

M E M O R A N D U M

Date: May 22, 2015

TO: Town Commission
FROM: Dave Bullock, Town Manager
SUBJECT: Ordinance 2015-17, Amending the Town Code for Compliance
With State Law Relating to Mangrove Regulation

At the April 20, 2015 Regular Workshop Meeting the Town Attorney made a recommendation to amend provisions of the Town Code that currently conflict with applicable Florida Statutes regulating the trimming or alteration of mangroves. She further advised that two recent court decisions have reaffirmed the limitation on local government's ability to regulate mangroves through local ordinance and enforcement proceedings.

The Town Attorney's has provided two memorandums regarding this recommendation and both are attached for your reference.

Based on the Town Attorney's recommendation and Commission discussion held on April 20, 2015, the Town Attorney and Manager were directed to develop Ordinance 2015-17. First reading was held at the May 4, 2015 Regular Meeting and was forwarded to the June 1, 2015 Regular Meeting for second reading and public hearing.

Please don't hesitate to contact me or the Town Attorney if you have any questions.

M E M O R A N D U M

Date: April 28, 2015

TO: Town Commission
CC: Dave Bullock, Town Manager
FROM: Maggie Mooney-Portale, Town Attorney
SUBJECT: Ordinance 2015-17, Amending the Town Code for Compliance With State Law Relating to Mangrove Regulation

This Memorandum shall serve as a supplement to the Memorandum dated April 14, 2015, on the subject of "Recommendation to Amend Town Code to Address Applicable Law Relating to Mangrove Regulation". Following the April 20, 2015, Workshop, Town Staff and the Town Attorney evaluated the use of the term "mangroves" within Chapters 98, 104, 151 and 154 of the Town Code to determine whether such terminology could be construed as a violation of Florida's Mangrove Trimming and Preservation Act, Sections 403.9321 – 403.9333, Florida Statutes. As a result of that evaluation, Ordinance 2015-17 is before you proposing certain changes to those Chapters of the Town Code. A summary of the proposed changes within Ordinance 2015-17 is below.

Several provisions contained within Chapter 98, Trees, of the Town Code could be construed as regulating the trimming and alteration of mangroves. Accordingly the following modifications have been recommended:

- Mangroves have been specifically excluded from the Town's Tree Code regulations.
- Language is recommended that recognizes that the State FDEP's authority over the regulation of mangroves as provided for in the Mangrove Trimming and Preservation Act, Florida Statutes 403.9321 – 403.9333.
- Mangroves have been specifically excluded from the Town's tree trimming regulations.
- Language is recommended that provides that mitigation for impacts to mangroves shall be governed by state permitting requirements.

The following modifications are recommended to Chapter 104, Property Maintenance Standards:

- Revisions are recommended to be consistent with the modifications to the Town's Tree Code regulations.
- Provisions relating to the regulation of mangroves trimming have been deleted.

The following modifications are recommended to Chapter 151, Shoreline Construction have been amended to:

- Include a definition of "wetlands" within the Town Code.
- Modify town permitting criteria to require that shoreline construction be built landward of wetlands, rather than mangroves.

The following modification is recommended to Chapter 154, Flood Control, to address the provision relating to the alteration of "mangrove stands":

- Language is recommended to clarify that the regulation of mangrove stand alteration is regulated by the FDEP.

Town staff and I will be available to respond to any questions that the Town Commission has with regard to the above recommended changes contained within Ordinance 2015-17.

M E M O R A N D U M

Date: April 14, 2015

TO: Town Commission

THROUGH: Dave Bullock, Town Manager

FROM: Maggie Mooney-Portale, Town Attorney, and
R. David Jackson, Assistant Town Attorney

SUBJECT: Recommendation to Amend the Town Code to Address
Applicable Law Relating to Mangrove Regulation

Florida's Mangrove Trimming and Preservation Act ("Act") is set forth under Sections 403.9321 - 403.9333, Florida Statutes (F.S.). The stated intent of the Act is "to protect and preserve mangrove resources valuable to our environment and economy from unregulated removal, defoliation, and destruction." Section 403.9323(1), F.S. Generally, the Act regulates the manner by which the alteration¹ and trimming of mangroves occurs and establishes a regulatory permitting program for obtaining authorization to perform alteration or trimming activities. The permitting and enforcement program established by the Act is primarily administered by the Florida Department of Environmental Protection's (FDEP), however there are provisions in the Act that afford local governments the ability to obtain a delegation of authority to regulate such mangrove alteration or trimming activities.

More specifically, Section 403.9324(1), F.S., provides that these laws along with any lawful regulations adopted by a local government that receives a delegation (from the FDEP of such authority to administer and enforce the regulation of mangroves) shall be the sole regulations in the State of Florida for the trimming and alteration of mangroves on privately or publicly owned lands. In order to receive delegation of the FDEP's authority to regulate the trimming and alteration of mangroves, a local government must make a written request for delegation and demonstrate that it has sufficient resources and procedures to adequately administer and enforce such a regulatory program. Section 403.9324(2), F.S. According to the FDEP, the Town of Jupiter Island and the City of Sanibel, along with Miami-Dade, Broward, Hillsborough, and Pinellas Counties are the only local governments to have been delegated the authority to implement such a program. Accordingly, the Act provides that in the absence of a delegation from the FDEP, the regulation of the trimming or alteration of mangroves is a subject matter that has been pre-empted by the Act to the state/FDEP to regulate.

The Town has not entered into a delegation agreement with the FDEP relating to the regulation of the trimming and alteration of mangroves. Nevertheless, several chapters of the Town's Code of Ordinances include provisions that appear to attempt to regulate various aspects relating to the protection of mangrove trees within the Town of Longboat

¹ "Alter" is defined by the Act as "anything other than trimming of mangroves." Section 403.9325(1), F.S..

Key. Some of these Code provisions include regulations relating to the trimming and removal of mangroves, as well as a section setting forth penalties for those found guilty of violating the provisions of this chapter. With respect to mangroves, enforcement of these Town Code provisions by the Town would be unenforceable without having been delegated the authority to do so by the FDEP.

In addition, the issue of local government regulation over mangroves was recently addressed in a 2014 decision from the State of Florida's Fourth District Court of Appeals where the Town of Jupiter (not the Town of Jupiter Island) tried to impose penalties through a code enforcement proceeding against a property owner who had removed 109 mangroves from its property without a permit from the municipality. The Court held that the Act expressly preempted the Town of Jupiter's local regulation of mangroves and enforcement unless it had received a delegation of such authority from the FDEP. *Town of Jupiter v. Byrd Family Trust*, 39 Fla. L. Weekly D237 (Fla. 4th DCA February 7, 2014). Further, the *Town of Jupiter* decision was recently cited by Judge Bonner in a similar case from the 12th Judicial Circuit (*Maurer v. Sarasota County*, Case No. 2014 CA 4833) which held that Sarasota County lacked jurisdiction to regulate the alteration of mangroves.

Based upon the language of the Act and the recent case law on the subject matter, it is recommended that the Town Commission authorize the Town Manager and Town Attorney to work with staff to prepare an ordinance that will amend the Town Code to remove any language where the Town is asserting authority to regulate the trimming or removal of mangroves.

Please do not hesitate to contact us if you have any questions.

ORDINANCE 2015-17

AN ORDINANCE AMENDING THE CODE OF ORDINANCES OF THE TOWN OF LONGBOAT KEY, FLORIDA; AMENDING CHAPTER 98, TREES; AMENDING SECTION 98.02, DEFINITIONS; AMENDING SECTION 98.03, MANGROVE TRIMMING OR REMOVAL; AMENDING SECTION 98.04, TRIMMING OF TREES OTHER THAN MANGROVES; AMENDING SECTION 98.07, PROTECTION OF TREES DURING SITE DEVELOPMENT; AMENDING CHAPTER 104, PROPERTY MAINTENANCE STANDARDS; AMENDING SECTION 104.16, DUTY TO KEEP PREMISES CLEARED; AMENDING TITLE 15, LAND DEVELOPMENT CODE; AMENDING CHAPTER 151, SHORELINE CONSTRUCTION; AMENDING SECTION 151.03 PERMIT REQUIRED; AMENDING CHAPTER 154, FLOOD CONTROL; AMENDING SECTION 154.105 SITE PLANS AND CONSTRUCTION DOCUMENTS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF ALL ORDINANCES IN CONFLICT HEREWITH; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Florida's Mangrove Trimming and Preservation Act (the "Mangrove Act"), Sections 403.9321 - 403.9333, Florida Statutes (F.S.) sets forth a comprehensive regulatory program for the regulation of the alteration and trimming of mangroves within the State of Florida; and

WHEREAS, recent Florida court decisions interpreting and construing the Mangrove Act have held that unless there is a formal delegation of authority from the Florida Department of Environmental Protection ("FDEP") to a local government authorizing that local government's regulation of mangroves, local governments are restricted from regulating the trimming or alteration of mangroves as the Mangrove Act pre-empts this subject matter to the State of Florida; and

WHEREAS, it has been recommended to the Town Commission that the provisions contained within the Town's Code of Ordinances that could be construed as regulating mangroves be amended to conform with recent court decisions construing the Mangrove Act; and

WHEREAS, the Town Commission desires to amend its Code of Ordinances to confirm with applicable Florida law regarding the regulation of the trimming and alteration of mangroves as provided for herein; and

WHEREAS, the Town Commission of the Town of Longboat Key finds is in the best interest of the health, safety, and welfare of the citizens of Longboat Key to modify the Code of Ordinances relating to the subject of mangroves.

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

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

SECTION 2. Chapter 98, Trees, Section 98.02 - Definitions, is hereby amended to modify the definition of "Tree" as follows:

"Tree." Any living, self-supporting, woody plant having a diameter of four inches or more when measured 4½ feet above ground level, and which will typically reach ten feet or more in height. For the purpose of this chapter, ~~all species of mangroves, and all palms with 4½ feet of clear trunk when measured from ground level are declared to be trees and are protected by the provisions of this chapter.~~ For purposes of this chapter, "mangroves" as defined by Chapter 403, Florida Statutes, shall be excluded from the Town's tree regulations as the regulation of the trimming and alteration of mangroves is a subject matter pre-empted to the State of Florida.

SECTION 3. Chapter 98, Trees, Section 98.03 - *Mangrove trimming or removal*, is hereby amended as follows:

98.03 - Mangrove trimming or ~~removal.~~ alteration.

~~(A) Mangrove trimming requires a state permit and shall be in accordance with the laws of the State of Florida.; no additional local permit is required for mangrove trimming.~~

~~(B) Mangroves cannot be removed unless a permit is obtained from the appropriate state agencies and the town as set forth below.~~

The trimming or alteration of mangroves shall be regulated by the Florida Department of Environmental Protection in accordance with applicable state law including, but not limited to, the "Mangrove Trimming and Preservation Act," Florida Statutes 403.9321, et seq.

SECTION 4. Chapter 98, Trees, Section 98.04 - *Trimming of trees other than mangroves*, is hereby amended as follows:

98.04 - Trimming of trees other than mangroves.

All trimming of trees except mangroves shall conform to American National Standards Institute (ANSI) A300 Standards-1995 or the most recent edition. In the Town of Longboat Key arborists, landscape architects, or other licensed professionals are not required to write standards, inspect, or administer tree trimming unless required by state or federal agencies.

SECTION 5. Chapter 98, Trees, Section 98.07 - *Protection of trees during site development*, is hereby amended as follows:

98.07 - Protection of trees during site development.

(A) Prior to land development, all trees shall be clearly marked to indicate which trees are permitted for removal and barriers shall be erected for the protection of the trees to be preserved using best management practices approved by town staff.

- (B) Silt screens shall be required where ~~mangroves~~ or wetlands could be affected by construction activities or to mitigate runoff from construction activities. In accordance with applicable state agency permitting requirements, silt screens may be required where mangroves could be affected by construction activities or to mitigate runoff from construction activities.
- (C) A performance bond may be required for the restoration or replacement of any preserved trees on the site, which ~~have been~~ will be adversely affected by construction activities, as determined by the town.

SECTION 6. Chapter 104, Property Maintenance Standards, subsection (B) of Section 104.16 – *Duty to keep premises cleared*, is hereby amended as follows:

104.16 - Duty to keep premises cleared.

- (A) For the purpose of promoting the health, safety, and welfare of the people of the town, every owner of a lot or parcel of land adjacent to a public street or road right-of-way, canal, or other navigable waterway, is required to prevent any overgrowth of trees and shrubs which interfere with vehicular traffic or boat navigation, create a hazard to vehicular traffic or boat navigation, and endanger the lives and property of the citizens of the town, or which tend to create a nuisance or other unsightly condition.
- (B) Trees (~~including~~ excluding mangroves) may be trimmed only in accordance with the procedure described in § 98.04. ~~If determined by the town manager or his designee that trimming of mangroves must be in excess of the limits allowed by chapter 98 or removal of mangroves is required, then a permit must be obtained from the appropriate state agencies and the town in accordance with section § 98.06~~

SECTION 7. Chapter 151, Shoreline Construction, Section 151.01, *Definitions*, is hereby amended by adding the following definition:

“Wetlands” means those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce, or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, sloughs, marshes, wet prairies, bayheads, bogs, cypress domes and strands, riverine swamps and marshes, hydric seepage slopes, tidal marshes, saltwater swamps, and other similar areas. The extent of wetlands is delineated

according to the methodology in Florida Administrative Code Rule 62-340.300, as amended from time to time.

SECTION 8. Chapter 151, Shoreline Construction, Section 151.03, *Permits required; application*, subsections 151.03(A)(4)(h) and 151.03(F) are hereby amended as follows:

151.03(A)(4)(h) The location of any ~~mangroves~~ wetlands within 100 feet of the proposed construction, or any other protected, threatened, or endangered species in accordance with applicable law;

151.03(F) Where ~~mangroves~~ wetlands exist the applicant must meet the following additional criteria:

- (1) Construction shall be prohibited except that a seawall or revetment may be constructed so long as it is more than ten feet landward from the ~~canopy or root system of the mangrove~~ wetlands or such other more restrictive state regulation;
- (2) Elevation of the top of the seawall cap or top of the revetment shall not be greater than 12 inches from the existing grade prior to construction. Existing grade is defined as the elevation or grade of the parcel as of March 15, 1991. If fill material is deposited after the above date, the previous elevation shall be considered as the existing grade for purposes of this section. The burden of proving the existing grade shall be upon the applicant;
- (3) All areas seaward of the seawall or revetment shall not be disturbed.

SECTION 9. Chapter 154, Flood Control, Section 154.105, *Site plans and construction documents*, subsection 154.105 (B)(4) is hereby amended as follows:

154.105(B)(4) For activities that propose to alter sand dunes or mangrove stands in coastal high hazard areas (Zone V), an engineering analysis that demonstrates that the proposed alteration will not increase the potential for flood damage; , provided such alteration is approved by the Florida Department of Environmental Protection.

SECTION 10. If any section, subsection, sentence, clause or provision of this Ordinance is held invalid, the remainder of the Ordinance shall not be affected.

SECTION 11. All ordinances or parts of ordinances in conflict herewith shall be and the same are hereby repealed.

SECTION 12. This Ordinance shall take effect upon second reading in accordance with Law and the Charter of the Town of Longboat Key.

Passed on the first reading the _____ day of _____, 2015.

Adopted on the second reading and public hearing the _____ day of _____, 2015.

Jack G. Duncan, Mayor

ATTEST:

Trish Granger, Town Clerk



End of Agenda Item