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To: Captiva Community Panel

From: Max Forgey, AICP
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Subject: Land Development Code (LDC) revisions and Lee County staff feedback

I have reviewed the "Captiva Land Development Code survey" which Ken Gooderham has prepared, including the very thorough responses received from Captiva residents and property owners. I would like to take this opportunity to respond to those comments and to make a few observations about the concerns expressed by Lee County staff which has conducted an unofficial review of the revisions. These concerns were exchanged in a meeting between Kathie Ebaugh and me on July 16, 2010.

Mangrove protection (Sec. 33-521).

Survey comments. This section has enjoyed strong approval from survey respondents who supported the proposed language by a 80.27% to 19.73% margin. Those who did not support it cited property rights concerns and that the State of Florida already had regulations that adequately protected mangroves.

County comments. Lee County staff notes that Lee County does not enforce mangrove protection, but defers to the Florida Department of Environmental Protection (DEP) throughout the unincorporated county. They have also expressed a concern with our use of the expression "protected to the greatest extent possible in a manner consistent with Florida law and policy" which they have said would "not be enforceable and problematic for staff to implement." Staff requested clarification that this provision would apply to single family dwelling units, which I confirmed. They advised that the Panel might want to consider a quantifiable setback instead of the "greatest extent possible" standard and that this might require an amendment to Chapter 14. They also asked that the Panel consider language to implement Objective 13 and Policy 13.1.13 of the Lee Plan:

> **OBJECTIVE 13.1:** Develop and maintain incentive and/or regulatory programs to ensure the long-term protection and enhancement of wetland habitats, water quality, natural upland habitats, community facilities, existing land use patterns,

infrastructure capacity, and historically significant features on Captiva Island. (Added by Ordinance No. 03-01).

POLICY 13.1.3: Lee County will encourage and support efforts by Captivans to strengthen existing vegetation ordinances to establish a landscaping code for Captiva Island that will require all new development, including single family residences, to implement minimum landscaping requirements intended to preserve, promote, and enhance the existing native vegetation and tree canopy on the Island. New landscaping requirements will focus on areas including, but not limited to, buffering and separation between new structures and Captiva Drive, buffering between adjoining properties, preservation and enhancement of native plant communities including, but not limited to, beach dune community, tropical hardwood hammock, coastal scrub and mangroves. (Added by Ordinance No. 03-01).

Response to County comments. I advised Ms. Ebaugh that the Panel formulated the "greatest extent possible in a manner consistent with Florida law and policy" language after a great deal of reflection and that its virtue is its simplicity. Identifying specific setbacks would make some mangrove destruction acceptable and other unacceptable, and that was not the direction that the Panel had shown an interest in pursuing. I advised that the Objective 13 additions were not a part of the original scope of services, and that the Panel had not considered them to date.

Water quality (aka septic systems; Sec. 33-522).

This section proposes to tie licensed OSTDS inspections to building permits and property sales and to strengthen existing septic system requirements by mandating *performance-based* OSTDS and would prohibit all septic systems within 75 feet of tidally influenced waters, but allowing a minimum setback of 50 feet for lots created prior to 1972. This provision was supported by a margin of 52.10% to 47.90%.

Survey comments. There appear to be few objections to the performance-based OSTDS requirement. Most of the objections to this draft language were from a large number of island residents and property owners who would prefer replacing the existing septic tanks with a sewer system. *This is an important issue, but it is beyond the scope of this project.*

County comments and response. County staff has suggested that we consider a threshold standard for expansions—e.g. 5% or 10% increase in floor space. I have requested that the County identify a standard which would be acceptable to them. County staff asked:

- Whether certification could apply to "building permits" as well as issuance of development orders or zoning approvals. (Tentative yes.)
- Who enforces paragraphs (B) and (C)? (Health Department)
- Why should this be included in LDC if the State already regulates it? (Because we are proposing a more rigid standard).

Estate zone rentals (Sec. 33-522(A) through (E)).

This section proposes to establish rental rules for properties in the RSC-2 zoned area (the Gold Coast) to allow rentals but make them more enforceable by allowing only one renter at a time per property. An exception for caretaker residences which are not rented is allowed, and there will be no net increase or decrease on density resulting from this change. This provision was supported by a margin of 54.49% to 45.51%.

This is one of the two most contentious issues which the Panel has considered—the other being building height. The Panel was looking for a language which allowed "Gold Coast" property owners (i.e. one acre lots or more) to rent their properties for events such as weddings and family gatherings. There was a concern that these rentals had gotten somewhat out of hand, especially when property owners with two or more units rented them to more than one group at a time. That was the justification for the single responsible party language.

Survey comments. This provision received generally positive support, especially on the Gold Coast, where respondents cited the current economic situation, the need to stimulate tourism, and property rights in general.

Proponents supported the proposed regulations for the following reasons:

- Property rights—the property owner should be able to rent his/her property to responsible parties.
- Economy—the current economic situation is extremely difficult. This would allow property owners to make an income from their investments.
- Allowing 'Gold Coast' rentals will tend to spread out the locations where tourists can be found.

Opponents opposed the draft regulations for the following reasons:

- Short-term rentals—Lee County prohibits rentals of less than seven days.
- They might allow the creation of "mini-resorts" of short-term rentals.

County comments. Except for a concern that the draft LDC amendments contain language which duplicates other sections of the Code, County staff has identified no concerns with this section.

My response. Public input was well articulated on both sides, but there is nothing new or unexpected on either side of this issue. Let's go back to our original assignment. The RSC-2 zoning category can be characterized as an area of large lots (one acre or more) with estate-sized main residences, sometimes with accessory units intended for guests or caretakers. Our research identified only four residences that have two or three accessory units. The Panel's directions to Morris-Depew and to me were to draft language clarifying what is already allowed: i.e. short-term rentals. They also asked us to prepare

language that assures that the property owner may not rent to more than one responsible party at a time, and we have done so.

Are rentals of less than seven days prohibited under the current Lee County Code? The language is somewhat ambiguous:

> *Dwelling unit* means a room or rooms connected together, which could constitute a separate, independent housekeeping establishment for a family, for owner occupancy, or for rental or lease on a weekly, monthly or longer basis, and physically separated from any other rooms or dwelling units which may be in the same structure, and containing sleeping and sanitary facilities and one kitchen. The term "dwelling unit" shall not include rooms in hotels, motels or institutional facilities." [Ch. 34]

This language does not specifically prohibit rentals of less than seven days. Let us suppose that that is the intent. This ordinance does not amend the definition of "dwelling unit" in Ch. 34 and the less-than-seven day restriction would continue to be enforceable by Lee County. The Panel considered an option specifying a minimum seven-day rental and decided not to. There seems to be no effective mechanism for enforcing the length of stay in private residences of this type.

In summary, the survey results confirm the Panel's direction. The purpose is to restrict the number of renters at one time. This proposed language does what the Panel asked us to do.

Height Restrictions # 1 ((Sec. 33-532(A and C))
Height Restrictions # 2 (((Sec. 33-532(A))

Height restrictions have been the most complex topic addressed by the Panel and have been the subject of workshops and extended public meetings. Our original assignment was to craft height restrictions that would continue to allow two stories over parking throughout the island, while encouraging architectural features, such as sloped roofs and roofline articulation, that evoke the island's visual ethos. The Panel wanted to assure that property owners had alternatives to the boxy features and flat-topped roofs which the existing 35-feet above base elevation/42-feet above sea level rule imposed when combined with changes in FEMA and FDEP regulations. The Panel repeatedly expressed the concern that the existing rules might prove to be a hardship in a post-hurricane scenario. The proposed language fulfills those very different needs. As long as the assignment was to balance property rights and individual choice with aesthetic harmony, this proposed language does both. Additionally, the Panel wished to set limits on the mass/total height allowed. Current County regulations set no ultimate limits on mass or height.

Survey results. This topic was divided in two for purposes of the survey. The response will address the issues together. Height Restriction #1 was summarized as follows:

> Allow owners to construct at least a two-story, 28-foot-high home over base flood elevation, even in areas of the island where federal or state requirements force structures to be built higher above sea level. (Areas where no minimum flood elevations are required must build no higher than 42 feet above sea level or 35 feet above average grade.) Measurement of height will begin at the lowest horizontal member, and will end at the mean (middle) of the roof slope (Sec. 33-532(A and C)). This proposal will maintain the "no variance" policy for building heights allowed on the island.

This provision was supported by a margin of 50.95% to 49.05%. Height Restriction #2 was summarized as follows:

> Encourage more sloped roofs (resulting in less boxiness or bulk) and more roof articulation (details such as cupolas, etc.), but set a limit on how high and large this articulation can be (four feet above roof peak or eight feet above sea level) and not to exceed 20% of the total front facade area (Sec. 33-532(A)).

This provision was supported by a margin of 54.52% to 45.48%.

Proponents supported the proposed regulations for the following reasons:

- *Restores earlier rights which were restricted by the existing regulations*: "This allows all property owners to build a home with two living levels. It also allows homes built before the height ordinance was enacted to rebuild their homes should they be catastrophically damaged by hurricane or fire."
- *Mitigates regulatory uncertainty on other levels*: "Lee County keeps raising the height where the building starts but they do not raise the upper limit. What you get are houses with flat roofs. The regulation should be so people can build a new home with 10 foot ceilings on the first floor and 9 foot on the second floor and still have an attractive roof line. Whatever that is, that should be the height. Talking about big mansions is not the subject. Good looking new home is the purpose."
- *Fairness of standard*. "Let's let all owners build 2 floors above the parking level, up to 10 feet ceiling heights."
- *Property rights and individual freedom:* "Let's let folks decide their own architecture. Get government out of people's lives." [NOTE: Since this provision allows more options than the existing language, this statement appears to support the change.]
- *Aesthetic improvement over existing regulation:* "Attractive houses is the goal. if roof heights need to be changed so be it."

Opponents opposed the draft regulations for the following reasons:

- *Existing regulations are working*: "The existing height policy works fine for Captiva. Leave it alone." and "We believe that the current height restrictions in the LDC and the Lee Plan have improved the quality of life on Captiva and that

the proposal to substantially loosen these restrictions by tying building heights to flood elevations has not been adequately justified."

- *Taller buildings are unattractive*: Allowing higher structures will move us toward being a junky tourist island like Ft. Myers Beach."
- *Average grade standard*: "The use of the term 'average grade' could be quite different as it relates to properties, maybe using the existing grade at the highest elevation of the proposed structure or the average of the four corners of the proposed structure would be more definitive. The use of the term 'mean [middle] of the roof slope' leaves a lot of room depending on the slope of the roof ie a 4/12 would be drastically different if it were a 24/12 pitch. Also some mention needs to be made of auxiliary structures such as fireplace structures etc. so as to define their height [usually codes require that they be 2' above any point 10' away] as someone might want it much higher." [NOTE: It is possible that this was a suggestion, and not a statement of opposition.]
- *Should exempt windmills*. "Windmills to generate electric power or provide pump energy should be allowed." [NOTE: It is possible that this was a suggestion, and not a statement of opposition.]
- *Creates loopholes*: "With the change in height restrictions, this provision seems like a lot of loopholes that will be filled by creative architecture."

County comments. Except for editorial comments, County staff has no substantive comments.

My response. The most commonly expressed objection was that existing standards are working. That has not been the consensus expressed by the Panel and most of the people who have appeared at its public meetings over the past year. The concern is that the existing regulations, in tandem with the upward drift of FEMA elevations and the changing coastal construction control lines were forcing some Captiva property owners to build boxy houses with flat-top roofs and low ceilings. The proposed language reflects those concerns.

Are taller buildings unattractive? That's an aesthetic judgment, but the proposed language promotes design features that should be considered attractive and island-appropriate by most Captiva residents, whether they agree with the draft ordinance or not—e.g. sloped roofs and roofline articulations such as cupolas and lanterns. There are maximum heights in this draft ordinance and the allowances for sloped roofs and roofline articulation do not allow property owners to run amok and build mid-rises a la Fort Myers Beach.

Does this language create loopholes? My working definition of a loophole, learned through many years of local government planning is that land use loopholes typically meet three tests: (1) They are complex, written in opaque legalese, intended to baffle the ordinary reader. (2) They are targeted to benefit a small class, sometimes only one person. (3) There is no obvious connection between the intent of the regulation and its provisions. This language is not complex. Section 33-532(A), which contains the core of the height regulations, is ten lines long. It imposes a 28 foot building height

standard. The exceptions are clearly laid out. This language does not create a special class—it applies throughout the island. Finally, the justifications are clearly stated.

Again, the survey results confirm the Panel's direction. With the exception of the observations about windmills and the average grade standard, there is no new material introduced here This proposed language does what the Panel asked us to do.

Signs #1: Sign Standards (Sec. 33-554(A)-(I))
Signs #2: Temporary Real Estate Signs (Sec. 33-554 (G))
Signs #3: Nonconforming signs (Sec. 33-559 and 33-55(11))

The three questions on the survey relating to signs received many and varied comments. Sign regulations are always controversial and are often the most debated chapter in local government land development codes. Our instructions from the Panel were to ban commercial "sold" and "for rent" signs and to make "for sale" signs as unobtrusive as possible; and to allow identification signs with regulations on size tied to road frontage and to allow limited illumination; to make contractor signs smaller. Our instructions were also to craft language which would allow the continuation of *nonconforming identification signs*.

Survey results. Section 33-554 (Signs #1) would establish exceptions to Article 33, reducing the allowable size contractor signs, etc. It proposes a new standard for identification signs not exceeding 2.0 square feet on lots with total frontage of less than 100 feet. For lots with 100 feet or more of frontage the old standard of 4.0 square feet would remain in place. Illumination of ID signs would be permitted, subject to restrictions. This provision was supported by a margin of 51.83% to 48.17%.

Section 33-554(G) (Signs #2) would set new standards for temporary real estate signs in terms of size, placement, number and length of time they can be up. Commercial "For Rent" and "Sold" signs would be eliminated. This provision was supported by a margin of 51.55% to 48.45%.

Sections 33-559 and 33-55(11) (Signs #3) allows existing signs that are not prohibited by this code to be maintained, but will require them to adhere to the new standards if they are destroyed or removed. Specifically, it allowed the 'grandfathering' of one type of sign—the residential identification sign. This change, as presented in the survey, was **not supported** by a margin of 48.13% in favor to 51.87%.

Given the overlap of these three survey questions (a topic of frequent observation by our respondents), the comments received can be combined and summarized. Supporters in general had little to say. One respondent observed that: "The proliferation of commercial, frequently oversized, signs has dramatically damaged the attractiveness and beauty of Captiva." Since this language requires the removal of many signs (i.e 'for rent' and 'sold' signs) and reduces the allowable size of others, we regard this as support. Another

respondent "[t]his change would represent the most important beautification project seen on Captiva since hurricane Charley").
Objections can be summarized as follows.

- *Objections to regulation in general*: "I support fewer laws and less regulation."
- *Current regulations are sufficient*: "The CCA believes the principal problem with the sign regulations is with enforcement--not the regulations themselves. We object to language which, intentionally or not, appears to have the effect of grandfathering signs which do not comply with the current regulations, but which are not specifically listed as 'prohibited' signs."
- *Objections to illumination of identification signs*: "No illumination...none...no illumination!!!"
- *Objections to (perceived) grandfathering*: "All nonconforming signs should be removed- no exception. Why allow exceptions when so much effort to regulate signs has been discussed."

County comments. County staff requests that we make reference to LDC Ch. 14-76(b)(8) concerning illuminated signs. Specifically, we should prohibit mercury vapor and metal halide lighting and incorporate review of by Department of Environmental Services staff for sea turtle protection prior to issuance of certificate of occupancy. They also asked that we clarify that real estate signs are not regarded as commercial signs and that we specify that directional signs in Sec. 33-55(15) not be placed within County right of way unless approved by Lee County Department of Transportation. Finally, they request that all definitions be moved to the definitions section.

My response. I respect the position expressed by several respondents that regulations are not a good thing in general, but I disagree and cite as evidence the dreadful visual blight of communities that did not regulate signage and appearance until it was too late—such as Pasco (US 19) and Osceola (US 192) Counties in Central Florida. Captiva is gorgeous in its natural state, and some level of regulation is required to keep it that way. The best compromise possible between individual property rights and the public good is to craft regulations that are as simple as possible, based upon the maximum amount of public input. I have been a professional planner for more than twenty-five years, and I have never seen public participation at this high level. The Panel has been patient and deliberate in all of their actions.

I think the CCA misunderstands the intent of these proposed amendments and particularly the ones concerning signs. Since their participation in this process has been limited, notwithstanding the many public meetings and workshops which the Panel has conducted, they have not discussed these concerns in a public forum over the past year. Furthermore, I disagree that current regulations are adequate. Existing regulations do not, for instance, prohibit sold signs or for rent signs and they allow commercial signs that are too large in some cases.

Illumination of identification signs is a legitimate issue. It was not a part of our original assignment and was added in order to aid visitors and emergency vehicles in finding

dwelling units that are hidden behind high opaque barriers, such as shrubs. For that very reason, illumination is unlikely to have much impact on sea turtles as all identification signs are along the roadway and not the beach.

Regarding grandfathering, I think there may be some misunderstanding of the intent of the changes which we are proposing. 'Grandfathering' applies *only* to identification signs: The underlined language is new. The remainder is the language on Sec. 30-251, which is currently in force:

> Sec. 33-559. Nonconforming signs
> With the exception of nonconforming identification signs as provided in Section 33-554(A), every existing sign of every type located upon Captiva Island which does not comply with this article shall be deemed nonconforming signs upon the effective date of this ordinance. For purposes of this ordinance, prohibited signs, as identified in Sec. 33-556 shall not be considered nonconforming.

There are two proposed changes here. The first applied only to *identification signs.* If your *existing sign* is a little larger than 4.0 square feet, you can keep it. I haven't measured these signs, but I suspect that there are a few of these signs which exceed the limit. The other makes double sure that it is clear that there is no grandfathering of prohibited signs. In my opinion, this addition does no harm and may offer additional clarity. That is all the grandfathering that has been introduced in these draft revisions.