

BAL HARBOUR

- V I L L A G E -

Mayor Jeffrey P. Freimark
Vice Mayor Seth E. Salver
Councilman David J. Albaum
Councilman Buzzy Sklar
Councilman David Wolf

Village Manager Jorge M. Gonzalez
Village Clerk Dwight S. Danie
Village Attorneys Weiss Serota
Helfman Cole & Bierman, P.L.

Local Planning Agency

Regular Meeting Agenda

April 29, 2025

At 6:30 AM

Bal Harbour Village Hall • 655 - 96th Street • Bal Harbour • Florida 33154

1 CALL TO ORDER / ROLL CALL

2 APPROVAL OF MINUTES

- 2.1** September 17, 2024 Local Planning Agency Meeting Minutes
[BalHarbourVillage-LocalPlanningAgencyMeetingMinutes_Sept17_2024.pdf](#)

3 HEARING

- 3.1** Ordinance Amending Zoning Regulations and Procedures in Response to State Preemption
AN ORDINANCE OF THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AMENDING CHAPTER 8.5 "FLOOD DAMAGE PREVENTION", SECTION 8.5-2 "DEFINITIONS" OF THE CODE OF ORDINANCES; AMENDING CHAPTER 21 "ZONING", ARTICLES I - III TO AMEND DEFINITIONS, PROCEDURES, AND REGULATIONS RELATED TO HEIGHT; PROVIDING FOR CONFLICTS, SEVERABILITY, INCLUSION IN THE CODE, AND FOR AN EFFECTIVE DATE.
[Item Summary - Zoning by Referendum LPA ADA.pdf](#)
[Memorandum - Zoning by Referendum LPA ADA.pdf](#)
[Ordinance - Zoning by Referendum LPA ADA.pdf](#)
[Attachment - Discussion January 13, 2025 ADA.pdf](#)
[Attachment - Village Attorney Analysis ADA.pdf](#)
[Attachment - Business Impact Statement - Zoning By Referendum ADA.pdf](#)

4 MOTION TO ADJOURN

One or more members of any Village Committee/Board may attend this meeting of the Council and may discuss matters which may later come before their respective Boards/Committees. On public comment matters, any person is entitled to be heard by this Council on any matter; however, no action shall be taken by the Council on a matter of public comment, unless the item is specifically listed on the agenda, or is added to the agenda by Council action. Any person who acts as a lobbyist, pursuant to Village Code Section 2-301 (Lobbyists), must register with the Village Clerk, prior to engaging in lobbying activities before Village staff, boards, committees, and/or the Village Council. If a person decides to appeal any decision made by the Village Council with respect to any matter considered at a meeting or hearing, that person will need a record of the proceedings and, for such purpose, may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based (F.S. 286.0105). All persons who need assistance or special accommodations to participate in virtual meetings please contact the Village Clerk's Office (305-866-4633), not later than two business days prior to such proceeding. In accordance with the Americans with Disabilities Act of 1990, all persons who are disabled and who need special accommodations to participate in this proceeding because of that disability should contact the Village Clerk's Office (305-866-4633), not later than two business days prior to such proceeding. All Village Council meeting attendees, including Village staff and consultants, are subject to security screening utilizing a metal detector and/or wand, prior to entering the Council Chamber, Conference Room, or other meeting area located within Village Hall. This is for the safety of everyone. Thanks for your cooperation.

BAL HARBOUR

- V I L L A G E -

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Local Planning Agency

Regular Meeting Minutes

September 17, 2024

At 6:30 AM

Bal Harbour Village Hall • 655 - 96th Street • Bal Harbour • Florida 33154

This meeting was conducted in-person. The meeting was also broadcast on the Village's website (www.balharbourfl.gov). Members of the public were also encouraged to participate by email (meetings@balharbourfl.gov) or by telephone at 305-865-6449.

- 1 **CALL TO ORDER** - Mayor Freimark called the meeting to order at 6:58 P.M. following the General Employees' Retirement Board Meeting.

The following were present:

Mayor Jeffrey P. Freimark
Vice Mayor Seth E. Salver
Councilman David J. Albaum
Councilman David Wolf
Councilman Buzzy Sklar

Also present:

Jorge M. Gonzalez, Village Manager
Dwight S. Danie, Village Clerk
Roger Pou, Deputy Village Attorney

2 APPROVAL OF MINUTES

2.1 April 9, 2024 Local Planning Agency Meeting Minutes

MOTION: A motion to approve the minutes was moved by Mayor Jeffrey P. Freimark and seconded by Vice Mayor Seth E. Salver.

VOTE: The motion passed by unanimous voice vote (5-0)

3 HEARINGS

LPA1 AN ORDINANCE OF THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AMENDING CHAPTER 21 "ZONING" OF THE CODE OF ORDINANCES TO CLARIFY AND REVISE DEFINITIONS AND REGULATIONS APPLICABLE TO THE RESIDENTIAL ZONING DISTRICTS, AND TO PROVIDE REGULATORY INCENTIVES FOR AFFORDABLE RENTAL DWELLINGS; PROVIDING FOR CONFLICTS, SEVERABILITY, INCLUSION IN THE CODE, AND FOR AN EFFECTIVE DATE.

Mr. Gonzalez introduced the item saying that the ordinance aimed at creating economic and regulatory incentives for developing workforce housing, particularly in areas not covered by the Live Local Act. He added that this creates incentives for parcels that may not be eligible for Live Local treatment on the Ocean Front and RM5 districts.

MOTION: A motion to approve the ordinance on first reading was moved by Vice Mayor Seth E. Salver and seconded by Councilman David Wolf.

ROLL CALL	VOTE
Mayor Jeffrey P. Freimark	Yes
Vice Mayor Seth E. Salver	Yes
Councilman David J. Albaum	Yes
Councilman Buzzy Sklar	Yes
Councilman David Wolf	Yes

VOTE: The Motion passed by unanimous roll call vote (5-0).

LPA2 AN ORDINANCE OF THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AMENDING CHAPTER 21 "ZONING" OF THE CODE OF ORDINANCES TO ESTABLISH DEFINITIONS AND REGULATIONS APPLICABLE TO MARIJUANA USES; PROVIDING FOR CONFLICTS, SEVERABILITY, INCLUSION IN THE CODE, AND FOR AN EFFECTIVE DATE.

Mr. Gonzalez introduced this item saying that it addressed the regulation of marijuana dispensaries in anticipation of a statewide ballot referendum on recreational marijuana use, adding that the ordinance, as drafted, would prohibit marijuana dispensaries in each and every zoning district. He said that State law allows local governments to treat marijuana dispensaries like pharmacies or drug stores or prohibit them altogether.

There were no comments from the public

MOTION: A motion to approve the ordinance on first reading was moved by Mayor Jeffrey P. Freimark and seconded by Vice Mayor Seth E. Salver.

ROLL CALL	VOTE
Mayor Jeffrey P. Freimark	Yes
Vice Mayor Seth E. Salver	Yes
Councilman David J. Albaum	Yes
Councilman Buzzy Sklar	Yes
Councilman David Wolf	Yes

VOTE: The Motion passed by unanimous roll call vote (5-0).

4 MOTION TO ADJOURN - The meeting was adjourned at 7:06 PM.

Mayor Jeffrey Freimark



Attest:

Dwight S. Danie, Village Clerk

BAL HARBOUR

- V I L L A G E -

LOCAL PLANNING AGENCY ITEM SUMMARY

Condensed Title:

AN ORDINANCE OF THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AMENDING CHAPTER 8.5 "FLOOD DAMAGE PREVENTION", SECTION 8.5-2 "DEFINITIONS" OF THE CODE OF ORDINANCES; AMENDING CHAPTER 21 "ZONING", ARTICLES I - III TO AMEND DEFINITIONS, PROCEDURES, AND REGULATIONS RELATED TO HEIGHT

Issue:

Should the Local Planning Agency recommend that the Village Council amend Chapters 8.5 and 21 of the Code of Ordinances regarding building heights in the Village?

The Bal Harbour Experience:

<input type="checkbox"/> Beautiful Environment	<input checked="" type="checkbox"/> Safety	<input checked="" type="checkbox"/> Modernized Public Facilities/Infrastructure
<input type="checkbox"/> Destination & Amenities	<input type="checkbox"/> Unique & Elegant	<input checked="" type="checkbox"/> Resiliency & Sustainable Community

Item Summary / Recommendation:

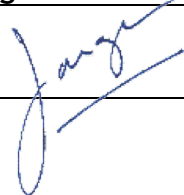
The proposed Ordinance addresses conflicts between the Village Charter and newly enacted state laws by amending Bal Harbour Village's height regulations and procedures. Due to recent legislative changes that arguably preempt the Village's ability to require voter referendums for land development regulation amendments, this Ordinance establishes alternative safeguards to ensure transparency, public participation, and thorough scrutiny in future height regulation changes. The Ordinance introduces several key provisions, including requiring that any proposed changes to height regulations be presented as a discussion item at a regularly scheduled Village Council meeting before initiating the statutory adoption process, ensuring that the public has an opportunity to provide input. Additionally, it mandates that the Local Planning Agency (LPA) hold a public hearing on any proposed height modifications prior to the first reading by the Village Council. To further strengthen oversight, the ordinance establishes a requirement for a supermajority (4/5) vote of the Village Council to approve any height regulation changes at both first and second readings.

Furthermore, the Ordinance revises the methodology for measuring building height, aligning it with the highest minimum elevation required by county, state, or federal law. This adjustment accounts for Base Flood Elevation and incorporates voluntary Freeboard allowances established by those laws, promoting resiliency and compliance with evolving floodplain regulations. Lastly, the ordinance establishes a uniform maximum height limit of 56 feet for municipal buildings, regardless of their zoning district or location. The Village Council unanimously approved the ordinance on first reading with a 5-0 vote at its March 18, 2025, meeting.

THE ADMINISTRATION RECOMMENDS APPROVAL OF THIS ORDINANCE ON SECOND READING.

Sign off:

Village Attorney	Chief Financial Officer	Village Manager
Susan Trevarthen	Claudia Dixon	Jorge M. Gonzalez



BAL HARBOUR

- V I L L A G E -

LOCAL PLANNING AGENCY MEMORANDUM

TO: Honorable Members of the Local Planning Agency

FROM: Jorge M. Gonzalez, Village Manager

DATE: April 29, 2025

SUBJECT: **AN ORDINANCE OF THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AMENDING CHAPTER 8.5 "FLOOD DAMAGE PREVENTION", SECTION 8.5-2 "DEFINITIONS" OF THE CODE OF ORDINANCES; AMENDING CHAPTER 21 "ZONING", ARTICLES I - III TO AMEND DEFINITIONS, PROCEDURES, AND REGULATIONS RELATED TO HEIGHT; PROVIDING FOR CONFLICTS, SEVERABILITY, INCLUSION IN THE CODE, AND FOR AN EFFECTIVE DATE.**

ADMINISTRATIVE RECOMMENDATION

I recommend that the Local Planning Agency advise the Village Council to approve the ordinance on second reading. The Village Council unanimously approved the Ordinance on its first reading with a 5-0 vote during the meeting on March 18, 2025. This memorandum includes a Business Impact Statement for your reference.

BACKGROUND

In recent sessions, the Florida State Legislature has enacted certain laws which have the effect of limiting or preempting local governments' land development regulation powers. Among the various laws, one specifically has the effect of preempting requirements for initiative or referendum in regard to land development regulations. In the past this has been described as "Zoning by Referendum." The attached analysis by the Bal Harbour Village Attorney examines the argument that the new law prevents the Village from seeking voter approval of future changes to the Village's height regulations in accordance with Section 80 of the Village Charter. The issue was discussed at the January 13, 2025 Council meeting, and the Administration identified that the legal analysis identifies an apparent conflict, and recommended that the conflict can and should be proactively resolved by Council action.

In light of the Village Attorney's analysis and the argument that Village Charter Section 80 conflicts with and therefore has been preempted by state law, the Village Council was recommended to consider amending its height regulations and definitions to provide greater protections that could substitute for the referendum requirement that has been preempted, and adopting an ordinance that creates a process for how it will consider requests for future changes to the height standards of the zoning districts in the Code moving forward, which would provide clarity and certainty of process as follows:

1. Establish extraordinary measures requiring greater scrutiny and consideration before any future change to height regulations is approved. These may include:
 - o Require a Discussion Item be placed and considered at a regularly scheduled Village Council meeting on any future such request before proceeding with the statutory process of adoption,
 - Require that the Discussion Item allow for public comment?
 - o Require that the legal public hearing by the Local Planning Agency (LPA) be held before the first reading by the Village Council,
 - o Require a supermajority (4/5) vote of the Village Council to successfully enact any such legislation:
 - Only at Second Hearing? or
 - Both First and Second Hearing?
2. Harmonize the method of measuring height with the minimum required elevation for finished floors to be consistent village wide, allowing for current and future FEMA flood map or other State and Federal requirements. (i.e. FEMA, Building Code, or other Base Flood Elevation standards, etc.)
3. Provide for a voluntary freeboard allowance of some specified maximum amount.
 - o During the 2024 legislative session, the Florida Legislature considered a law mandating minimum floodplain requirements and for additional voluntary freeboard requirements adopted locally up to 10 feet. It is expected that this legislation will be considered again during the 2025 session with a good chance of success.¹
4. Establish a universal height limit for municipal or institutional buildings, regardless of zoning district or location.

The Council discussed these recommendations at the January 13, 2025, Council Meeting and directed the Village Manager and Village Attorney to draft proposed text amendments for all of these proposed actions for consideration at a future Council meeting. The Council further discussed and refined its proposed course of action at the Village Council retreat in February 2025.

ANALYSIS

This Ordinance has been developed based on feedback gathered during the Council meeting on January 13, 2025, and the Council Retreat. The Village Council unanimously approved the Ordinance on first reading with a 5-0 vote at the March 18, 2025 meeting. For reference, a Business Impact Statement is included with this memorandum.

¹ As of April 15, 2025, no bill has been filed in the current session of the Florida Legislature to establish a voluntary freeboard in state law. However, it is possible, and even likely, that such legislation will be adopted in the future, and this Ordinance automatically incorporates such future changes.

The Ordinance amends Chapter 8.5 "Flood Damage Prevention" to provide for a maximum voluntary freeboard allowance at the level required by applicable county, state, or federal law, and implements this definition in Chapter 21 as follows:

Sec. 8.5-2. - Definitions.

(a) *Scope.* Unless otherwise expressly stated, the following words and terms shall, for the purposes of this chapter, have the meanings shown in this section.

* * *

Freeboard means a factor of safety usually expressed in feet above a flood level for purposes of floodplain management. "Freeboard" tends to compensate for the many unknown factors that could contribute to flood heights greater than the height calculated for a selected size flood, such as wave action, bridge openings, and the hydrological effect of urbanization of the watershed. Freeboard results in significantly lower flood insurance rates due to lower flood risk. The Village's maximum voluntary freeboard is the amount required by applicable county, state, or federal law.

Sec. 21-1. - Definitions and rules of construction.

(c) The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

* * *

Height of a Building or Structure means the vertical distance from the highest minimum elevation provided by county, state, or federal law; the Base Flood Elevation plus any additional Freeboard, as defined in section 8.5-2. of the Village Code, average Street Grade to the highest point of the coping of a flat roof or to the average height of the highest gable of a pitch or hip roof. ~~Notwithstanding the foregoing, the height of Single Family Dwellings may be measured from the highest minimum elevation provided by state or federal law; the Base Flood Elevation plus any additional Freeboard, as defined in section 8.5-2. of the Village Code.~~ Penthouses shall be considered in determining both the Height and the number of Stories of a Building. When a parapet wall is provided, the vertical distance shall be measured from the highest minimum elevation provided by county, state, or federal law; the Base Flood Elevation plus any additional Freeboard, as defined in section 8.5-2. of the Village Code, average Street Grade to the highest point of its parapet wall. Parapet walls shall not exceed four feet in height as measured from the highest point of the roof to the highest point of the parapet wall.

It also amends Chapter 21 "Zoning", Article II "Administration" to establish extraordinary measures requiring greater public scrutiny and Council consensus before any future

change to height regulations is approved, including the placement of a discussion item on an agenda of a regular Council meeting prior to starting the statutory adoption process for such changes, open to public comment; requiring that the Local Planning Agency (LPA) public hearing for such changes be held before the first reading by the Village Council; and requiring a supermajority of the Council (4/5 vote) to approve first and second reading of any such legislation, as follows:

Sec. 21-56. Procedures for Amendments to the Village Code that Increase Developable Height. The following extraordinary measures, to ensure greater public scrutiny and deliberation, shall be followed whenever the Village Council proposes to amend the Village Code or take other action that increases the height limit in any zoning district in the Village:

(a) A discussion item must be placed on an agenda of a regular Village Council meeting prior to starting the statutory notice and adoption process for such proposal, and the discussion item must include public comment;

(b) The Local Planning Agency (LPA) public hearing for such a proposal must be held before the first reading by the Village Council; and

(c) A supermajority of the Village Council (4/5 vote) is required to approve both first and second readings of any such legislation or action.

Finally, the Ordinance sets a maximum height limit for municipal buildings regardless of their location or zoning district, as follows:

Sec. 21-79. Height Limit for Municipal Buildings. A height limit of 56 feet applies to municipal buildings, regardless of their zoning district or location.

THE BAL HARBOUR EXPERIENCE

The Ordinance provides for a maximum level of voluntary freeboard, and allows for all uses to measure their height from the highest minimum elevation provided by county, state, or federal law, which supports the goal of Resiliency & Sustainable Community. It sets a maximum height for municipal structures, which supports the goal of Modernized Public Facilities/Infrastructure and Safety.

CONCLUSION

The proposed Ordinance was drafted as requested by the Village Council, to resolve the conflict presented by the new statute that arguably prevents the Village from seeking voter approval of future changes to the Village's height regulations in accordance with Section 80 of the Village Charter.

The Ordinance amends the Village's height regulations and definitions to provide greater protections to substitute for the referendum requirement that has been preempted, and creates a process for how it will consider requests for future changes to the height standards of the zoning districts in the Code moving forward, which will provide clarity and

certainty of process. It also sets a maximum height for municipal buildings. It is recommended that the Local Planning Agency advise the Village Council to approve the ordinance on second reading.

Attachments:

1. Discussion Item – January 13, 2025
2. Village Attorney Analysis
3. Business Impact Statement

ORDINANCE NO. 2025____

AN ORDINANCE OF THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AMENDING CHAPTER 8.5 "FLOOD DAMAGE PREVENTION", SECTION 8.5-2 "DEFINITIONS" OF THE CODE OF ORDINANCES; AMENDING CHAPTER 21 "ZONING", ARTICLES I - III TO AMEND DEFINITIONS, PROCEDURES, AND REGULATIONS RELATED TO HEIGHT; PROVIDING FOR CONFLICTS, SEVERABILITY, INCLUSION IN THE CODE, AND FOR AN EFFECTIVE DATE.

WHEREAS, the Bal Harbour Village (the "Village") Council finds it periodically necessary to amend its Code of Ordinances (the "Village Code") in order to update regulations and procedures to implement municipal goals and objectives; and

WHEREAS, current Village regulations address the measurement of height, and for uses other than single family, require the measurement to begin from the average street grade of the adjacent road; and

WHEREAS, because the highest minimum elevation provided by applicable law is increasing with sea level rise and the related increase in the levels of groundwater in the Village, the practically available height for development is diminished by this method of measurement; and

WHEREAS, changing this approach to measurement of height in the Village and clarifying the maximum level of freeboard will increase the sustainability of development now and into the future, and allow reasonable developable use of the current height limits; and

WHEREAS, the Village Council seeks to amend Chapter 8.5 "Flood Damage Prevention" to provide for a maximum freeboard allowance at the level required by applicable county, state, or federal law; and

WHEREAS, the Village further seeks to amend Chapter 21 "Zoning", Article I "In General", Section 21-1 "Definitions and Rules of Construction" to amend the definitions and regulations applicable to the measurement of height of uses other than single family residential; and

WHEREAS, the Village Council further seeks to amend Chapter 21 “Zoning”, Article II “Administration” to establish extraordinary measures requiring greater public scrutiny and Council consensus before any future change to height regulations is approved, including the placement of a discussion item on an agenda of a regular Council meeting prior to starting the statutory adoption process for such changes, open to public comment; requiring that the Local Planning Agency (LPA) public hearing for such changes be held before the first reading by the Village Council; and requiring a supermajority of the Council (4/5 vote) to approve first and second reading of any such legislation; and

WHEREAS, the Village Council further seeks to amend Chapter 21 “Zoning”, Article III “District Regulations” to establish a height limit for municipal buildings that will apply to property regardless of zoning district or location; and

WHEREAS, the Administration recommended approval of this Ordinance in its report for the March 18, 2025 Village Council meeting; and

WHEREAS, the Village Council, sitting as the Local Planning Agency, has reviewed this Ordinance at a duly noticed public hearing in accordance with law on April __, 2025, determined that this Ordinance is consistent with the Village’s Comprehensive Plan, and recommended approval; and

WHEREAS, the Village Council conducted a first and second reading of this Ordinance at duly noticed public hearings, as required by law, and after having received input from and participation by interested members of the public and staff, the Village Council has determined that this Ordinance is consistent with the Village’s Comprehensive Plan and in the best interest of the public health, safety and welfare.

NOW, THEREFORE, BE IT ORDAINED BY THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AS FOLLOWS:

Section 1. Recitals Adopted. That the above-stated recitals are hereby adopted and confirmed.

Section 2. Village Code Amended - Chapter 8.5. That Chapter 8.5 “Flood Damage Prevention” of the Code of Bal Harbour Village, Florida, is hereby amended to

read as follows:¹

CHAPTER 8-5. - FLOOD DAMAGE PREVENTION

* * *

Sec. 8.5-2. - Definitions.

(a) *Scope.* Unless otherwise expressly stated, the following words and terms shall, for the purposes of this chapter, have the meanings shown in this section.

(b) *Terms defined in the FBC.* Where terms are not defined in this chapter and are defined in the FBC, such terms shall have the meanings ascribed to them in that code.

(c) *Terms not defined.* Where terms are not defined in this chapter or the FBC, such terms shall have ordinarily accepted meanings such as the context implies.

* * *

Freeboard means a factor of safety usually expressed in feet above a flood level for purposes of floodplain management. "Freeboard" tends to compensate for the many unknown factors that could contribute to flood heights greater than the height calculated for a selected size flood, such as wave action, bridge openings, and the hydrological effect of urbanization of the watershed. Freeboard results in significantly lower flood insurance rates due to lower flood risk. The Village's maximum voluntary freeboard is the amount required by applicable county, state, or federal law.

* * *

Section 3. Village Code Amended - Chapter 21. That Chapter 21 "Zoning" of the Code of Bal Harbour Village, Florida, is hereby amended to read as follows:

CHAPTER 21. - ZONING

ARTICLE I. - IN GENERAL.

Sec. 21-1. - Definitions and rules of construction.

(a) For the purpose of this chapter, which shall be known as the Zoning Ordinance of Bal Harbour Village, Florida, words used in the present tense include the future; the singular number includes the plural, and the plural the singular; the words "used for" include the

¹ Additions to existing Village Code text are shown by underline; deletions from existing Village Code text are shown by ~~striketrough~~. Any changes between first and second reading are shown by highlighted double underline and ~~double striketrough~~ font.

meaning "designed for"; the word "structure" includes the word "building"; the word "shall" is mandatory and not directory; and the word "lot" includes the words "plot" and "tract".

(b) Words and terms not defined in this section shall be interpreted in accord with their normal dictionary meaning and customary usage.

(c) The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

* * *

Height of a Building or Structure means the vertical distance from the highest minimum elevation provided by county, state, or federal law; the Base Flood Elevation plus any additional Freeboard, as defined in section 8.5-2. of the Village Code, average Street Grade to the highest point of the coping of a flat roof or to the average height of the highest gable of a pitch or hip roof. ~~Notwithstanding the foregoing, the height of Single Family Dwellings may be measured from the highest minimum elevation provided by state or federal law; the Base Flood Elevation plus any additional Freeboard, as defined in section 8.5-2. of the Village Code.~~ Penthouses shall be considered in determining both the Height and the number of Stories of a Building. When a parapet wall is provided, the vertical distance shall be measured from the highest minimum elevation provided by county, state, or federal law; the Base Flood Elevation plus any additional Freeboard, as defined in section 8.5-2. of the Village Code, average Street Grade to the highest point of its parapet wall. Parapet walls shall not exceed four feet in height as measured from the highest point of the roof to the highest point of the parapet wall.

* * *

ARTICLE II. ADMINISTRATION

* * *

DIVISION 2. - AMENDMENTS; ZONING CHANGES; VARIANCES

Sec. 21-56. Procedures for Amendments to the Village Code that Increase Developable Height. The following extraordinary measures, to ensure greater public scrutiny and deliberation, shall be followed whenever the Village Council proposes to amend the Village Code or take other action that increases the height limit in any zoning district in the Village:

(a) A discussion item must be placed on an agenda of a regular Village Council meeting prior to starting the statutory notice and adoption process for such proposal, and the discussion item must include public comment;

(b) The Local Planning Agency (LPA) public hearing for such a proposal must be held before the first reading by the Village Council; and

(c) A supermajority of the Village Council (4/5 vote) is required to approve both first and second readings of any such legislation or action.

Secs. 21-~~567~~–21-75. - Reserved.

* * *

ARTICLE III. DISTRICT REGULATIONS

* * *

Sec. 21-79. Height Limit for Municipal Buildings. A height limit of 56 feet applies to municipal buildings, regardless of their zoning district or location.

Secs. 21-~~7980~~–21-95. - Reserved.

Section 4. Severability. That the provisions of this Ordinance are declared to be severable and if any section, sentence, clause or phrase of this Ordinance shall for any reason be held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Ordinance and they shall remain in effect, it being the legislative intent that this Ordinance shall stand notwithstanding the invalidity of any part.

Section 5. Inclusion in the Code. That it is the intention of the Village Council, and it is hereby ordained that this Ordinance shall become and be made a part of the Bal Harbour Village Code; that the sections of this Ordinance may be renumbered or relettered to accomplish such intention; and that the word "Ordinance" shall be changed to "Section" or other appropriate word.

Section 6. Conflict. That all Sections or parts of Sections of the Code of Ordinances, all ordinances or parts of ordinances, and all resolutions, or parts of resolutions, in conflict with this Ordinance are repealed to the extent of such conflict.

Section 7. Effective Date. That this Ordinance shall become effective upon adoption on second reading. This Ordinance shall apply only to building permits for which a process number is issued after the effective date of this Ordinance.

PASSED AND ADOPTED on first reading this 18th day of March, 2025.

PASSED AND ADOPTED on second reading this 29th day of April, 2025.



Mayor Jeffrey P. Freimark

ATTEST:

Dwight S. Danie, Village Clerk

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

Village Attorney
Weiss Serota Helfman Cole & Bierman P.L.

BAL HARBOUR

- V I L L A G E -

DISCUSSION ITEM

TO: Honorable Mayor and Village Council

FROM: Jorge M. Gonzalez, Village Manager

DATE: January 13, 2025

SUBJECT: **Discussion Regarding Impacts To The Village Charter Of State Preemptions (Zoning By Referendum)**

In recent sessions, the State Legislature has enacted certain laws which have the effect of limiting or preempting local governments' land development regulation powers. Among the various laws, one specifically has the effect of preempting requirements for initiative or referendum in regard to land development regulations. In the past this has been described as "Zoning by Referendum." The attached analysis by the Village Attorney examines the argument that the new law prevents the Village from seeking voter approval of future changes to the Village's height regulations in accordance with Section 80 of the Village Charter.

You will recall that this issue was previously discussed during the 2024 Village Council Retreat. At that time, we informed you of the legislation and our preliminary assessment of its impact on the Village charter. After some discussion and deliberation, the consensus of the council was to instruct the Village Attorney to further review the issue and provide a legal analysis of how the legislation specifically affects Bal Harbour Village.

In the intervening period, the Village also received correspondence from counsel for the Bal Harbour Shops, asserting arguments regarding the impact of this legislation on the Village Charter. Lastly, we have also conferred with counsel for other Bal Harbour Village property owners considering their property uses and the impacts of this legislation on their development plans.

The Village Attorney's research and analysis on this issue is attached for your review. The analysis identifies an apparent conflict that can and should be proactively resolved by Council action. This discussion item is presented to provide an opportunity for the Council to discuss the Village Attorney's analysis, ask pertinent questions and develop a consensus on a strategic path to move forward and give direction on the next appropriate steps to remedy the issues that have been identified.

Issues to Consider:

In light of the Village Attorney's analysis and the argument that Village Charter Section 80 conflicts with and therefore has been preempted by state law, the Village Council may wish to consider amending its height regulations and definitions to provide greater protections that could substitute for the referendum requirement that has been preempted. The Council may wish to consider adopting an ordinance that creates a process for how it will

consider requests for future changes to the height standards moving forward, which would provide clarity and certainty of process.

It should be noted that a host of other land development regulations are currently under the Village Council control, subject to any superseding County, State or Federal requirements. In addition, prior to the enactment of Section 80 of the Village Charter in 2006, matters relating to building height were also under the purview and control of the Village Council. Given the preemption, the Council is now (again) the body that should rightly assert control over all land development regulations.

Given this new legislative preemption and in consideration that building height in the past received an additional level of review, it is prudent for the Council to consider an Ordinance to establish its intention and procedures moving forward. In doing so, and in addition to establishing a process, there are other height related items that the Council may wish to consider and codify as part of this deliberation:

1. Establish extraordinary measures requiring greater scrutiny and consideration before any future change to height regulations is approved. These may include:
 - o Require a Discussion Item be placed and considered at a regularly scheduled Village Council meeting on any future such request before proceeding with the statutory process of adoption,
 - Require that the Discussion Item allow for public comment?
 - o Require that the legal public hearing by the Local Planning Agency (LPA) be held before the first reading by the Village Council,
 - o Require a supermajority (4/5) vote of the Village Council to successfully enact any such legislation,
 - Only at Second Hearing? or
 - Both First and Second Hearing?
2. Harmonize the method of measuring height with the minimum required elevation for finished floors to be consistent village wide, allowing for current and future FEMA flood map or other State and Federal requirements. (I.e. FEMA, Building Code, or other Base Flood Elevation standards, etc.)
3. Provide for a voluntary freeboard allowance of some specified maximum amount,
 - o During the 2024 legislative session, the Florida Legislature considered a law mandating minimum floodplain requirements and for additional voluntary freeboard requirements adopted locally up to 10 feet. It is expected that this legislation will be considered again during the 2025 session with a good chance of success.
4. Establish a universal height limit for municipal or institutional buildings, regardless of zoning district or location,

It is recommended that the Council discuss this matter and give instruction to the Village Manager and Village Attorney to draft proposed text amendments consistent with your guidance for Council consideration at a future Village Council meeting.

Attachments: Village Attorney Analysis

BAL HARBOUR

- V I L L A G E -

TO: Honorable Mayor and Village Council
Jorge Gonzalez, Village Manager

FROM: Susan L. Trevarthen, Village Attorney *SLT*

DATE: January 13, 2025

SUBJECT: **Legal Analysis of Village Charter Requirements Regarding Building Height**

This memo analyzes the question of the height limits applicable to development in the Village. This issue was discussed by the Village Council at its 2024 Retreat, as it related to recent state legislation prohibiting voter referenda on land development regulations. The Village also received correspondence from counsel for the Bal Harbour Shops, asserting arguments regarding the impact of this legislation on the Village Charter. And the Village has also conferred with counsel for other property owners about this issue. The Village Manager will present his recommendations for action on this issue in a discussion item for the January 13, 2025 meeting.

In brief, this analysis concludes that there is a reasonable argument that Section 80 of the Village Charter conflicts with recent state legislation, and therefore can no longer be enforced. The memo sets forth the history of this charter section and of the state law surrounding such provisions, describes and responds to the analysis received, and provides guidance on how the Village might read this section going forward. In a separate memo, the Village Manager presents options for how to respond to this analysis.

BACKGROUND

Village Charter Provisions re Height

Adopted in 2006 by a referendum vote of the Village electors (and amended by the voters in 2020 to address the measurement of height for Single Family Dwellings), Section 80 of the Village Charter establishes the height limits in the Village as follows:

Building height allowed on any property shall not exceed the permitted height for that property set forth in the Village's comprehensive plan¹ or municipal code, in effect the date this amendment is approved, whichever provisions are most restrictive. Notwithstanding the foregoing, the height of single family dwellings may be measured from the highest minimum elevation provided by state or federal law. Unless otherwise specified in the comprehensive plan or municipal code in effect the date this amendment is approved, each building "story" shall mean 11 feet in height.

Village Charter, § 80.

Attempts to further amend this section were rejected by the voters, including one in 2021 brought forward by petition that provided greater height for the Bal Harbour Shops property, and one in 2023

¹ The Village Comprehensive Plan does not regulate the height of development in the Village.

advanced by the Village Council to provide greater height for structures used for municipal purposes. See **Exhibit A**, Rejected Charter Amendments to Section 80.

What is the impact of having Section 80 in the Charter? Charters are created by vote of the electors, and may only be amended by similar vote of the electors. The Village Council lacks the power to directly amend the Charter without obtaining voter approval. See Section 166.031, Florida Statutes, in **Exhibit B**. Therefore, Village changes to Section 80, or to the 2006 height standards that Section 80 freezes in place, can only be accomplished with the approval of the electors.

All municipal charters are subject to the requirements of general law, which means that state statutes can override municipal charter requirements.²

Land Development Regulations re Height

Part II of Chapter 163, Florida Statutes, the Community Planning Act, requires local governments to adopt comprehensive plans by ordinance, and to adopt implementing land development regulations into their local codes of ordinances. The statute generally defines land development regulations as “ordinances enacted by governing bodies for the regulation of any aspect of development and includes any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land, except that this definition does not apply in s. 163.3213.”³ Ordinances regulating height are components of local zoning codes that regulate development, and are therefore land development regulations.

² **Section 166.021. Powers.**

(1) As provided in s. 2(b), Art. VIII of the State Constitution, **municipalities** shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and **may exercise any power for municipal purposes, except when expressly prohibited by law.**

(2) “Municipal purpose” means any activity or power which may be exercised by the state or its political subdivisions.

(3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, **the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:**

(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;

(b) Any subject expressly prohibited by the constitution;

(c) **Any subject expressly preempted to state or county government by the constitution or by general law; and**

(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

(4) The provisions of this section shall be so construed as to secure for municipalities the **broad exercise** of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities **the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited** by the constitution, general or special law, or county charter and **to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.** . . .

³ For purposes of substantially affected persons maintaining administrative actions to assure that land development regulations implement and are consistent with the local comprehensive plan, a land development regulation is defined in Section 163.3213(2)(b) as “an ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, landscaping, tree protection, or sign regulation or any other regulation concerning the development of land. This term shall include a general zoning code, but shall not include a zoning map, an action which results in zoning or rezoning of land, or any building construction standard adopted pursuant to and in compliance with the provisions of chapter 553 [Florida Building Code].

The Village Code of Ordinances, Chapter 21 “Zoning”, is the source of the Village’s height regulations, as limited by the Charter.

First, the Code supplies relevant definitions, as follows:

Sec. 21-1. - Definitions and rules of construction.

- (a) For the purpose of this chapter, which shall be known as the Zoning Ordinance of Bal Harbour Village, Florida, words used in the present tense include the future; the singular number includes the plural, and the plural the singular; the words "used for" include the meaning "designed for"; the word "structure" includes the word "building"; the word "shall" is mandatory and not directory; and the word "lot" includes the words "plot" and "tract".
- (b) Words and terms not defined in this section shall be interpreted in accord with their normal dictionary meaning and customary usage.
- (c) The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

* * *

Height of a Building or Structure means the vertical distance **from the average Street Grade** to the highest point of the coping of a flat roof or to the average height of the highest gable of a pitch or hip roof. Notwithstanding the foregoing, the height of Single-Family Dwellings may be measured from the highest minimum elevation provided by state or federal law; the Base Flood Elevation plus any additional Freeboard, as defined in section 8.5-2. of the Village Code.⁴ Penthouses shall be considered in determining both the Height and the number of Stories of a Building. When a parapet wall is provided, the vertical distance shall be measured from the average Street Grade to the highest point of its parapet wall. Parapet walls shall not exceed four feet in height as measured from the highest point of the roof to the highest point of the parapet wall.

* * *

Penthouse means any Structure above the main roof of a Building used for living, professional or business purposes. Penthouses may also be used for housing elevator machinery and water storage tanks. Penthouses, except when used for machinery or storage of water, are considered as an additional Story to the height of a Building and shall be considered in Height measurement.

* * *

Story means that portion of a Building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost Story shall be that portion of a Building included between the upper surface of the topmost floor and the ceiling or roof above. If the finished floor level directly above a basement is more than six feet above Grade, such basement shall be considered a Story. For the purposes of Section 80 of the Village Charter, it is hereby specified that there shall be no limitation on the height of a building "story," so long as the overall height limits specified within this Code are not exceeded. It is the specific intent of the Village Council that the 11 foot story height limitation contained in Section 80 of the Charter shall not be applicable in any zoning district as it is the intention of the Council that the height of a story

⁴ This sentence was added to implement the 2020 Charter amendment, which added the following sentence to Section 80: “Notwithstanding the foregoing, the height of single family dwellings may be measured from the highest minimum elevation provided by state or federal law.”

shall be specified as "unlimited" so as to allow freedom of design for lofts, mezzanines, vaulted ceilings, lobbies, assembly areas, mechanical rooms or spaces, multi-story units or clerestory areas.

Street means a thoroughfare which affords the principal means of access to abutting Property.

Street Grade means the average elevation of the centerline of the abutting Street as measured at the crown of the road.

* * *

It is important to note that the definition of Story in the Code was amended by the Village Council prior to the effectiveness of Section 80 of the Charter, and overrode the 11-foot story height limitation in Section 80.

Therefore, as frozen by the Charter, the Code provides that height on properties (that are not single family) must be measured from average street grade. Calculations of whether the standards for height and number of stories are met must include any penthouses, and an additional four feet is allowed for parapet walls. The height of stories is not limited to 11 feet, and is measured from the upper level of each floor to the upper level of the next floor. Basements are considered stories if the finished floor of the story above the basement level is more than 6 feet above grade. The height and story limits on development other than single family are as follows:

Zoning Category	Height Limit (Feet)	Stories
PC Private Club	35	2
RM-1 MF Residential	30	2
RM-2 MF Residential	30	2
RM-3 MF Residential	30	2
RM-4 MF Residential	35	2
RM-5 MF Residential	45	3
OF Ocean Front District	275 (25 more for nonhabitable roof features)	17 – additional stories controlled by front setback
B Business District	56	3
	Parking structures measured from surface parking level: 36 feet or 3 stories, or 56 feet or 5 stories with public hearing. Garage stories limited to 11.5 feet.	
	Up to 42,600 sq .ft. with a public hearing: 69 feet.	
	Stories limited to 19 feet	

The Bal Harbour Shops and Height

This 16-acre property is designated Commercial COM on the Future Land Use Map of the Village's Comprehensive Plan. As noted above, the Plan does not regulate the height.

The property is zoned B Business, and therefore is limited by Section 21-318 of the Village Code to 56 feet in height and 5 stories with a public hearing, with a maximum story height of 19 feet, special height rules for parking garages, and the ability for up to 42,600 square feet to reach 69 feet with a public hearing.

In 2020, the Future of Bal Harbour committee collected petitions and qualified to place on a January 2021 ballot a proposal to change the height limits applicable to the Bal Harbour Shops property (the Special Business Improvement Area). The Shops indicated that the additional height was necessary to pursue a hotel and other development on their property, and the question proposed that the height limit for their property be set by the Village Council following a public hearing. The Village electors rejected this proposal. See **Exhibit A**. In January 2024, the Shops filed their Live Local Act development application, and

indicated that a key consideration in doing so was that this statute provides qualifying projects additional height for their property without approval of the Village electors or Village Council.

The Village amended the B District height requirement to acknowledge that it will follow the Live Local Act's height preemption for qualifying projects. Based on the Oceanfront OF zoning district, the only high-rise district in the Village Code, the height for such projects is limited to 275 feet with 25 additional feet available for nonhabitable roof features. The achievable height in stories is governed by the front setback; for each story over 17 stories, the setback from Collins Avenue must be increased. However, the Village denied the Live Local Act application, and found that it was not a qualifying project pursuant to state law. Litigation is pending regarding this issue.

Policy Issues with Inability of Village Council to Amend Height Regulations

As the Village identified in its early efforts to develop a program for the new Village Hall, the fact that that the Village's height regulations require measurement from street grade rather than the highest minimum elevation pursuant to state or federal law poses a growing challenge to development in this era of sea level rise. As the minimum elevation rises while the street grade and maximum height standards remain fixed, the developable height effectively shrinks. Preliminary studies show that Village Hall could not have the programmatically required space and meet the Code height limitations. If the height were measured from the highest minimum elevation, the professional architects indicated that they could design a Village Hall that met the Village's program requirements. However, when this issue was presented to the electors in May 2023 by the Village Council (prior to the statute becoming effective July 1, 2023), they rejected the use of the highest minimum elevation to measure the height of structures used for municipal purposes. See **Exhibit A**.

More recently, another property owner has inquired about this height limit and how it impacts redevelopment of a parcel on the west side of Collins Avenue. All development in the Village that is not single family faces this measurement challenge under the Code's height measurement.

Letter from Bal Harbour Shops

The Village received a letter from the attorneys for the Bal Harbour Shops, asserting that Village Charter Section 80 is no longer enforceable or valid because of the adoption of a statute by the Florida Legislature in 2023. See **Exhibit C**. Effective July 1, 2023, the new law created Section 163.3167(8)(b): "An initiative or referendum process in regard to any land development regulation is prohibited."

The letter argues that Section 80 conflicts with this statute by requiring voter approval to change the Village's height regulations in the Village Code, and therefore cannot be given effect. It further argues that the statute is retroactive in its effect and applies not just to prevent the adoption of future Charter requirements of this kind, but also to existing Charter provisions such as Section 80 of the Village Charter.

ANALYSIS

Statutory Prohibitions of Various Land Use and Zoning Decisions by the Voters

Chapter 2023-305, Laws of Florida, amended Section 163.3167's several prohibitions of voter approval requirements in relation to development to also prohibit "an initiative or referendum process in regard

to any land development regulation.”⁵ Section 163.3167(8)(b) broadened the existing prohibitions of local referenda and initiatives regarding comprehensive plan amendments and development orders.

It is not possible to generalize the impact of this statute on all charters in the state; most of them are unique in their wording. If the charters specifically call for voter approval of zoning ordinances, that is more clearly prohibited by Section 163.3167(8)(b). The Village has interpreted the Charter very conservatively, and has chosen to go to the electors for approval of any change that even arguably impacted Section 80.

More specifically, the Village has interpreted Section 80 of the Charter not to require elector approval of changes to **the Code**. Rather, as demonstrated by the Village’s implementation of the 2020 amendment to the method of measuring height of single family structures, the electors were asked to approve an amendment to Section 80 authorizing this change. After the voters approved the amendment to Section 80, the Village Council then used its legislative powers to amend the Code consistent with the amended Section 80.

In contrast, Miami Beach has charter provisions that require voter approval prior to any increase to the "zoned floor area ratio" of any property within the City, and prior to enacting any Ordinance that reduces the powers and duties of the Historic Preservation Board, or creates less stringent historic preservation standards or regulations. See Miami Beach Charter Sections 1.03(c)⁶ and 1.06⁷. Miami Beach concluded

⁵ Section 163.3167, Florida Statutes, provides in relevant part:

(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 land development regulation is prohibited.**

(c) 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.

(d) A citizen-led county charter amendment that is not required to be approved by the board of county commissioners preempting any development order, land development regulation, comprehensive plan, or voluntary annexation is prohibited unless expressly authorized in a county charter that was lawful and in effect on January 1, 2024.

(e) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order or land development regulation. 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 (c). Therefore, **the prohibition on initiative and referendum stated in paragraphs (a) and (c) 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.

⁶ “The floor area ratio of any property or street end within the City of Miami Beach shall not be increased by zoning, transfer, or any other means from its current zoned floor area ratio as it exists on the date of adoption of this Charter Amendment [November 7, 2001], including any limitations on floor area ratios which are in effect by virtue of development agreements through the full term of such agreements, unless any such increase in zoned floor area ratio for any such property shall first be approved by a vote of the electors of the City of Miami Beach.” In the June 30, 2023 memo, this provision was characterized as requiring a voter referendum prior to any **legislative** action that would result in an increase to a property’s zoned FAR as it existed on November 7, 2001. Examples of such legislative action were given, included Miami Beach seeking voter approval of the adoption of an ordinance creating an overlay zone with greater FAR, or of an amendment to the Code creating FAR incentives for properties meeting certain geographic or use criteria, rather than voter approval of changes to the Charter followed by City Commission enactment of ordinances to amend the Code.

⁷ As characterized in the June 30, 2023 memo, Charter Section 1.06 requires voter approval prior to the adoption of any Ordinance which “reduces the powers and duties of the City’s Historic Preservation Board, or creates less stringent historic preservation standards or regulations” The memo noted that the City had never attempted to exercise this clause, and questions whether an amendment to the powers or duties of a land use board would satisfy the statutory definition of a “land development

that Section 163.3167(8)(b) prohibits certain portions of their charter requirements related to development and land use.⁸ See Miami Beach City Attorney memo dated June 30, 2023, **Exhibit D**, correctly observing that “[t]he City Charter is not absolute, and a local ordinance or charter provision may not be construed in a manner that would conflict with State law. See *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 888 (Fla. 2010); see also *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1069 (Fla. 3d DCA 1981).” The memo also recognizes that the City could implement alternative protections related to FAR increases, by adopting a supermajority voting requirement when such increases are considered by the City Commission.

Shops Arguments on Impact of Statute

Shops’ counsel argued that the Village Charter Section 80 was preempted by the adoption of Section 163.3167(8)(b). Counsel also argues that Section 163.3167(8)(b) is retroactive in its impact. Counsel points to the lack of a savings clause, while ignoring that Section 163.3167(8)(e) itself specifies that it is only retroactive as to subsections (a) and (c).

Characterizing the Shops’ goal as the construction of a hotel with a height in excess of that allowed by the B Business District, counsel correctly notes that “a referendum is required to amend or repeal the Charter Height Prohibition. See § 166.031(2), Fla. Stat. (charter amendments subject to a referendum of the electors).” They then conclude that “The practical and legal effect of the Charter Height Prohibition is to illegally require a referendum to amend the Charter for any land development regulation proposed to exceed the height limits set forth in the Charter Height Prohibition.”

Counsel continues:

As a result, the Charter Height Prohibition conflicts with the Referendum Prohibition and is invalid under Article VII, § 2(b) of the Florida Constitution, because, as the Florida Supreme Court has stated:

The critical phrase of article VIII, section 2(b)—“except as otherwise provided by law”—establishes the constitutional superiority of the Legislature’s power over municipal power. Accordingly, “[m]unicipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute.” *Thomas*, 614 So. 2d at 470. When a municipal “ordinance flies in the face of state law”—that is, cannot be reconciled with state law—the ordinance “cannot be sustained.” *Barragan*, 545 So. 2d at 255. Such “conflict preemption” comes into play “where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute.” 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012).

City of Palm Bay v. Wells Fargo Bank, N.A., 114 So. 3d 924, 928 (Fla. 2013). Under this doctrine, “an ordinance which supplements a statute’s restriction of rights may coexist with that statute, whereas an ordinance which countermands rights provided by statute must fail.” *Miami Beach v.*

regulation.” In other words, the memo correctly recognizes that Section 163.3167(8)(b) only applies to land development regulations, not to all local enactments.

⁸ The June 30, 2023 memo also concluded that other portions of the Charter requiring voter approval of zoning map amendments that were previously grandfathered by the statute based on their adoption prior to 2011 were **not** prohibited by Section 163.3167(8)(b): “Given that the New Law broadly prohibits a referendum on the adoption of a land development regulation, the foregoing interpretation as to map amendments may be subject to challenge. Any such challenge is one we would take on in good faith, as we will continue to give effect to the City Charter to the fullest extent permitted under State law.”

Rocio Corp., 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981) (internal citations omitted). “When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way.” *Alsop v. Pierce*, 155 Fla. 185, 196, 19 So. 2d 799, 805-06 (1944). Moreover, a “city should not be permitted to do indirectly that which it cannot do directly.” *Barragan v. Miami*, 545 So. 2d 252, 255 (Fla. 1989) (Erllich, J., concurring).

The arguments based on *Palm Bay* can be distinguished, because a charter provision adopted by the voters is not a land development regulation adopted by the local governing body. See *Cocoa Beach*, below.

Alsop and *Barragan* are arguably more on point. While it predates home rule and the comprehensive planning statutes, one could argue under *Alsop* that Section 163.3167(8)(b) dictates how land development regulations must always be done, and is therefore effectively a prohibition on Charter provisions restricting the governing body from being able to amend its land development regulations by ordinance, without the vote of the people. And under *Barragan*, a worker compensation case, one could argue that Section 80 is accomplishing indirectly what cannot be achieved directly under Section 163.3167(8)(b).

Counsel attempts to address the distinction between a charter and a land development regulation by noting that general law can override municipal charters, a principle which is undoubtedly true. However, the argument ignores the substantive distinction between them, to conclude that the Charter provision violates Section 163.3167(8)(b) without actually demonstrating that the statute applies to Charter provisions:

“A local ordinance or charter provision that interferes with the operation of a statute “cannot coexist” with that statute.” *Emerson v. Hillsborough County*, 312 So. 3d 451, 457 (Fla. 2021) “A municipality may not adopt a law, whether a Charter section or an ordinance, that conflicts with a state statute.” *Mullen v. Bal Harbour Vill.*, 241 So. 3d 949, 956 (Fla. 3d DCA 2018) (proposed charter amendment conflict with the § 163.3167(8), Fla. Stat., prohibiting referenda for development orders and was therefore illegal).⁹

Counsel concludes that Section 80 is therefore void and unenforceable like the provisions of the Miami Beach charter, without analyzing the distinctions between the two charters.

Counsel also makes a larger argument that Section 80 violates not just Section 163.3167(8)(b), but also the overall Community Planning Act which, in their view, prohibits the implementation of comprehensive plans and the regulation of land use through local charters. They base this argument on the intent of the statute as well as the various statutory requirements to adopt comprehensive plans and implementing land development regulations, and infer that the statutory scheme cannot coexist with charter provisions addressing the topics of land development regulations.

First, § 163.3201, Fla. Stat., states:

⁹ In *Mullen*, the petitioners sought to amend the Village Charter in direct violation of a different provision of Section 163.3167(8), which clearly prohibits requirements for voter approval of development orders. The petitioners’ question called for a vote to be held before a development order could be approved by the Village Council, and did not add a substantive standard to the Charter like Section 80:

Sec. 82. - Large scale commercial expansion. Any proposed development plan for an existing commercial property that increases the existing commercial retail space by more than thirty (30) percent of the current amount of retail space, **must be submitted for approval to the electors in Bal Harbour Village and approved by a vote of at least sixty (60) percent of the Village electors voting on such referendum.**

It is the intent of this act that adopted comprehensive plans or elements thereof shall be implemented, in part, by the adoption and enforcement of appropriate local regulations on the development of lands and waters within an area. It is the intent of this act that the adoption and enforcement by a governing body of regulations for the development of land or the adoption and enforcement by a governing body of a land development code for an area shall be based on, be related to, and be a means of implementation for an adopted comprehensive plan as required by this act.

Second, pursuant to § 163.3167(1)(c), Fla. Stat., cities and counties must “implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements thereof.” In addition, § 163.3202, Fla. Stat., identifies the substantive requirements for land development regulations, which include “specific and detailed provisions necessary or desirable to implement the comprehensive plan.” Finally, § 163.3194(2), Fla. Stat., sets out procedures for adopting land development regulations and substantive standards to ensure they are consistent with the comprehensive plan.

If this were true, it begs the question of why the Florida Legislature felt it was necessary to continue amending Section 163.3167 over the past 15 years to gradually increase the scope of its prohibition of local referendum requirements. If the Community Planning Act preempted the field and provided the exclusive method of addressing comprehensive planning and land use regulations, there would be no need for these multiple, precise amendments. Moreover, if this were the case, why did the Shops themselves choose to go via petition to the electors for approval of an amendment to Section 80 in 2021, rather than arguing that Section 80 was preempted by the Community Planning Act?

Counsel also notes the existence of *Cocoa Beach*, but fails to explain why it does not require a conclusion that charter provisions are not land development regulations and therefore fall outside the scope of Section 163.3167(8)(b). Counsel recognizes that the case does not address their point, but then simply asserts that their view is correct:

Together, these statutes require the implementation of comprehensive plans through land development regulations. A charter provision is not a land development regulation. See *City of Cocoa Beach v. Vacation Beach, Inc.*, 852 So. 2d 358, 360 (Fla. 5th DCA 2003). In *Vacation Beach*, the court held that the failure to follow the statutory procedures in § 163.3194(2) did not render a charter amendment regulating land uses invalid. However, *Vacation Beach* did not address the larger question of whether regulating land use by charter conflicts with - and therefore violates - the intent, purpose, and requirements of §§ 163.3167, 163.3201, and 163.3194 that the comprehensive plan be implemented through land development regulations, to the exclusion of other regulatory mechanisms, including city and county charters. **The answer is clearly yes: the Community Planning Act leaves no room for regulating land use or implementing comprehensive plans through charters.** (emphasis added)

Is Section 80 void because it is in conflict with state law?

The legal question is whether the unique wording of Section 80 of the Village Charter will be construed by a reviewing court to be in conflict with and therefore prohibited by Section 163.3167(8)(b). This is a novel question that has not been addressed by any reviewing court. If charters contain substantive regulations of land development, and do not create a referendum requirement to enact ordinances to amend the land development regulations in the zoning code, there is an argument that they are not directly addressed by Section 163.3167(8)(b). See *Cocoa Beach v. Vacation Beach, Inc.*, 852 So.2d 358, 360 (Fla.

5th DCA 2003) (“City is correct that neither charter amendment is a ‘land development regulation,’ which is defined as ‘an ordinance enacted by a local governing body”).¹⁰

The Village Charter does not direct the method of adoption of land development regulations, like some other charters do, but rather specifically sets the permissible height at the standards established in the zoning code as they existed at the time the Charter amendment was adopted, in 2006. In other words, it does not call for a vote of the electors before an ordinance can be enacted to implement a change to the zoning code. Rather, the standard exists in the Charter until the voters agree to amend the Charter. If such a Charter amendment is adopted, then the Village Council acts by ordinance to legislatively implement that change into the Village’s land development regulations in Chapter 21 of the Code of Ordinances, as was done in 2020.

An issue is whether Section 80 even limits the method of measuring the height limit, or if it only limits the numerical standards for height (e.g. “35 feet”) in the Code. Since the creation of Section 80, the Village has only changed its Code provisions regarding and definitions of height to acknowledge the clear preemption established by the Live Local Act for qualifying projects. The Village has not specifically considered whether only the numerical standards for floors, stories, penthouses, and other aspects of development are affected by Section 80, leaving the definitions of height open to Council action by ordinance without voter approval.

Another consideration is that the Council specifically asked the electors in 2020 and 2023 whether to alter the method of measurement for specific uses. In 2020, the electors agreed that single family development could base height measurements on flood elevation. But in 2023, the electors rejected applying a similar principle to municipal structures with a 55-foot cap. See **Exhibit A**.

1. Does Section 163.3167(8)(b) apply to Section 80?

It can be argued that the prohibition in Section 163.3167(8)(b) reaches charter provisions as well as ordinances. First, Section 163.3167(8)(b) does not qualify the terms “initiative or referendum,” so these terms arguably encompass referenda that are used to approve charter provisions, as specifically provided by Section 166.031, Florida Statutes. Moreover, the language used in Section 163.3167(8)(b), “**in regard to any land development regulation,**” is broadening.¹¹ Thus, if a charter amendment relates to “any land development regulation,” then it falls within the scope of Section 163.3167(8)(b). Here, Section 80 on its face relates to “any land development regulation,” since it expressly addresses permitted height as “set forth in the Village’s . . . municipal code” in effect at the time of its adoption.

¹⁰ In *Cocoa Beach*, the court considered whether a charter amendment relating to maximum density and height, which provided that contrary ordinances were repealed, violated the procedural requirements in Section 163.3194(2), Florida Statutes, which required that “no land development regulation, land development code, or amendment thereto **shall be adopted by the governing body** until such regulation, code or amendment has been referred either to the local planning agency or to a separate land development regulation commission created pursuant to local ordinance.” 852 So. 2d at 359-60 (emphasis added). The court held that the requirement of referral to the LPA did not apply to the charter amendment at issue: while the charter amendment referenced land development regulations because it repealed (and, therefore, “amended”) contrary ones, because the charter amendment was adopted by referendum, it was not “adopted by the governing body.” *Id.* at 360.

¹¹ See *Ham v. Portfolio Recovery*, 308 So. 3d 942, 948 (Fla. 2020) (construing the term “with respect to” in Section 57.105, F.S., recognizing that it means “**with regard to or relation to,**” and that such terms are “**necessarily broader** than terms such as “based on,” “under” or “pursuant to,” and citing *Lamar, Archer & Confrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018) for the proposition that “[u]se of word ‘respecting’ in a legal context **generally has a broadening effect, ensuring that the scope of the provision covers not only its subject but also matters relating to that subject.**”) (emphasis added).

2. Does Section 163.3167(8)(b) apply only to future votes of the electors to amend or repeal Section 80, or does it apply retroactively to Section 80 as it currently stands?

Under Florida law, in the absence of clear intent to apply retroactively, statutes are presumed to apply prospectively only.¹² (On retroactivity, see below). Prospective application of Section 163.3167(8)(b) means that the Village electors cannot now modify or repeal Section 80; this creates a quandary because under Florida law, only the electors have the power to do so. See §166.031(1), Fla. Stat.¹³

There is some question, however, whether Section 163.3167(8)(b) reaches the existing Section 80 because, under ordinary rules of statutory construction, Chapter 2023-305, Laws of Florida, did not give Section 163.3167(8)(b) retroactive effect.¹⁴ Unlike the prohibitions against initiatives and referenda “in regard to development orders” or “in regard to comprehensive plan or map amendments” in Section 163.3167(8)(a) and (c), Chapter 2023-305 did not expressly deem the results of past initiatives or referenda “in regard to any land development regulation” “null and void and of no legal force and effect.” Because the Legislature could have, but did not give retroactive effect to Section 163.3167(8)(b), the prohibition against initiatives and referenda “in regard to any land development regulation” would appear to apply prospectively only.¹⁵

If the Section 163.3167(8) prohibition has only a prospective effect, then the Legislature has permanently frozen Section 80, even though the electors would have understood in 2006 (and later, by their action in

¹² See, e.g., *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985) (“In the absence of explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only.”); see also *Old Port Cove Holdings, Inc. v. Old Port Condo. Ass’n, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008) (when considering whether a statute applies retroactively, courts apply a two-factor test: “(1) whether the statute itself expresses an intent that it apply retroactively; and, if so, (2) whether retroactive application is constitutional”).

¹³ “Charters or charter provisions adopted or readopted subsequent to the adoption of the Municipal Home Rule Powers Act in 1973 ... may only be amended as provided in section 166.031, Florida Statutes.” FL AGO 2003-36 (Fla. A.G.), 2003 WL 21788973 (City charter could not be amended to provide that future amendments to the charter may be made by the city commission without referendum). However, see §166.031(5), Fla. Stat. (“A municipality may, by unanimous vote of the governing body, abolish municipal departments provided for in the municipal charter **and amend provisions or language out of the charter which has been judicially construed, either by judgment or by binding legal precedent from a decision of a court of last resort, to be contrary to either the State Constitution or Federal Constitution.**”) (emphasis added).

¹⁴ Analysis of the legislative history further supports this conclusion. House Bill 41 eventually was laid on the table, and the companion Senate Bill 718 was adopted. The original HB 41 legislation included the prohibition in regard to land development regulations in subsection (8)(a), which would have made the new language subject to retroactivity. However, HB 41 was specifically amended in a strikethrough amendment to create the new subsection (8)(b), and a subsequent amendment eliminated the LDR prohibition from the retroactivity provision in (8)(e). SB 718 was then amended to include the new language from HB 41. See links below, which show the clear legislative intent:

<https://www.flsenate.gov/Session/Bill/2023/41/BillText/Filed/PDF>

<https://www.flsenate.gov/Session/Bill/2023/41/Amendment/424083/PDF> (strike all amendment)

<https://www.flsenate.gov/Session/Bill/2023/41/Amendment/828419/PDF> (amendment eliminating the LDR language from the retroactive provisions)

<https://www.flsenate.gov/Session/Bill/2023/718/Amendment/951112/PDF> (SB 718 amendment to be consistent with the new HB 41 language)

¹⁵ See *Hassan v. State Farm Mutual Auto. Ins. Co.*, 674 So. 2d 106, 109 (Fla. 1996) (concerning retroactive application of legislation, where the legislature clearly expressed its intent that its amendment to subsection (10) of the statute was remedial and applied retroactively, and did not express that intention with respect to its amendment of subsection (6), subsection (6) had no retroactive application: “We agree with the district court that if the legislature had intended subsection (6) to apply retroactively, it would have so stated, as it did in connection with subsection (10).”)

2020) that they were voting for a freeze on height that they could modify by subsequent initiative or referendum vote in the future. Now, because of the action of the Florida Legislature adopting Section 163.3167(8)(b), they cannot do so.

3. Does the existing Section 80 conflict with Section 163.3167(8)(b)?

Where state law has not preempted the field completely, which is the case with land use and zoning regulation, cases focus on whether the local regulation and the state statute can coexist. In other words, does compliance with one require violation of the other? As stated in *Jass Properties, LLC v. City of N. Lauderdale*, 101 So. 3d 400, 402 (Fla. 4th DCA 2012):

“It is well settled that a municipality may not enact a local ordinance that conflicts with a state statute. See, e.g., *City of Kissimmee v. Fla. Retail Fed’n, Inc.*, 915 So.2d 205, 209 (Fla. 5th DCA 2005). To determine whether a conflict exists, a court must examine whether the two legislative enactments can coexist or “whether one must violate one provision in order to comply with the other.” *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 888 (Fla. 2010) (quoting *Laborers’ Int’l Union of N. Am., Local 478 v. Burroughs*, 541 So.2d 1160, 1161 (Fla. 1989)); see also *City of Kissimmee*, 915 So.2d at 209. “Courts are therefore concerned with whether compliance with a [municipal] ordinance [r]equires a violation of a state statute or renders compliance with a state statute impossible.” *Jordan Chapel Freewill Baptist Church v. Dade Cnty.*, 334 So.2d 661, 664 (Fla. 3d DCA 1976). If so, then the type of direct conflict exists that invalidates the ordinance.”¹⁶

Conflict preemption has been broadly formulated by the Florida courts. As explained in *Masone v. City of Aventura*, 147 So. 3d 492, 495 (Fla. 2014):

Even “where concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory field, ‘a municipality’s concurrent legislation must not conflict with state law.’” *City of Palm Bay*, 114 So.3d at 928 (quoting *Thomas v. State*, 614 So.2d 468, 470 (Fla. 1993)). “Such ‘conflict preemption’ comes into play ‘where the local enactment irreconcilably conflicts with **or stands as an obstacle to the execution of the full purposes of the statute.**” *Id.* (quoting 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012)).

(Emphasis added). See also *City of Palm Bay v. Wells Fargo Bank*, 114 So. 3d 924 (Fla. 2013) (“When a municipal ‘ordinance flies in the face of state law’ – that is, cannot be reconciled with state law — the ordinance ‘cannot be sustained.’”)

Here, existing Section 80 arguably stands as an obstacle to “the execution of the full purposes” of Chapter 2023-305, the law that created Section 163.3167(8)(b). Although the Legislature specifically omitted Section 163.3167(8)(b) from its explicit statement of retroactivity in Chapter 2023-305, it nevertheless added the prohibition in (8)(b) to the statutory statement of legislative intent: “It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order **or land development regulation.**” (emphasis in original reflecting addition to statute); §163.3167(8)(e). The express and full purpose of Chapter 2023-305, to prohibit initiative and referendum control of land

¹⁶ See also *Mullen v. Bal Harbour Village*, 241 So. 3d 949, 956 (Fla. 3d DCA 2018) (citing *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 929 (Fla. 2013); “A municipality may not adopt a law, whether a Charter section or an ordinance, that conflicts with a state statute,” and *Emerson v. Hillsborough Co.*, 312 So. 3d 451, 457 (Fla. 2021) (in the context of a county charter provision conflicting with a statute, stating: “A local ordinance or charter provision that interferes with the operation of a statute ‘cannot coexist’ with that statute.”)

development regulations, would be defeated if existing Section 80 were thought to have continued efficacy even though it is now frozen from future action by the electors by Section 163.3167(8)(b).

Finally and furthermore, it is arguably reasonable to conclude that Chapter 2023-305 frees the Village Council from the constraints of Section 80. If Section 80 were to remain in effect, the result might be unconstitutional. By Florida Constitution and statute, the Village's governing body enjoys broad municipal home rule powers. Art. VIII, § 2(b), Fla. Const.; §166.021, Fla. Stat.¹⁷ These powers include power to legislate zoning.¹⁸ Because the electorate may no longer adopt amendments to land development regulations by initiative or referendum, were the Village Council to be precluded from doing so using its legislative powers, the Village's municipal home rule power would be thwarted.

In addition, there can be no real debate that the Legislature otherwise **requires** municipalities to adopt zoning regulations. Section 163.3167(8)(b) and (e) should be read in harmony with a different provision of the same statute, Section 163.3167(1)(c), which provides that "[t]he several municipalities ... shall have the power and responsibility ... to implement adopted or amended comprehensive plans by the adoption of appropriate **land development regulations** or elements thereof." And, elsewhere of course, the Legislature recognizes the role of the Village Council, as the governing body of the municipality, to so legislate. See §163.3201, Fla. Stat. ("It is the intent of this act that the adoption and enforcement by a governing body of regulations for the development of land or the adoption and enforcement by a governing body of a land development code for an area shall be based on, be related to, and be a means of implementation for an adopted comprehensive plan as required by this act.")¹⁹

Conclusion

For the reasons set forth above, there is a reasonable argument that Section 80 of the Village Charter conflicts with recent state legislation, and therefore can no longer be enforced. In a separate memo, the Village Manager presents options for how to respond to this analysis.

Exhibits:

- A. Rejected Charter Amendments to Section 80
- B. Section 166.031, Florida Statutes
- C. Letter from Bal Harbour Shops Attorneys re Bal Harbour Charter Height Limit
- D. Miami Beach City Attorney Memo re Impact of Florida Senate Bill 718 on Referendum Requirements in City Charter

¹⁷ See §166.021(1), Fla. Stat. ("As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law."); §166.021(4), Fla. Stat. ("The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.")

¹⁸ See, e.g., *Gulf & Eastern Dev. Corp. v. City of Fort Lauderdale*, 354 So. 2d 57 (Fla. 1978) ("Zoning is a legislative function which reposes ultimately in the governing authority of a municipality"); *S.A. Healy Co. v. Town of Highland Beach*, 355 So. 2d 813 (Fla. 4th DCA 1978) ("Florida courts have consistently upheld the police power of a municipality to adopt zoning regulations....")

¹⁹ See also, e.g., §163.3202, Fla. Stat. (governing "land development regulations," requiring their adoption and enforcement (1), and specifying the role of "local governing body" and "local governing authority" and "local government" regarding the procedures).

Exhibit A
Rejected Charter Amendments to Section 80
Bal Harbour Village Charter

January 26, 2021 vote on petition re Special Business Improvement Area

The ballot question posed by the petition of the Future of Bal Harbour committee to the voters on January 26, 2021 was rejected by a vote of 703 against and 82 for the question, out of a total 2,139 registered voters:

Charter Amendment to Section 80 Exempting Special Business Improvement Area (Council to Determine Building Height)

The Village Charter was amended in 2006 prohibiting building height for any property from exceeding the permitted height set forth in the Village's comprehensive plan or municipal code as of November 7, 2006. Shall Section 80 of the Charter be amended, only as to the Special Business Improvement Area, to allow building height to exceed permitted height for that Area (currently 56' or 5 stories), subject to Council approval at public hearings?

The rejected Charter Amendment would have read as follows:

Sec. 80 Building Height

Building Height allowed on any property shall not exceed the permitted height for that property set forth in the Village's comprehensive plan or municipal code, in effect ~~the date this amendment is approved~~ on November 7, 2006 whichever provisions are most restrictive, except that the height of buildings or structures on property in the Special Business Improvement Area may exceed the permitted height set forth in the Village's comprehensive plan or municipal code subject to the Village Council approval at public hearings. Unless otherwise specified in the comprehensive plan or municipal code in effect ~~the date this amendment is approved~~ on November 7, 2006, each building "story" shall mean 11 feet in height.

May 3, 2023 vote on Council question re municipal purposes

The ballot question posed by the Village Council to the voters on May 3, 2023 was rejected by a vote of 149 against and 121 for the question, out of a total 2,019 registered voters:

Measure Height of Single Family Dwellings from Base Flood Elevation

Shall the Charter be amended to allow the height of structures that are used for municipal purposes to be measured from the highest minimum elevation required by state or federal law, not to exceed 55 feet?

The rejected Charter Amendment would have read as follows:

Sec. 80. Building Height

Building height allowed on any property shall not exceed the permitted height for that property set forth in the Village's comprehensive plan or municipal code, in effect the date this amendment is approved, whichever provisions are most restrictive Notwithstanding the foregoing:-

(a) the height of single family dwellings may be measured from the highest minimum elevation provided by state or federal law-, and

(b) the height of structures that are used for municipal purposes may be measured from the highest minimum elevation provided by state or federal law.

Unless otherwise specified in the comprehensive plan or municipal code in effect the date this amendment is approved, each building "story" shall mean 11 feet in height.

Exhibit B
Charter Amendment Statute

166.031 Charter amendments.—

(1) The governing body of a municipality may, by ordinance, or the electors of a municipality may, by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality. The governing body of the municipality shall place the proposed amendment contained in the ordinance or petition to a vote of the electors at the next general election held within the municipality or at a special election called for such purpose.

(2) Upon adoption of an amendment to the charter of a municipality by a majority of the electors voting in a referendum upon such amendment, the governing body of said municipality shall have the amendment incorporated into the charter and shall file the revised charter with the Department of State. All such amendments are effective on the date specified therein or as otherwise provided in the charter.

(3) A municipality may amend its charter pursuant to this section notwithstanding any charter provisions to the contrary. This section shall be supplemental to the provisions of all other laws relating to the amendment of municipal charters and is not intended to diminish any substantive or procedural power vested in any municipality by present law. A municipality may, by ordinance and without referendum, redefine its boundaries to include only those lands previously annexed and shall file said redefinition with the Department of State pursuant to the provisions of subsection (2).

(4) There shall be no restrictions by the municipality on any employee's or employee group's political activity, while not working, in any referendum changing employee rights.

(5) A municipality may, by unanimous vote of the governing body, abolish municipal departments provided for in the municipal charter and amend provisions or language out of the charter which has been judicially construed, either by judgment or by binding legal precedent from a decision of a court of last resort, to be contrary to either the State Constitution or Federal Constitution.

(6) Each municipality shall, by ordinance or charter provision, provide procedures for filling a vacancy in office caused by death, resignation, or removal from office. Such ordinance or charter provision shall also provide procedures for filling a vacancy in candidacy caused by death, withdrawal, or removal from the ballot of a qualified candidate following the end of the qualifying period which leaves fewer than two candidates for an office.

History.—s. 1, ch. 73-129; s. 1, ch. 86-95; s. 1, ch. 90-106; s. 43, ch. 90-315; s. 45, ch. 94-136.

September 10, 2024

VIA HAND DELIVERY AND EMAIL

The Honorable Mayor Jeffrey Freimark
Jorge M. Gonzelez, Village Manager
Susan Trevarthen, Village Attorney
jfreimark@balharbourfl.gov
jgonzalez@balharbourfl.gov
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Bal Harbour Village
655 96th Street
Bal Harbour, FL 33154

Re: Village Charter Section 80 is Invalid and Unenforceable Under Florida Law

Dear Mayor Freimark, Mr. Gonzalez, and Ms. Trevarthen:

On behalf of our client, Whitman Family Development, LLC (“WFD”), the owner and operator of Bal Harbour Shops, we write to notify you of our position that § 80 of the Bal Harbour Village Charter (the “Charter Height Prohibition”) conflicts with Florida law and is therefore invalid and unenforceable because it subjects to a voter referendum any amendment to Village Code § 21-218 seeking an increase in building height.

The Charter Height Prohibition purports to prohibit amendments to the Village’s comprehensive plan and municipal code that would increase building height. Adopted in 2006 by a referendum vote of the Village electors, the Charter Height Prohibition states as follows:

Building height allowed on any property shall not exceed the permitted height for that property set forth in the Village's comprehensive plan or municipal code, in effect the date this amendment is approved, whichever provisions are most restrictive. Unless otherwise specified in the comprehensive plan or municipal code in effect the date this amendment is approved, each building "story" shall mean 11 feet in height.

Village Charter, § 80.

The Bal Harbour Shops property is designated “COM” in the Village Comprehensive Plan, or “Commercial” on the Village’s Future Land Use Map. The Village Comprehensive Plan does not impose a height limit on land designated Commercial.

Bal Harbour Shops is in the “B” zoning district established by the Village Code. The “municipal code” governing height in the “B” district in effect in 2006 stated:

Except as set forth herein, no Building or Structure in the B Business District shall exceed 56 feet or three Stories in Height, whichever is less. No Parking Structure shall exceed 56 feet or five Stories above the surface parking level in Height, whichever is less. Any Parking Structure which exceeds 36 feet or three Stories shall require a public hearing in accordance with the procedures set forth in Sections 21-51 and 21-52 and the standards set forth in Section 21-53(a). Notwithstanding any other limitation herein, for any assemblage of contiguous Lots now or hereafter owned by the same owner in the Business District which contains five or more contiguous acres, an area not to exceed 42,600 square feet thereof may, after a public hearing in accordance with the procedures set forth in Sections 21-51 and 21-52 and the standards set forth in Section 21-53(a), contain Structures not to exceed 69 feet in Height. Except as provided below, when a parapet wall is provided, the vertical distance shall be measured from the highest point of any street bounding the property to the highest point of the parapet wall. Parapet walls shall not exceed four feet in Height as measured from the highest point of the roof to the highest point of the parapet wall. Except as otherwise provided herein, a "Story" of a Structure shall be considered to be no greater than 19 feet in Height and a "Story" of a Parking Structure shall be considered to be no greater than 11 feet six inches in Height.

Code § 21-318 (2006).¹ Village Code § 21-318 constitutes a “land development regulation” as defined in § 163.3164, Florida Statutes.

In 2023, the Florida Legislature adopted Chapter 2023-305, a statute prohibiting referenda on land development regulations (the “Referendum Prohibition”). The Referendum Prohibition states:

An initiative or referendum process in regard to any land development regulation is prohibited.

§ 163.3167(8)(b), Fla. Stat. The Referendum Prohibition aligns with similar provisions in § 163.3167(8), Fla. Stat., that prohibit initiatives or referenda on development orders and comprehensive plan amendments “Whenever the legislature acts to supersede a local government's authority to enforce its ordinances, the effect is immediate and applies to both future and pending proceedings and present and past offenses.” *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999). The Referendum Prohibition contains no “savings clause” for initiatives or referenda on land development regulations and therefore applies both prospectively and retroactively.

As you know, WFD wants to apply to amend Village Code § 1-318 for a hotel that exceeds the Charter Height Prohibition’s restrictions. Under Florida Law, a referendum is required to amend or repeal the Charter Height Prohibition. *See* § 166.031(2), Fla. Stat. (charter amendments

¹A 2024 amendment to Code § 21-318 applies to projects proposed under the “Live Local Act.”

subject to a referendum of the electors). The practical and legal effect of the Charter Height Prohibition is to illegally require a referendum to amend the Charter for any land development regulation proposed to exceed the height limits set forth in the Charter Height Prohibition.

As a result, the Charter Height Prohibition conflicts with the Referendum Prohibition and is invalid under Article VII, § 2(b) of the Florida Constitution, because, as the Florida Supreme Court has stated:

The critical phrase of article VIII, section 2(b)—"except as otherwise provided by law"—establishes the constitutional superiority of the Legislature's power over municipal power. Accordingly, "[m]unicipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." *Thomas*, 614 So. 2d at 470. When a municipal "ordinance flies in the face of state law"—that is, cannot be reconciled with state law—the ordinance "cannot be sustained." *Barragan*, 545 So. 2d at 255. Such "conflict preemption" comes into play "where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute." 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012).

City of Palm Bay v. Wells Fargo Bank, N.A., 114 So. 3d 924, 928 (Fla. 2013). Under this doctrine, "an ordinance which supplements a statute's restriction of rights may coexist with that statute, whereas an ordinance which countermands rights provided by statute must fail." *Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981) (internal citations omitted). "When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way." *Alsop v. Pierce*, 155 Fla. 185, 196, 19 So. 2d 799, 805-06 (1944). Moreover, a "city should not be permitted to do indirectly that which it cannot do directly." *Barragan v. Miami*, 545 So. 2d 252, 255 (Fla. 1989) (Erllich, J., concurring).

The above doctrine applies to Charter provisions, including the Charter Height Prohibition: "A local ordinance or charter provision that interferes with the operation of a statute "cannot coexist" with that statute." *Emerson v. Hillsborough County*, 312 So. 3d 451, 457 (Fla. 2021) "A municipality may not adopt a law, whether a Charter section or an ordinance, that conflicts with a state statute. *Mullen v. Bal Harbour Vill.*, 241 So. 3d 949, 956 (Fla. 3d DCA 2018) (proposed charter amendment conflict with the § 163.3167(8), Fla. Stat., prohibiting referenda for development orders and was therefore illegal).

Here, the Charter Height Prohibition directly countermands WFD's rights under the Referendum Prohibition because it directly conflicts with the Referendum Prohibition's plainly stated proscription against referenda for land development regulations. The Charter Height Prohibition is therefore void and unenforceable. The City of Miami Beach has reached the same conclusion regarding provisions of its charter purporting to require a referendum before amending zoning regulations to increase FAR.

Furthermore, the Charter Height Prohibition also conflicts with multiple provisions of the Community Planning Act, which, read together, prohibit the implementation of comprehensive plans and the regulation of land use through city or county charters.

First, § 163.3201, Fla. Stat., states:

It is the intent of this act that adopted comprehensive plans or elements thereof shall be implemented, in part, by the adoption and enforcement of appropriate local regulations on the development of lands and waters within an area. It is the intent of this act that the adoption and enforcement by a governing body of regulations for the development of land or the adoption and enforcement by a governing body of a land development code for an area shall be based on, be related to, and be a means of implementation for an adopted comprehensive plan as required by this act.

Second, pursuant to § 163.3167(1)(c), Fla. Stat., cities and counties must “implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements thereof.” In addition, § 163.3202, Fla. Stat., identifies the substantive requirements for land development regulations, which include “specific and detailed provisions necessary or desirable to implement the comprehensive plan.” Finally, § 163.3194(2), Fla. Stat., sets out procedures for adopting land development regulations and substantive standards to ensure they are consistent with the comprehensive plan.

Together, these statutes require the implementation of comprehensive plans through land development regulations. A charter provision is not a land development regulation. See *City of Cocoa Beach v. Vacation Beach, Inc.*, 852 So. 2d 358, 360 (Fla. 5th DCA 2003). In *Vacation Beach*, the court held that the failure to follow the statutory procedures in § 163.3194(2) did not render a charter amendment regulating land uses invalid. However, *Vacation Beach* did not address the larger question of whether regulating land use by charter conflicts with - and therefore violates - the intent, purpose, and requirements of §§ 163.3167, 163.3201, and 163.3194 that the comprehensive plan be implemented through land development regulations, to the exclusion of other regulatory mechanisms, including city and county charters. The answer is clearly yes: the Community Planning Act leaves no room for regulating land use or implementing comprehensive plans through charters.

We request the Village’s prompt response stating whether it agrees or disagrees with our position and legal analysis. We ask the Village to tell us if it will assert that the Charter Height Prohibition is valid and remains in effect should WFD apply to amend the current B district height limits.

Sincerely,

A handwritten signature in blue ink, appearing to read "John K. Shubin".

John K. Shubin, Esq.
Ian E. DeMello, Esq.
Robert K. Lincoln, Esq.
For the firm

cc: Dwight Danie, Village Clerk, ddanie@balharbourfl.gov
Etan Mark, Esq., Village Special Counsel, Etan@markmigdal.com


MIAMI BEACH

OFFICE OF THE CITY ATTORNEY

LTC# 300-2023

LETTER TO COMMISSION

TO: Mayor Dan Gelber and Members of the City Commission

FROM: Rafael A. Paz, City Attorney 

DATE: June 30, 2023

SUBJECT: Impact of Florida Senate Bill 718 on the Referendum Requirements in City Charter Sections 1.03(c) and 1.06

The purpose of this Letter to Commission ("LTC") is to advise the City Commission of the impact of Senate Bill 718, which Governor Ron DeSantis signed into law on June 28, 2023 (the "New Law"). A copy of the New Law, which takes effect on July 1, 2023, is attached to this LTC. The New Law impacts the referendum requirements in the following City Charter provisions:

- (1) Charter Section 1.03(c), which requires voter approval prior to any increase to the "zoned floor area ratio" of any property within the City, and
- (2) Charter Section 1.06, which requires voter approval prior to enacting any Ordinance that reduces the powers and duties of the Historic Preservation Board, or creates less stringent historic preservation standards or regulations.

The New Law, which, in pertinent part, comes down to a single sentence, is plain and unambiguous in its simplicity:

An initiative or referendum process in regard to any land development regulation is prohibited.

See Sec. 163.3167(b), Fla. Stat. (2023).

Under what circumstances is a referendum now prohibited?

- As explained in this LTC, the New Law, as applied to the City, broadly prohibits a referendum process on any land development regulation that results in an FAR increase (except for a map amendment, i.e., rezoning), or creates a less stringent historic preservation standard or regulation. A referendum on a comprehensive plan amendment that increases FAR would also be prohibited under existing State law, as the City Charter contains no such requirement.

Which referendum requirements in the City Charter remain enforceable?

- Under State law, and given that Charter Section 1.03(c) was adopted prior to June 1, 2011, referendum approval is still required for any map amendment (or rezoning) that increases FAR.
- The New Law has no impact whatsoever on City Charter provisions requiring voter referendum approval for the sale or lease of certain City-owned property, including the referendum requirements set forth in Sections 1.03(b), 1.03(d), or 1.03(e) of the City Charter.¹
- The New Law will also have no impact on the referendum requirement, approved by the voters in August 2022, for any vacation of a right-of-way that results in the aggregation of floor area across unified abutting parcels.

As the sale or lease of City property, or a vacation of a City right-of-way, is not accomplished via adoption of a land development regulation, the above-referenced Charter provisions, which involve the City's proprietary decisions regarding the *disposition* of City-owned property, are not impacted by the New Law, and remain fully enforceable.

I. SUMMARY OF EXISTING LAW

A. City Charter Section 1.03(c), Requiring Voter Approval to Increase FAR

Floor area ratio ("FAR") is the measure used by the City to regulate the overall size of a building. Floor area ratio is defined in the City's Resiliency Code as "the floor area of the building or buildings on any lot divided by the area of the lot." Generally speaking, the term "floor area" is defined as "the sum of the gross horizontal areas of the floors of a building or buildings . . .," subject to a list of enumerated exceptions. The Resiliency Code establishes a maximum FAR for each zoning district in Miami Beach.

In 1997, following a petition drive by an advocacy group known as "Save Miami Beach," the City's voters approved an amendment to the City Charter, requiring voter approval for future FAR increases—specifically, for any property "adjacent to the waterfront." See Resolution No. 97-22413. In 2003, the City's residents voted to expand the referendum requirement to include **all** property within the City's limits. See Resolution No. 2003-25441.

The current text of Charter Section 1.03(c) reads, in pertinent part, as follows:

The floor area ratio of any property or street end within the City of Miami Beach shall not be increased by zoning, transfer, or any other means from its current zoned floor area ratio as it exists on the date

¹ For the sale or lease of 10 years or longer of any City property not specifically subject to a referendum requirement, the Charter, at Section 1.03(b)(4), requires approval by 4/7ths of the Planning Board and 6/7ths of the City Commission. This provision is also not impacted by the New Law.

Also not impacted is Charter Sec. 1.03(f), which requires 4/7ths approval of the Planning Board and 6/7ths approval of the City Commission for a management agreement or concession agreement, for a term of 10 years or longer, relating to City property.

of adoption of this Charter Amendment [November 7, 2001], including any limitations on floor area ratios which are in effect by virtue of development agreements through the full term of such agreements, unless any such increase in zoned floor area ratio for any such property shall first be approved by a vote of the electors of the City of Miami Beach.

Section 1.03(c) requires a voter referendum prior to any legislative action that would result in an increase to a property's zoned FAR as it existed on November 7, 2001. Since the initial adoption of the referendum requirement in 1997, the City has submitted a total of 12 proposed FAR increases to the voters. A summary of these measures is as follows:

- November 2022: Increase FAR to allow conversion of existing hotels in RPS-4 District in the South of Fifth neighborhood to residential use (approved by the voters)
- November 2022: Increase FAR to incentivize office/residential in the First Street Overlay, along 1st Street and Washington Avenue (approved by the voters)
- November 2022: Increase FAR for North Beach Oceanside Resort Overlay area (Deauville Hotel) (rejected by the voters)
- August 2022: Increase FAR to incentivize conversion of apartment hotels to residential use in RPS-1 and RPS-2 Districts in the South of Fifth neighborhood (approved by the voters)
- August 2022: Increase FAR in Alton Road Gateway Overlay to facilitate community health center (approved by the voters)
- November 2020: Increase FAR by allowing reconstruction of original floorplates in historic buildings (approved by the voters)
- November 2020: Increase FAR for Wolfsonian Arts District (approved by the voters)
- November 2020: Increase FAR by excluding certain areas of building from calculation of floor area (approved by the voters)
- November 2019: Increase FAR for CD-2 zoning districts along Washington Avenue and Alton Road (rejected by the voters)
- November 2019: Allow new floor area within historic buildings for adaptive reuse (rejected by the voters)
- November 2017: Increase FAR as part of rezoning the North Beach Town Center (approved by the voters)
- November 2015: Increase FAR for Ocean Terrace Overlay (rejected by the voters)

B. The Community Planning Act (Chapter 163, Florida Statutes)

The Community Planning Act, formerly known as the Growth Management Act, governs the field of comprehensive planning and land development regulation by cities and counties throughout Florida. Among these provisions are certain restrictions on local initiatives or referenda concerning specified land use matters (also known as “zoning by referendum”). See Sec. 163.3167(8), Fla. Stat.

The City Charter is not absolute, and a local ordinance or charter provision may not be construed in a manner that would conflict with State law. See *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 888 (Fla. 2010); see also *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1069 (Fla. 3d DCA 1981). As City Attorneys have advised since at least 1997, the “zoning by referendum” provisions of the Community Planning Act restrict the application of the referendum requirement in Miami Beach Charter Section 1.03(c). The City may not call a referendum ostensibly required by the City Charter if the referendum would be prohibited by State law.

1. Initiative or Referendum on a Development Order

Even before the adoption of SB 718 this year, the “zoning by referendum” provisions of the Community Planning Act have limited the City’s authority to submit proposed FAR increases to the voters. Section 163.3167(8)(a), Florida Statutes, broadly prohibits “[a]n initiative or referendum process in regard to any development order.”² As applied to the City, a “development order” includes a building permit, design review approval (for properties outside of historic districts), Certificate of Appropriateness (for properties within local historic districts or individually designated historic sites), lot split approval, variance, Board of Adjustment order, or site-specific rezoning. **To hold a referendum on the City’s issuance on any of these approvals is strictly prohibited under existing provisions of the Community Planning Act.**

2. Initiative or Referendum on a Comprehensive Plan Amendment or Map Amendments (i.e. Rezoning)

The Community Planning Act also prohibits an initiative or referendum process “in regard to any local comprehensive plan amendment or map amendment.” However, the Act exempts, and specifically permits, a referendum process on a “local comprehensive plan amendment or map amendment” that is “expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011.” See Sec. 163.3167(8)(b), Fla. Stat.

The City Charter does not qualify for the exception as to comprehensive plan amendments, because the Charter does not contain any language requiring referendum approval for a comprehensive plan amendment. Therefore, the City is prohibited, under State law, from submitting a comprehensive plan amendment to the voters.

² State law defines a “[d]evelopment order” as “any order granting, denying, or granting with conditions an application for a development permit.” “Development permit” is defined as “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.” Sec. 163.3164(15) and (16), Florida Statutes.

However, the City Charter does qualify for the exception as to **map amendments**. Charter Section 1.03(c) requires voter approval to increase FAR by “zoning” (i.e. by adoption of a map amendment or rezoning). By way of example, a map amendment to rezone a defined area of the City from RM-1 (with an FAR of 1.25) to RM-2 (with an FAR of 2.0) would require voter approval.

This particular provision has been in place since November 7, 2001, i.e. prior to the June 1, 2011 cutoff date in the statute. **Accordingly, Charter Section 1.03(c) qualifies for the exception in Section 163.3167(8)(b) and, therefore, the City’s referendum requirement remains enforceable, but solely as to map amendments or rezonings involving an increase in FAR.**

C. City Charter Section 1.06, relating to the Historic Preservation Board and the City’s Historic Preservation Ordinance

Charter Section 1.06 requires voter approval prior to the adoption of any Ordinance which “reduces the powers and duties of the City’s Historic Preservation Board, or creates less stringent historic preservation standards or regulations” This provision was approved by the City’s voters on November 6, 2012, by a vote of 61.29%.

In the nearly 11 years since the adoption of this section, no measure has been submitted to the voters which would reduce the powers and duties of the HPB or create a less stringent historic preservation standard or regulation.

II. EFFECT OF SENATE BILL 718 ON THE CITY CHARTER

A. Impact on Charter Section 1.03(c), relating to FAR Increases

The New Law amends the Community Planning Act to provide that “[a]n initiative or referendum process in regard to any land development regulation is prohibited.”

“Land development regulations” are defined in Section 163.3164, Florida Statutes, as “ordinances enacted by governing bodies for the regulation of any aspect of development and includes any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land,”

As summarized in Section I.A of this LTC, the vast majority of FAR increases submitted to the City’s voters since the adoption of Charter Sec. 1.03(c) have involved the enactment of a land development regulation (sometimes referred to informally as a “text amendment,” as opposed to a map amendment or rezoning).

1. Overlays

One example of an FAR increase effectuated through a land development regulation is the creation of an overlay. An overlay involves adopting narrowly tailored development standards for a defined geographic area, without changing the underlying zoning district classification, and accordingly, without changing any of the other requirements or allowances that apply to the zoning district. Examples include FAR incentives for the First Street Overlay (adopted in November 2022), the Alton Road Gateway Overlay (August 2022), and the Wolfsonian Arts District (adopted in November 2020). A referendum on the adoption of an overlay is now prohibited.

In contrast, a rezoning to a district with a greater FAR would generally permit more intense uses, increased density (regulated as dwelling units per acre) and increased building height. As explained in this LTC, a referendum on a rezoning that increases FAR remains required.

2. Specific, targeted incentives for specific uses, or developments meeting defined benchmarks

FAR increases implemented as land development regulations also include incentives for properties meeting certain geographic or use criteria (e.g., incentive for the conversion of existing hotels in the RPS-4 district to residential use, or conversion of apartment hotels in RPS-1 and RPS-2 to residential use).

To the extent that these overlays or targeted incentives have been effectuated as amendments to the City's land development regulations, the New Law, which prohibits a "referendum process in regard to any land development regulation," would now bar the City from submitting these measures, or any future similar measure, to the voters by referendum.

3. Map amendments or rezonings

However, the New Law leaves intact the exception for local charter provisions which, as of June 1, 2011, contain express language as to "map amendments." Therefore, to the extent a proposed map amendment would result in an FAR increase, the referendum requirement in Charter Section 1.03(c) would continue to apply.

As noted above, a rezoning to a more intense district classification not only involves an increase in FAR, but also an increase in intensity (including additional allowable uses) and density (regulated as dwelling units per acre). For instance, in 2017, the City's voters approved an FAR increase for the North Beach Town Center, which was effectuated as a rezoning of TC-1, TC-2, and TC-3 districts to the newly created TC-C, "Town Center Core" district. Because this measure was effectuated as a "map amendment," even after the adoption of SB 718, referendum approval would still be required for a similar measure.

Given that the New Law broadly prohibits a referendum on the adoption of a land development regulation, the foregoing interpretation as to map amendments may be subject to challenge. Any such challenge is one we would take on in good faith, as we will continue to give effect to the City Charter to the fullest extent permitted under State law. Specifically, based on the statutory exception set forth in Section 163.3167(8)(c), it is our opinion that the new provision in Section 163.3167(8)(b) does not preempt Charter Section 1.03(c) in its entirety, as the new prohibition in subsection 8(b) must be read *in pari materia* with the existing provisions of subsection (8)(c), which expressly permit a "referendum process in regard to any . . . map amendment" that is "expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011." The City Charter was adopted prior to 2011 and qualifies for this exception, and accordingly, referendum approval remains intact, but solely for any **map amendment** that would result in an increase to a property's zoned FAR.

B. Impact on Charter Section 1.06, relating to Historic Preservation

As the City's historic preservation standards and regulations meet the definition of "land development regulations" in Chapter 163, a referendum to adopt a less stringent amendment is now prohibited. However, with respect to the "powers and duties" of the HPB, the City Attorney's Office would need to carefully review any future amendment to determine whether a referendum

would be required, as an amendment to the powers or duties of a land use board is unlikely to satisfy the statutory definition of a “land development regulation.” To this end, it must be noted that not a single amendment to reduce the powers and duties of the HPB or create a less stringent historic preservation standard or regulation has been presented to the voters for consideration since this Charter requirement was adopted nearly 11 years ago. Accordingly, we will evaluate this issue further if the City Commission ever desires to enact any such ordinance.

At the request of Commissioner Steven Meiner and Commissioner Alex Fernandez, the City Commission has recently referred items to the Land Use and Sustainability Committee, Planning Board, and Charter Review Board to consider amending the Resiliency Code to require a 6/7ths vote prior to any future FAR increase. In light of these referrals, the City Commission may also wish to consider adopting a 6/7ths voting requirement for any Ordinance that would reduce the powers and duties of the HPB, or enact a less stringent historic preservation standard or regulation.

III. CONCLUSION

The New Law further limits the City's authority to call a referendum on land use or zoning matters beyond existing provisions of the Community Planning Act, which prohibit an initiative or referendum on a development order and, as applied to the City, on a comprehensive plan amendment.

Effective July 1, 2023, and except as specified herein, the City is barred from calling a referendum on any land development regulation, including a land development regulation that increases a property's FAR or creates a less stringent historic preservation standard or regulation.

The New Law **does not**, however, render invalid the entirety of Sections 1.03(c) or 1.06 of the City Charter. Because Charter Section 1.03(c) has been in place since before June 1, 2011, referendum approval is **still required** for any map amendment (or rezoning) that would result in an increase to a property's zoned FAR. In addition, to the extent an amendment to the powers and duties of the HPB is not a land development regulation, then Charter Sec. 1.06 would still require voter approval. However, except in these two limited circumstances, the City Charter must yield to State law, and a referendum process in regard to a land development regulation is otherwise prohibited.

CHAPTER 2023-305

Committee Substitute for Committee Substitute for Senate Bill No. 718

An act relating to local government; amending s. 163.3167, F.S.; prohibiting an initiative or referendum process in regard to any land development regulation; reordering and amending s. 171.031, F.S.; defining the term “feasibility study”; amending s. 171.0413, F.S.; specifying the measurement of land during annexation procedures; amending s. 171.042, F.S.; replacing the term “report” with the term “feasibility study”; amending s. 171.051, F.S.; revising contraction procedures when qualified voters desire to be excluded from municipal boundaries; prohibiting contraction under certain circumstances; providing construction and applicability; amending s. 171.204, F.S.; conforming a cross-reference; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (8) of section 163.3167, Florida Statutes, is amended to read:

163.3167 Scope of act.—

(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 land development regulation is prohibited.

~~(c)(b)~~ (c) 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.

~~(d)(e)~~ (e) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order or land development regulation. 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 ~~(c)~~ (b). Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and ~~(c)~~ (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.

Section 2. Section 171.031, Florida Statutes, is reordered and amended to read:

171.031 Definitions.—As used in this chapter, the following words and terms have the following meanings unless some other meaning is plainly indicated:

(1) “Annexation” means the adding of real property to the boundaries of an incorporated municipality, such addition making such real property in every way a part of the municipality.

~~(4)~~(2) “Contraction” means the reversion of real property within municipal boundaries to an unincorporated status.

~~(7)~~(3) “Municipality” means a municipality created pursuant to general or special law authorized or recognized pursuant to s. 2 or s. 6, Art. VIII of the State Constitution.

~~(8)~~(4) “Newspaper of general circulation” means a newspaper printed in the language most commonly spoken in the area within which it circulates, which is readily available for purchase by all inhabitants in its area of circulation, but does not include a newspaper intended primarily for members of a particular professional or occupational group, a newspaper whose primary function is to carry legal notices, or a newspaper that is given away primarily to distribute advertising.

~~(9)~~(5) “Parties affected” means any persons or firms owning property in, or residing in, either a municipality proposing annexation or contraction or owning property that is proposed for annexation to a municipality or any governmental unit with jurisdiction over such area.

(6) “Feasibility study” means an analysis conducted by qualified staff or consultants of the economic, market, technical, financial, and management feasibility of the proposed annexation or contraction, as applicable.

~~(10)~~ “Qualified voter” means any person registered to vote in accordance with law.

~~(11)~~(7) “Sufficiency of petition” means the verification of the signatures and addresses of all signers of a petition with the voting list maintained by the county supervisor of elections and certification that the number of valid signatures represents the required percentage of the total number of qualified voters in the area affected by a proposed annexation.

~~(12)~~(8) “Urban in character” means an area used intensively for residential, urban recreational or conservation parklands, commercial, industrial, institutional, or governmental purposes or an area undergoing development for any of these purposes.

~~(14)~~(9) “Urban services” means any services offered by a municipality, either directly or by contract, to any of its present residents.

~~(13)~~(10) “Urban purposes” means that land is used intensively for residential, commercial, industrial, institutional, and governmental

purposes, including any parcels of land retained in their natural state or kept free of development as dedicated greenbelt areas.

~~(3)(11)~~ “Contiguous” means that a substantial part of a boundary of the territory sought to be annexed by a municipality is coterminous with a part of the boundary of the municipality. The separation of the territory sought to be annexed from the annexing municipality by a publicly owned county park; a right-of-way for a highway, road, railroad, canal, or utility; or a body of water, watercourse, or other minor geographical division of a similar nature, running parallel with and between the territory sought to be annexed and the annexing municipality, ~~may shall~~ not prevent annexation under this act, provided the presence of such a division does not, as a practical matter, prevent the territory sought to be annexed and the annexing municipality from becoming a unified whole with respect to municipal services or prevent their inhabitants from fully associating and trading with each other, socially and economically. However, nothing in this subsection may herein shall be construed to allow local rights-of-way, utility easements, railroad rights-of-way, or like entities to be annexed in a corridor fashion to gain contiguity; and when any provision ~~or provisions of any~~ special law ~~prohibits or laws prohibit~~ the annexation of territory that is separated from the annexing municipality by a body of water or watercourse, then that law shall prevent annexation under this act.

~~(2)(12)~~ “Compactness” means concentration of a piece of property in a single area and precludes any action which would create enclaves, pockets, or finger areas in serpentine patterns. Any annexation proceeding in any county in ~~this the state~~ must shall be designed in such a manner as to ensure that the area will be reasonably compact.

~~(5)(13)~~ “Enclave” means:

(a) Any unincorporated improved or developed area that is enclosed within and bounded on all sides by a single municipality; or

(b) Any unincorporated improved or developed area that is enclosed within and bounded by a single municipality and a natural or manmade obstacle that allows the passage of vehicular traffic to that unincorporated area only through the municipality.

Section 3. Subsection (5) of section 171.0413, Florida Statutes, is amended to read:

171.0413 Annexation procedures.—Any municipality may annex contiguous, compact, unincorporated territory in the following manner:

(5) If more than 70 percent of the acres of land in an area proposed to be annexed is owned by individuals, corporations, or legal entities which are not registered electors of such area, such area may shall not be annexed unless the owners of more than 50 percent of the acres of land in such area consent to such annexation. Such consent must shall be obtained by the

parties proposing the annexation before ~~prior to~~ the referendum to be held on the annexation.

Section 4. Subsections (1) and (2) of section 171.042, Florida Statutes, are amended to read:

171.042 Prerequisites to annexation.—

(1) ~~Before~~ ~~Prior to~~ commencing the annexation procedures under s. 171.0413, the governing body of the municipality shall prepare a feasibility study report setting forth the plans to provide urban services to any area to be annexed, and the feasibility study must report ~~shall~~ include the following:

(a) A map or maps of the municipality and adjacent territory showing the present and proposed municipal boundaries, the present major trunk water mains and sewer interceptors and outfalls, the proposed extensions of such mains and outfalls, as required in paragraph (c), and the general land use pattern in the area to be annexed.

(b) A statement certifying that the area to be annexed meets the criteria in s. 171.043.

(c) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans must ~~shall~~:

1. Provide for extending urban services except as otherwise provided in this subsection ~~herein~~ to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality before ~~prior to~~ annexation.

2. Provide for the extension of existing municipal water and sewer services into the area to be annexed so that, when such services are provided, property owners in the area to be annexed will be able to secure public water and sewer service according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.

3. If extension of major trunk water mains and sewer mains into the area to be annexed is necessary, set forth a proposed timetable for construction of such mains as soon as possible following the effective date of annexation.

4. Set forth the method under which the municipality plans to finance extension of services into the area to be annexed.

(2) Not fewer than 15 days before ~~prior to~~ commencing the annexation procedures under s. 171.0413, the governing body of the municipality shall file a copy of the feasibility study report required by this section with the board of county commissioners of the county in which ~~wherein~~ the municipality is located. Failure to timely file the feasibility study report as required in this subsection may be the basis for a cause of action to invalidate ~~invalidating~~ the annexation.

Section 5. Subsections (2) and (4) of section 171.051, Florida Statutes, are amended, and subsection (11) is added to that section, to read:

171.051 Contraction procedures.—Any municipality may initiate the contraction of municipal boundaries in the following manner:

(2) A petition of 15 percent of the qualified voters in an area desiring to be excluded from the municipal boundaries, filed with the clerk of the municipal governing body, may propose such an ordinance. The municipality to which such petition is directed shall immediately undertake a feasibility study of the feasibility of such proposal and the governing body shall, within 6 months, evaluate the feasibility study of such proposal and either initiate proceedings under subsection (1) by introducing a contraction ordinance or reject the petition as a legislative decision, specifically stating the facts upon which the rejection is based.

(4) If, at the meeting held for the such purpose of considering the contraction ordinance introduced by the governing body, a petition is filed and signed by at least 15 percent of the qualified voters resident in the area proposed for contraction requesting a referendum on the question, the governing body shall, upon verification, paid for by the municipality, of the sufficiency of the petition, and before passing such ordinance, submit the question of contraction to a vote of the qualified voters of the area proposed for contraction, or the governing body may vote not to contract the municipal boundaries.

(11) If more than 70 percent of the acres of land in an area proposed to be contracted is owned by individuals, corporations, or legal entities that are not registered electors of such area, such area may not be contracted unless the owners of more than 50 percent of the acres of land in such area consent to such contraction.

Section 6. The amendments made by this act to s. 171.051, Florida Statutes, are intended to be prospective in nature and apply only to petitions filed on or after July 1, 2023.

Section 7. Section 171.204, Florida Statutes, is amended to read:

171.204 Prerequisites to annexation under this part.—The interlocal service boundary agreement may describe the character of land that may be annexed under this part and may provide that the restrictions on the character of land that may be annexed pursuant to part I are not restrictions on land that may be annexed pursuant to this part. As determined in the interlocal service boundary agreement, any character of land may be annexed, including, but not limited to, an annexation of land not contiguous to the boundaries of the annexing municipality, an annexation that creates an enclave, or an annexation where the annexed area is not reasonably compact; however, such area must be “urban in character” as defined in s. 171.031 ~~s. 171.031~~(8). The interlocal service boundary agreement may not allow for annexation of land within a municipality that is not a party to the

agreement or of land that is within another county. Before annexation of land that is not contiguous to the boundaries of the annexing municipality, an annexation that creates an enclave, or an annexation of land that is not currently served by water or sewer utilities, one of the following options must be followed:

(1) The municipality shall transmit a comprehensive plan amendment that proposes specific amendments relating to the property anticipated for annexation to the Department of Economic Opportunity for review under chapter 163. After considering the department's review, the municipality may approve the annexation and comprehensive plan amendment concurrently. The local government must adopt the annexation and the comprehensive plan amendment as separate and distinct actions but may take such actions at a single public hearing; or

(2) A municipality and county shall enter into a joint planning agreement under s. 163.3171, which is adopted into the municipal comprehensive plan. The joint planning agreement must identify the geographic areas anticipated for annexation, the future land uses that the municipality would seek to establish, necessary public facilities and services, including transportation and school facilities and how they will be provided, and natural resources, including surface water and groundwater resources, and how they will be protected. An amendment to the future land use map of a comprehensive plan which is consistent with the joint planning agreement must be considered a small scale amendment.

Section 8. This act shall take effect July 1, 2023.

Approved by the Governor June 28, 2023.

Filed in Office Secretary of State June 28, 2023.

BAL HARBOUR

- V I L L A G E -

BUSINESS IMPACT STATEMENT

Proposed Ordinance Title:

AN ORDINANCE OF THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AMENDING CHAPTER 8.5 "FLOOD DAMAGE PREVENTION", SECTION 8.5-2 "DEFINITIONS" OF THE CODE OF ORDINANCES; AMENDING CHAPTER 21 "ZONING", ARTICLES I - III TO AMEND DEFINITIONS, PROCEDURES, AND REGULATIONS RELATED TO HEIGHT; PROVIDING FOR CONFLICTS, SEVERABILITY, INCLUSION IN THE CODE, AND FOR AN EFFECTIVE DATE.

Summary of Proposed Ordinance and Statement of Purpose to be Served:

This Ordinance seeks to amend the Village Code to refine the regulations regarding height measurement and approval procedures for height increases. The key objectives of the ordinance are as follows:

1. Ensure Consistency in Height Measurement:

- Align the measurement of building height with the highest minimum elevation required by applicable county, state, or federal law.
- Define freeboard and establish a voluntary freeboard allowance at the level required by law.

2. Implement Public Scrutiny and Council Oversight for Height Changes:

- Require a discussion item at a regular Village Council meeting before any proposal to increase height moves forward.
- Require the Local Planning Agency (LPA) public hearing to be conducted before the first reading by the Village Council.
- Require a supermajority (4/5) vote of the Village Council to approve both first and second readings of height-related amendments.

3. Establish Height Limits for Municipal Buildings:

- Introduce a maximum height limit of 56 feet for municipal buildings, applicable regardless of zoning district or location.

These measures are designed to enhance transparency, maintain community engagement, and provide clear, consistent guidelines for future zoning and development decisions while ensuring alignment with state and federal regulations.

Estimate of Direct Economic Impact on Private/For Profit Businesses:

- Estimate of Direct Business Compliance Costs:** There are no anticipated direct compliance costs.
- New Charges/Fees on Business Impacted:** The ordinance does not introduce new charges or fees for businesses.
- Estimate of Regulatory Cost:** The ordinance does not impose additional costs on the Village beyond administrative review and implementation.

Good Faith Estimate of Number of Businesses Likely Impacted:

There are approximately 110 businesses within the Business District. There is no expectation that these businesses would be impacted by the changes proposed by this ordinance. While this ordinance is primarily focused on zoning procedures and municipal building regulations, it does provide cost-saving benefits for businesses and developers who may seek height-related modifications in the future. Businesses considering redevelopment or expansion stand to save both time and money under the new ordinance, as it replaces the costly and time-consuming referendum process with a more structured and efficient approval system, while still ensuring public and Council oversight for transparency.