinance is ambiguous.

b. Area Use Limitations.

Area use limitations also may be imposed. These limitations attempt to provide a minimum balance between various types of uses by setting minimum or maximum percentages of total area for uses such as open space, governmental services, residential, commercial, and industrial.

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c. Floor Area Ratio.

A floor area ratio (FAR) provides that the total square footage to be built on a parcel of property cannot exceed X times the total square footage of the parcel. These ratios tend to vary considerably between communities and between zoning districts within a given community. Ordinarily, one would expect to find the highest floor area ratio in the downtown business district of a community and the lowest ratio in single-family residential districts. If one proposes to provide on-site parking in a parking structure, it is important to determine whether the square footage in that structure is included by the approving agency in the computation of the FAR. If so, the FAR becomes an extremely restrictive provision. Although a FAR requirement has a net effect on the relationship of open space to covered areas on a parcel, the FAR concept attempts to focus on a maximum relationship of building mass to parcel size and, in a broader sense, attempts to establish a general scale relative to the pedestrian traffic within a district.

9. CONSISTENCY WITH COMPREHENSIVE PLAN.

Section 163.3194(1)(a), Florida Statutes, requires that all actions taken regarding development orders, that is, building and zoning permits, subdivision approvals, rezonings, and variances, are consistent with an adopted local government comprehensive plan or applicable element. The degree of plan specificity varies greatly among local governments and, therefore, the ability to determine compliance with the plans varies accordingly.

Some plans are very specific regarding land uses, densities, and performance standards for infrastructure requirements such as water, sewerage, drainage, and roadway systems. These plans approach the level of a zoning code's specificity. Other portions of plans dealing with issues such as mass, scale, and views tend to be more general and subjective with respect to consistency requirements. A PUD is deemed

> consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

§ 163.3194(3)(b), Fla. Stat. (2012).

Finally, the PUD zoning code may not have been updated since the adoption of the comprehensive plan. Consequently, compliance with the code may not ensure consistency with the comprehensive plan and may even result in violations of the plan. For an analysis of this situation, see Layman, *A Practitioner's Guide to "Consistency" Problems Resulting from the Local Government Comprehensive Planning Act of 1975*, 55 FLA. B.J. 803 (1981); Arline, *The Consistency Mandate of the Local Government Comprehensive Planning Act*, 55 FLA. B.J. 661 (1981).

B. *Approval Process.*

1. PREAPPLICATION CONFERENCE.

Although a preapplication conference often is not a formal requirement of the PUD ordinance, it is an important step in most instances. It provides a means of obtaining and giving background information and insights into the project, reaching an understanding of the applicable PUD requirements, and ascertaining issues and the political climate. Positions and lines of thought should be discovered before the official filing to expedite the entire process.

Many items should be discussed at the preapplication conference, including the proper relation between the project and the surrounding uses. The project should be analyzed against and compared to the comprehensive plan. The adequacy of existing and proposed streets, utilities, and other public facilities to serve the development should be reviewed. The adequacy and extent of open space and the ability of the property and surrounding areas to handle future expansions are important considerations.

The developer should convey a spirit of cooperation with the zoning and planning officials. The officials should feel that the project approval is moving along as a result of joint efforts of the officials and the developer.

It may be necessary on large projects to have several preapplication conferences over a period of weeks or months. The planning board or commission may get involved and there may be informal workshops.

2. FILING.

Zoning authorities usually have an official filing form. The filing requirements, however, often are ambiguous. It should be determined in advance at the preapplication conference exactly what must be filed, the level of detail required, and the format. The filing forms almost always require exhibits such as surveys, certification of title to the property, certification as to adjacent property owners, and often some or all of the matters described above.

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The developer always has an intended schedule for development of the project that requires filing by certain dates. Frequently, the developer's schedule is impractical in light of the zoning authority's timetables, whether by ordinance or practice. The attorney must ensure that the timetable of the PUD filing is established early and must inform the client. When the PUD is filed, the attorney or client should request a schedule of the hearings and meetings that will take place in accord with the ordinance. Most jurisdictions have a filing deadline that if missed precludes filing until the next hearing cycle.

One of the most difficult decisions in PUD filing is to determine additional information not required by the ordinance that should be submitted to supplement the filing. Generally, it is unwise to submit additional documents because of the tendency to confuse the issues involved or create new issues that may become obstacles to approval. If legitimate issues of divergent opinions between the developer and the zoning authority are discovered before the filing, they should be discussed and overcome in the developer's PUD filing by memoranda of law, economic information, and planning studies.

3. PREHEARING CONFERENCE.

After filing the PUD application, an official but informal meeting normally is held with the applicant to determine if the filing meets the technical and substantive requirements of the planning, zoning, and building ordinances. The prehearing conference usually is attended by members of appropriate departments within the municipality or county. Each department identifies issues or problems that the department may have with the project. To the extent possible, those issues and problems should be resolved before any hearings.

4. PLANNING BOARD.

After the prehearing conference, a duly noticed public hearing on the PUD application usually is held by the planning board or similar tribunal. Before the hearing, all members of the planning board receive a copy of the PUD application, including the overall plan as it may have been amended before the public hearing, together with the comments of the staff.

Both the applicant and the public have an opportunity to speak for and against the application. The comments of the staff are reviewed, explained, or expanded. The planning board makes an overall decision on the application by either approving it as proposed, approving it conditionally, or disapproving it. Usually, the decision of the planning board is only a recommendation to the municipal commission or county commission and does not carry a presumption of correctness.

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5. MUNICIPAL COMMISSION OR COUNTY COMMISSION.

Once again, a duly noticed public hearing on the PUD application is held, but this time by the municipal commission or county commission. The staff is present, and both the applicant and the public have the opportunity to be heard. At this meeting, the recommendations of the staff and the planning board are presented.

Due process required in quasi-judicial proceedings is not as extensive as in a normal judicial proceeding. Furthermore, the distinction between "parties" and "participants" is important in this regard. Parties in a quasi-judicial hearing are entitled to greater due process protection (such as being allowed to cross-examine witnesses) than are others who are only participants. The process to which participants are entitled depends upon the function of the proceeding as well as the nature of the interests affected. *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7 (Fla. 5th DCA 2010).

On projects with significant or complex issues, it is important to meet with the members of the planning board, the council or commission, and opposition groups to prepare adequate responses to objections and concerns. Regarding meeting with elected or appointed officials, the requirements of the Sunshine Law, § 286.011, Florida Statutes (2012), must be scrupulously met. Just as important are the Florida court rulings on the cause of action created by ex parte communications in quasi-judicial proceedings such as those on PUD applications. Such communications can lead to a court ordering a rehearing on the application. *See Lee Cnty. v. Sunbelt Equities, II*, *Ltd. P'ship,* 619 So. 2d 996 (Fla. 2d DCA 1993) ; *Bd. of Cnty. Comm'rs of Leon Cnty. v. Monticello Drug Co.*, 619 So. 2d 361 (Fla. 1st DCA 1993); *Snyder v. Brevard Cnty.*, 595 So. 2d 65 (Fla. 5th DCA 1991); *Jennings v. Dade Cnty.*, 589 So. 2d 1337 (Fla. 3d DCA 1991).

6. PLATTING.

Approval by the council or commission does not end the approval process. Almost always, one or more plats of the PUD are required. A plat provides the mechanism to implement and guarantee conformance with the PUD approval. It sets forth in the public records the boundaries of the development and each subdevelopment parcel and contains title and survey certifications. Furthermore, the plat contains dedications and restrictions required in the PUD approval for facilities such as roads and drainage. Approval of the plat must be obtained from the governing body. Chapter 177, Florida Statutes, provides the minimum platting requirements imposed on local governments. The approval of plats is considered quasi-judicial. *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838 (Fla. 2001).

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V. Practical Considerations.

A. *Consulting Team.*

A PUD is a complex and substantial project that may require the joint efforts of a team of consultants, including architects, land planners, economists, traffic and parking engineers, ecologists, geohydrologists, archaeologists, surveyors, lawyers, marketing specialists, media specialists, structural engineers, soils engineers, waste disposal engineers, hydrographic engineers, and chemists.

Because the work of one consultant may depend on the data and conclusions of another consultant, it is extremely important that the members of the consulting team have confidence in the professionalism of the other members of the team. It is equally important that the approving bodies have respect for the quality and veracity of the work product of the consultants. The key members of the consulting team also must have the ability and skill to explain their work and the implications of their work to the staff of the approving body, public officials, news media, and the general public.

Management of the activities and work product of the consulting team members is a vital task, especially to avoid duplication of effort, confusion, contradictions, blunders, and omissions of crucial information. Consequently, there must be a clear understanding among the members of the consulting team about who has primary responsibility for coordinating the team's activities.

The developer, of course, has the greatest interest in the outcome of the work of the consulting team. At the same time, the lawyer on the project must provide critical advice regarding procedures, strategy, legal tests, timing, and building the record. Often, the lawyer is held primarily responsible for the result, even though most of the outcome depends on the work and professional judgment of the nonlawyer members of the team. It is suggested, therefore, that the most effective management control occurs through the attorney in close consultation with the developer. Realistically, this may not be possible in a given situation because the client may have formed the team before the attorney becomes involved, or the client may not perceive attorneys as project managers.

Once the project is underway, members of the consulting team must be sure to keep other members adequately informed as to the progress of their work. When particular tasks are undertaken, realistic due dates should be established by the consultant and team coordinator. A record of these tasks and dates should be made and their completion must be tracked regularly.

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B. *Data Acquisition.*

To address adequately the many issues that arise out of a PUD application, it is necessary to acquire a considerable amount of data describing the existing physical conditions of the site and surrounding properties; the existing status and availability of utilities, transportation systems, and other public facilities; and the impacts of the proposed project on the physical features, utilities, services, and facilities. The resolution of many of the issues that arise in the review of a PUD application is based on expert judgments inferred from the data collected. The amount, type, and quality of that data, therefore, are very important.

It is to the applicant's advantage to determine before acquiring data the amount and types of data required and the standards that the reviewing bodies deem applicable to the collection and analysis of that data. This determination should help eliminate potential disputes. A debate before the decision-making bodies over differences of opinion regarding the reasonable inferences of data is futile if the parties do not agree on the types, quantity, and validity of the data from which those inferences are drawn. Rarely will elected officials have the inclination to sort through data generation disputes.

An applicant also should keep in mind that regarding some issues such as water availability, wetlands, endangered and threatened species, water quality, and air quality, a local government agency may look to another state or federal agency for an assessment of existing conditions and potential impacts. It is useful, therefore, to collect and analyze data according to the standards used by those other agencies.

If the applicant's consultants believe that certain agency data requirements and procedures are misdirected, excessive, or unsatisfactory, those disagreements should be addressed with the appropriate agency before the client expends money undertaking a data acquisition and analysis program. If the disagreements cannot be eliminated, at least the applicant is aware early in the process of the potential areas of contention.

C. *Master Plan Document.*

The master plan document is the central reference document for presenting and reviewing the proposed PUD. It should convey in content, format, and appearance the professionalism and character of the applicant. A looseleaf binder should be used to enable substitution of pages as required to correct errors, omissions, or changes in the project plan after filing. Careful attention should be given to the selection of the front and back cover material, the paper quality for the text, the style of type, the quality of printing, and the section separators.

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A typical master plan document might include the following sections (reflected in a table of contents):

1. Background. This section should include a description of the developer and reference to any prior projects if they have been well received by reviewing agencies and the public. It also should describe the location of the property and contain a reference to the effort expended in assembling the property (if significant) and a list of the members of the consulting team and their respective areas of responsibility.

2. General project description. This part of the document should describe concisely the existing physical condition of the project site, the type of development proposed, the components of the proposed development, the value of the proposed investment, and the benefits to the community regarding tax revenues, jobs, payrolls, and natural resource management. It should contain a schedule for commencing and completing the project broken down into phases, if any. It should be designed to provide a preliminary overview of the project.

3. Detailed project description. This section should set forth in detail a written and illustrated description of the land use plan and architectural design statement for the project. Typical illustrative materials supporting the text include: a colored site drawing showing the location of specific land uses; an aerial photograph of the existing site, with an overlay showing proposed land uses; renderings depicting typical appearances of buildings and landscaping; building perspectives; typical floor plans; building elevations; and tables summarizing land uses by category, acreage, and percent of land covered.

4. Compliance with PUD requirements. This part should list the PUD requirements from the applicable ordinance, with a discussion after each requirement of the manner and degree to which the proposed project complies with a specific requirement. A certain amount of repetition of information provided in other sections of the master plan is appropriate to provide for ease of review by agency staff and other interested persons for compliance with the specific ordinance requirements.

5. Consistency with comprehensive plan. This section should discuss the manner and degree to which the proposed plan complies with the applicable portions of an adopted local government comprehensive plan.

6. Agreement to develop. The required agreement by the owner/developer to carry out the development in conformance with the approved plan and any conditions attached to that approval should be reproduced in this section.

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7. Supporting reports. The various supporting reports, for example, market analysis, traffic, utilities, surface water management, archaeological, and ecological reports, should be included as separate sections to which reference is made when appropriate throughout the main sections of the text in the master plan. If the total number of pages of master plan text, supporting illustrations, and supporting reports becomes too great, it may be necessary to separate the document into two volumes. The first volume should contain sections 1. through 6. listed above, and the second volume should contain the supporting reports.

D. *Communication.*

The approval process comprises a series of formal and informal hearings and meetings with various agency staff, supporters, opponents, and the news media. By their nature, PUDs tend to generate a wide range of reaction from the very positive to the very negative and to stimulate long-standing prejudices and fears. It is important, therefore, for the developer to disseminate accurate and sufficient information to interested groups, including potential objectors, before the grapevine fills a vacuum with misinformation.

Presentations, whether formal or informal, to one person or many, should be well organized and structured in advance to ensure that the information is conveyed clearly and concisely. These presentations should address not only the matters the applicant wishes to convey about the proposed project, but also those matters of most concern to the particular listener. In addition to verbal descriptions, the use of slides, photographs, renderings, computer graphics, and scale models can be extremely effective. Also useful are two- or three-page fact sheets that summarize in an outline the basic information about the project. These fact sheets can be provided to interested persons and are handy references, especially for public officials. At the same time, presentations should not be more extensive or elaborate than the issues require. The more information presented and the longer time taken can often lead to confusion and the creation of new issues.

The flexibility inherent in the PUD process is an attractive feature to the developer. It is also that feature, however, that makes negotiation a significant part of the approval process. Consequently, the applicant must attempt to educate the decision makers, the public, and the news media about the facts of the project before uninformed reactions gain momentum and support. For as long as it is productive and practical, the deliberations with the reviewing agencies, public officials, and opponents should be conducted in a nonadversarial manner.

The applicant must attempt to set a pace in the approval process that gives officials and the public an opportunity to absorb accurate information about the project and to express their views, but that does not allow the approval process to become bogged down. If the process becomes too protracted, all parties tend to develop a negative (or more negative) attitude about

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the project as a function of becoming worn down by the process. The applicant must demonstrate patience, persistence, and a firm resolve.

E. *Development Conditions.*

Since a PUD usually takes a number of years to build out, it is especially vulnerable to market and economic changes. Consequently, the conditions of approval should contemplate these circumstances. There should be a conversion table that allows for a readjustment of the density and intensity of uses within the PUD. The requirements for vesting the full development program should be delineated very clearly. Provision for minor adjustments to the master plan development criteria should also be made. For a judicial discussion of de minimus changes to PUDs, see *Bailey v. Zoning Board of Adjustment of Philadelphia*, 801 A.2d 492 (Pa. 2002).

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END OF MEMORANDUM

M E M O R A N D U M

DATE: October 20, 2015

TO: David Bullock, Town Manager

FROM: Alaina Ray, AICP, Director
Planning, Zoning and Building Department

SUBJECT: November Town Commission/ Planning & Zoning Board Joint Workshop

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Background

A significant number of the Town's multi-family and tourism properties were rendered non-conforming as a result of Comprehensive Plan (Plan) and Zoning actions that occurred in 1984 and 1985. These actions affected a majority of the then-existing multi-family and tourism properties on the island, which had been built at densities higher than the densities allowed under the 1984-85 revisions.

As the island's existing multi-family and tourism properties have aged, concern has arisen that some of these properties may be reaching market obsolescence, in that they no longer meet market demand for modern features. For example, newer developments tend to have covered attached parking, expansive balconies/terraces, concrete construction, higher hurricane standards, high ceilings, etc. The constraints resulting from the non-conforming density issue may have contributed to making redevelopment and/or modernization of these aging properties problematic, at best.

Recognizing the difficulties associated with the inability to rebuild these non-conforming properties in the event of voluntary or involuntary destruction, the Town Commission adopted Ordinance 2007-48, directing to referendum of the electors of the Town the following question:

> For the properties that have more dwelling or tourism units than currently allowed, but which were legal at the time they were created, may the Town consider and grant approval to allow those properties to rebuild to their current dwelling or tourism unit levels in the event of involuntary or voluntary destruction?

In 2008, a majority of the Town's electors affirmatively approved the referendum and, subsequently, the Town adopted modifications to the nonconforming regulations of the Land Development Code (LDC) that allowed some limited flexibility for these properties to reconstruct at their existing density. However, these properties were still classified as non-conforming, which presents potential legal, financial, and LDC complications. In addition, the LDC revisions placed strict limitations on the design of any reconstruction, for example, buildings were required to be rebuilt within the same cubic content, which would preclude modifications such as creating larger units and/or providing higher ceiling height.

The LDC revisions that were adopted, while providing the maximum flexibility that may have been thought to be appropriate at the time, may not have provided adequate flexibility and/or incentive to assist in making redevelopment and/or modernization of these properties a viable option.

Recent Ordinances

In October 2014, the Town Commission recognized the need to address these continued non-conforming properties and provide additional flexibility to encourage redevelopment and/or modernization of aging properties. Subsequently, the Commission directed Staff to embark on an effort to resolve, to the greatest extent possible, the nonconforming density issue. As a result, the Town Commission has since adopted ordinances that modify the Town's Plan, which created a framework that will allow these non-conforming properties to be rezoned into new proposed conforming zoning districts that closely match their existing densities. These adopted Ordinances are described below.

Ordinance 2015-02: This ordinance focused on the Plan's Future Land Use Element (FLUE) policies that directly relate to nonconforming properties. The Plan previously included language that placed strict limitations on redevelopment of these properties and prevented flexibility within the LDC. Changes were made to the Plan to remove the restrictive language and direct the standards for the redevelopment of nonconforming properties to the LDC.

Ordinance 2015-10: This ordinance focused on modifications to the Plan's Future Land Use (FLU) categories. The revisions established a broader, more general FLU category framework to accommodate nonconforming properties and provide the ability to consider and adopt new zoning districts in the LDC. Additionally, the FLUE was expanded to provide for the following two new broad categories, which can be utilized to support the proposed zoning districts:

1. "Established Areas"— areas that are established and settled in their development pattern, and unlikely to be desirous of, or to support a market for, dynamic changes in use; and
2. "Opportunity Areas"— areas that are suitable for and capable of the type of dynamic redevelopment that can restore the historic balance of residential and tourism uses the Town desires for the future.

September 2015 Joint Meeting Direction

During the Town Commission and Planning & Zoning Board (P&Z Board) Joint Workshop on September 21, 2015, Staff was directed to explore and/or review the following:

- Options to conform existing density that does not involve a Town-initiated referendum
- Concepts including single zoning districts, Planned Unit Developments, or other general zoning district approaches

Previous proposals that provided options for conforming the existing built density involved a Town-initiated density referendum and a large-scale rezoning of multiple properties on an “opt-in” basis. For properties currently built over the density allowed under their current zoning districts, these previous options would have provided some limited additional density. Based on discussion at the September Joint Meeting, consensus was reached to explore options that would not automatically grant any additional density and would not require a Town-initiated referendum.

The Town Commission and P&Z Board also discussed the potential for a “pool” of multi-family units that might be used to encourage redevelopment. While this would involve a Town-initiated referendum, Staff included the “Unit Pool” concept in this report and associated presentation, along with potential considerations that might be appropriate, if there is consensus to explore this option further.

Discussion also occurred related to a concept that proposed one zoning district for Nonconforming Residential properties and one zoning district for Nonconforming Tourism properties, with density capped at the existing built density of each nonconforming property. Staff was directed to investigate the viability and feasibility of such a concept and that analysis is included in the presentation. The Town Attorney has also provided a memo, included within the agenda materials, which addresses legal perspectives of certain issues discussed at the September 21st Joint Workshop.

The attached PowerPoint presentation includes three (3) options for conforming existing density. All three (3) of these options are viable, depending on desired outcomes. The Town could utilize all three (3) options, or some combination thereof, should that be deemed appropriate.

In addition to the presentation, a diagram is included that provides a graphic “roadmap” of the processes involved for each of the options presented.

Path Forward

If consensus is reached during the November Joint Workshop to pursue one or more of the options presented, draft Land Development Code regulations designed to implement the selected option(s) will be developed.

Should the Town Commission choose to pursue a referendum for a “pool” of multi-family units, referendum language for the potential units would be crafted for adoption by the Town Commission through ordinance.

Any option(s) selected to conform properties for density will involve an intensive educational effort to educate property owners of their options.

Attachments:

PowerPoint Presentation
“Roadmap” Diagram

TOWN OF LONGBOAT KEY

Nonconforming Properties: Options

Town Commission/ Planning & Zoning Board
Joint Workshop

November, 2015

Presentation Elements

1. September Workshop Direction
2. Nonconforming Property Approach
3. Density Incentive to Redevelop
   a) Current Situation
   b) Policy Question
4. Options for Rezoning Nonconforming Properties
   a) Options: Critical Points
   b) Option 1: Planned Unit Developments (PUDs)
   c) Option 2: Multi-Family Unit “Pool”
   d) Option 3: Special Zoning Districts – No Additional Density
   e) Option Comparison Chart
   f) Policy Question
5. Next Steps

September Workshop: Direction

- Explore options that do ***not*** involve a Town-initiated referendum, but allows owner-initiated referendum to increase density
- Review the concepts discussed during the September Workshop: Planned Unit Development or other general zoning district approach
- Explore potential for a “pool” of multi-family units, similar to the existing Tourism Pool?

Nonconforming Property Approach

- Comprehensive Plan has been revised to allow revisions to the Land Development Code (LDC)
- Create new Zoning Districts to allow properties to become conforming for density
- Once LDC is revised, properties that are non-conforming for density will have opportunity to become conforming through Comprehensive Plan Future Land Use (FLU) change and rezoning (either Town-initiated or Owner-initiated, depending on direction)

Density Incentive to Redevelop: Current Situation

- Currently, Residential properties built with 6 units per acre (6/au) or more **cannot** seek additional density.
  - Tourism properties (or properties zoned Residential but ***legally used*** for Tourism) built with more than 6/ua can request units from the Tourism Pool ***if*** they meet specific Site Plan criteria
- Example:
  - Residential Condominium Property "A" was built in 1960's at 10/ua
  - Owners agree on a plan to redevelop the aging condominium property, but their selected developer needs to sell additional units to make redevelopment financially feasible, without pricing current unit owners out of the redeveloped property
  - Currently, there is ***no*** zoning district the property could rezone into in order to redevelop higher than their existing density, even if LBK voters were willing to approve the additional density

DENSITY INCENTIVE TO REDEVELOP: POLICY QUESTION

Does the town wish to provide a mechanism for property owners to *request* additional density as a financial incentive to redevelop aging, nonconforming properties?

NO	YES
• Create zoning district(s) that conform existing density, ***but*** do ***not*** provide a method for property owners to request additional units (Option 3)	• Create zoning district(s) that conform existing density ***and*** provide a method for property owners to ***request*** additional units (Option 1 and Option 2)

Options: Critical Points

- All options presented are viable solutions, depending on desired outcomes
- Town could utilize all three options presented, in some combination; ***not*** limited to only selecting one option
- Documentation/Certification of existing built conditions is recommended regardless of path selected

Option 1:
Planned Unit Developments

- Town creates two new Planned Unit Development (PUD) Districts, specifically for purpose of promoting and allowing redevelopment, that would allow ***property owners*** to seek rezoning to a density higher than 6/ua:
  - Residential Opportunity Planned Unit Development (RO-PUD)
  - Tourism Opportunity Planned Unit Development (TO-PUD)
- These new Zoning Districts would correspond to, and be consistent with, the recently adopted Comprehensive Plan Future Land Use Categories:
  - Multiple-Family Residential Opportunity Area
  - Commercial Tourism Destination Opportunity Area

Option 1:
Planned Unit Developments (cont.)

- PUD District regulations should include:
  - Requirement to redevelop the property (not just build additional units)
  - Defined criteria for additional density:
    - Percentage of current number of units?
    - According to amount of Open Space, size of setbacks, lot size, other site issues, etc?
  - Defined criteria for additional building height flexibility:
    - According to amount of Open Space provided, size of setbacks, Lot Coverage, etc?
    - Allow additional floor per certain number of additional units?
    - Allow additional building height sufficient for modern units?

Option 1:
Planned Unit Developments(cont.)

- ***Property Owner*** would initiate referendum to request additional density
- If referendum is approved, ***Property Owner*** would:
  - Seek a change to their Future Land Use (FLU) Category into either the existing Comprehensive Plan's Multiple-Family Residential Opportunity Area or Commercial Tourism Destination Opportunity Area; ***and***
  - Seek a rezoning into the new PUD Zoning District

Option 1:
Planned Unit Developments(cont.)

- PUD proposal must be for a ***redevelopment*** of the property
  - What are the objectives of redevelopment?
    - Maintain/ increase property values?
    - Maintain/increase marketability with modern units that have desired amenities?
    - Increase compliance with FEMA and Hurricane Codes?
  - Develop PUD criteria based on defined redevelopment objectives
    - Complete demolition of ***all*** buildings or ***some*** buildings?
    - Construction equal to or exceeding 50 percent of existing structural value?
- Once rezoned, the property would be ***conforming*** for density ***and*** could ***redevelop*** according to the approved PUD criteria and density

Option 1:
Planned Unit Developments (cont.)

Pros

- No referendum costs/risks to Town
- Provides financial incentive for property owners to rezone and redevelop
- Density decided based on:
  - Voter approval for each property;
  - The most appropriate use of property; and
  - Other criteria to be defined by Code
- PUD criteria could require that property be redeveloped (to the extent determined appropriate to meet certain objectives), rather that just building additional units
- Rezoned properties would be deemed Conforming
- If Town eventually decided to seek referendum for a unit “pool,” the “pool” units could be applied to this option.

Cons

- Cost, time, and risk to property owners for referendum process
- May require some additional flexibility in site development regulations, compared to current regulations
- PUD criteria must be clear and concise; no unfettered discretion

Option 2:
Multi-Family Unit "Pool"

- Town creates new PUDs, as described in Option 1
- ***Town initiates*** referendum for a "pool" of multi-family units
- If referendum is approved, Town could adopt regulations governing the distribution of the units in the "pool," for example:
  - Limit the number of additional units a development could receive to a percentage of the development's existing units
  - Limit the total number of units that can be granted per year
  - Other limitations as may be found appropriate

Option 2:
Multi-Family Unit "Pool" (cont.)

- ***Property Owner*** would:
  - Seek a change to their Future Land Use Category into the existing Comprehensive Plan's Multiple-Family Residential Opportunity Area; ***and***
  - Seek a rezoning into the new PUD Zoning District
- PUD proposal must be for a ***redevelopment*** of the property, based on objectives and criteria as discussed in Option 1
- Once rezoned, the property would be ***conforming*** for density ***and*** could ***redevelop*** according to the approved PUD density

Option 2:
Multi-Family Unit "Pool" (cont.)

Pros	Cons
• Town-sponsored, one-time referendum to establish a unit "pool," rather than potentially multiple referenda • Property owners would not need to seek referendum • Provides financial incentive for property owners to rezone and redevelop • Commission controls the allocation of specific number of units allotted to properties, based on criteria to be defined by Code • Rezoned properties would be deemed Conforming	• Costs/risks to Town associated with a referendum • May require some additional flexibility in site development regulations, compared to current regulations • PUD criteria must be clear and concise; no unfettered discretion

Option 3:
Special Purpose Zoning Districts – No Additional Density

- Town revises Comprehensive Plan to add a Special Purpose Future Land Use Category that allows Special Purpose Zoning Districts
- Town creates new Special Purpose Zoning Districts to conform and limit density to existing nonconforming built density, specifically for those properties:
  - Tourism Special Purpose Zoning District (or other recognized Land Use nomenclature)
  - Residential Special Purpose Zoning District (or other recognized Land Use nomenclature)

Option 3: Special Purpose Zoning Districts – No Additional Density (cont.)

- Properties would require a change to their Comprehensive Plan Future Land Use into a new Special Purpose Category
- Properties would require rezoning into a new Special Purpose Zoning District
- Two options for rezoning properties:
  - ***Town-initiated*** (Town carries cost; rezone multiple properties at one time on an “opt-in” basis)
  - ***Owner-initiated*** (Property Owner carries cost; requests rezoning on an individual basis)

Option 3:
Special Purpose Zoning Districts – No Additional Density (cont.)

- Rezoning would ***not*** allow any additional density
- Would provide a mechanism for property owners who ***do not*** need/wish to seek additional density to become conforming
- Once rezoned, property would be ***conforming*** for density

Option 3:
Special Districts – No Additional Density (cont.)

Pros	Cons
• No referendum costs/risks to Town • Rezoned properties would be deemed Conforming • Density would be capped at existing built density for these properties, as long as they remain in these Zoning Districts	• Does not provide a method for property owners to seek additional density • Owner must “opt in” and/or initiate the process • Comprehensive Plan must be amended to add Special Purpose Future Land Use Category

Option Comparison

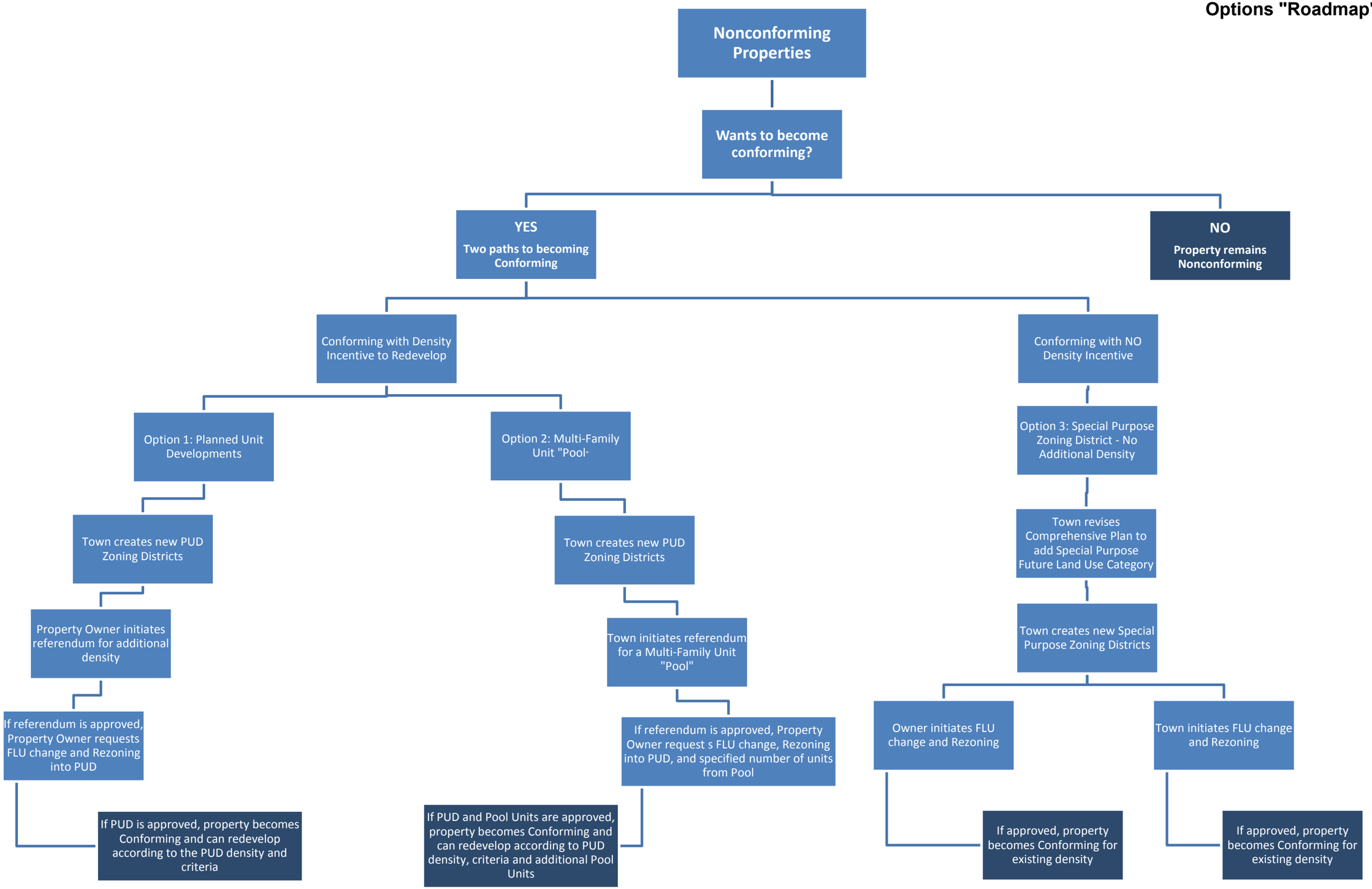
	OPTION 1	OPTION 2	OPTION 3
Can it be implemented without a Town-initiated referendum?	YES	NO	YES
Does it conform properties for density?	YES	YES	YES
Does it require rezoning?	YES	YES	YES
Does it provide mechanism/process for property owners to request additional density through referendum?	YES	YES	NO
Does it provide incentive to redevelop?	YES	YES	UNKNOWN

Options:
Policy Question

Does the Town wish to implement one or more of the Options presented?

- **Option 1: Planned Unit Developments**
- **Option 2: Multi-Family Unit "Pool"**
- **Option 3: Special Purpose Zoning Districts – No Additional Density**

Next Steps

- Based on direction given during November 9th Joint Workshop, Staff will begin crafting draft LDC regulations.
- Land Use and Legal consultants (yet to be identified) will be engaged to assist with development and review of LDC regulations.
- When draft LDC regulations are complete, they will be taken to the Planning & Zoning Board for review and recommendation to the Town Commission.

Options "Roadmap"