

NOTE: A request form is available from the Deputy Town Clerk; please fill it in and return it prior to the start of the meeting if you would like to speak during public comment. When you speak, you must come to the podium in the front and clearly state your name and address for the record. Please turn off or mute your cell phone or pager at the start of the meeting. Thank you.

TOWN OF BAY HARBOR ISLANDS

SPECIAL COUNCIL MEETING AGENDA

November 30, 2021

SPECIAL NOTICE – HYBRID MEETING

The Town of Bay Harbor Islands Special Council Meeting will take place in a Hybrid format where a quorum of the Town Council Members will be physically present at the Town Hall Council Chambers. Members of the public are welcome to participate in person or virtually via the Zoom platform.

Zoom Link: <https://us06web.zoom.us/j/83510621892>
Meeting ID: 835 1062 1892

To request to speak during Zoom Public Comment, please utilize the “raise your hand” Zoom feature on your electronic device. You will be recognized at the direction of the Zoom Meeting Host.

Members of the Public may also be admitted to the Council Chambers in person, for Public Comment, subject to social distancing and facial covering.

In addition, any member of the public who does not wish, or is unable to participate through the Zoom video conferencing platform, but would still like to participate can do so by listening to the meeting as it happens by dialing the Toll-free number below:

US Toll Free Number: 877 853 5247 or 888 788 0099
For higher quality, dial a number based on your current location.
US: 1 646 558 8656 or 1 301 715 8592 or 1 312 626 6799
Meeting ID: 835 1062 1892
Participant ID: Press the # key

To request to speak: Dial *9 on your telephone device to activate the “Raise your Hand” feature on the zoom platform.

Members of the Public can also submit their request to speak and/or comments via e-mail to the Office of the Town Clerk at achang@bayharborislands-fl.gov

CALL TO ORDER: 6:00 p.m.

PLEDGE OF ALLEGIANCE:

ROLL CALL:

1. **Consideration and Approval** of an ordinance on second reading amending Sections 5-20 - 5-25 of Article II of the Town Code entitled Planning, Design and Zoning Board Approval to change the title of said article to Design Review Board Approval. Enclosed is a copy of the proposed ordinance and other supporting documents.

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA, AMENDING THE TOWN'S CODE OF ORDINANCES AS RELATED TO THE PLANNING AND ZONING BOARD; AMENDING CHAPTER 5 ENTITLED BUILDING AND CONSTRUCTION; AMENDING ARTICLE II, SECTIONS 5-20 – 5-25 ENTITLED PLANNING & ZONING BOARD APPROVAL TO CHANGE THE TITLE OF SAID ARTICLE II TO DESIGN REVIEW BOARD APPROVAL; PROVIDING FOR INCORPORATION OF RECITALS; PROVIDING FOR CONFLICT AND REPEALER; PROVIDING FOR CODIFICATION; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

STAFF RECOMMENDATION: Council Discretion

POLL VOTE

ADJOURNMENT: Approximately 6:30 p.m.

Pursuant to Florida Statutes 286.0105, the Town hereby advises the public that should any person decide to appeal any decision of the Town Council with respect to any matter to be considered at this meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose he or she 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.

AGENDA ITEM REPORT

November 30, 2021

ITEM NUMBER: 1.

ITEM: Consideration and Approval of an ordinance on second reading amending Sections 5-20 - 5-25 of Article II of the Town Code entitled Planning, Design and Zoning Board Approval to change the title of said article to Design Review Board Approval. Enclosed is a copy of the proposed ordinance and other supporting documents.

DESCRIPTION:

At the October 13th Regular Council Meeting, the Town Council held a discussion regarding the newly enacted legislation HB401 that mostly amended statutes governing the Florida Building Code and Chapter 163.3202 of the Florida Statutes that regulates Land Development Regulations. The changes to Chapter 163 concerning limitations on Land Development Regulations applied to single-family and two-family (duplex). As a result, the Town Council directed staff to prepare a draft ordinance to include their suggestions, which included an amendment to the Planning & Zoning Board's name, the purpose of plan review, etc.

On November 10, 2021, the Town Council held a brief discussion and made the following modifications:

* The code amendment will change the name of the the Planning & Zoning Board to Design Review Board.

* Meetings of the Board will be held once a month on the first Tuesday of the month or as otherwise needed.

* If additional meetings during the month are desired, the Chairperson or at least two (2) Members of the Board may request a meeting.

Enclosed is a copy of the proposed ordinance, Town Attorney Geller's legal opinion and other supporting documents.

PREVIOUS MEETING VOTE:

COUNCIL VOTE			
NAME	FOR	AGAINST	ABSENT
Mayor J. Fuller	X		
Vice Mayor E. Tricoche	X		
Council Member S. Bruder			X
Council Member M. Diallo	X		
Council Member J. Leonard	X		
Council Member I. Salver	X		
Council Member Robert Yaffe	X		

RECOMMENDED ACTION:
Council Discretion

FINANCIAL ANALYSIS:

BUDGET IMPACT:

Submitted By: Alba L. Chang, Town Clerk

ATTACHMENTS

1. 11-22-2021 BHI Draft Ord PZB
2. BHI Draft Ord Text Exhibit PZB SFR Rev Nov 22 2021
3. TA -opinion on Applicability of HB 401 to BHI P&Z Board procedures
4. BHI Summary of HB 401 with MMPA Comments 11.3.21

ORDINANCE NO. _____

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA, AMENDING THE TOWN'S CODE OF ORDINANCES AS RELATED TO THE PLANNING AND ZONING BOARD; AMENDING CHAPTER 5 ENTITLED BUILDING AND CONSTRUCTION; AMENDING ARTICLE II, SECTIONS 5-20 – 5-25 ENTITLED PLANNING & ZONING BOARD APPROVAL TO CHANGE THE TITLE OF SAID ARTICLE II TO DESIGN REVIEW BOARD APPROVAL; PROVIDING FOR INCORPORATION OF RECITALS; PROVIDING FOR CONFLICT AND REPEALER; PROVIDING FOR CODIFICATION; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, HB 401 recently became law in Florida, regulating the ability of municipalities to review plans for single and two-family residences; and

WHEREAS, the Town of Bay Harbor Islands desires to amend the Town Code to comply with the new law; and

WHEREAS, the Town Council periodically studies various land development trends and issues, and if felt to be appropriate amends the Town's Land Development Code regulations accordingly; and

WHEREAS, the Town retains the services of urban planning professionals to study land development activities and land development regulations and recommend strategies and Code modifications to address identified problems; and

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA:

Section 1: The foregoing recitals are adopted and hereby incorporated as if fully set forth herein.

Section 2: That the Town of Bay Harbor Islands Building and Construction Code is hereby amended to modify Sections 5-20 – 5-25 related to the planning, design and zoning board approval, as more fully set forth in the attached Exhibit "A", and by reference are made a part hereof.

Section 3: That if any section, paragraph, sentence or word of this Ordinance or the

application thereof to any person or circumstance is held invalid, that the invalidity shall not affect the other sections, paragraphs, sentences, words or application of this Ordinance.

Section 4: That it is the intention of the Town Council of the Town of Bay Harbor Islands, and it is therefore ordained, that the provisions of the Ordinance shall become and be made a part of the Town of Bay Harbor Islands' Code of Ordinances, that sections of this Ordinance may be re-numbered or re-lettered to accomplish such intentions, and that the word "Ordinance" shall be changed to "Section" or other appropriate word.

Section 5: That all Ordinances, parts of Ordinances, Resolutions or parts of Resolutions in conflict herewith be and the same are hereby repealed to the extent of such conflict.

Section 6: That this Ordinance shall be in full force and take effect immediately upon its passage and adoption.

PASSED on First Reading this 10th day of November, 2021.

PASSED on Second Reading this 30th day of November, 2021.

**JOSHUA D. FULLER
MAYOR**

ATTEST:

**ALBA L. CHANG, CMC
TOWN CLERK**

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

**JOSEPH S. GELLER, ESQ.
GREENSPOON MARDER, LLP
TOWN ATTORNEYS**

Note: Yellowed text represents suggested changes between 1st reading and 2nd reading of this Ordinance and will be edited / removed, in addition to any other Town Council changes, prior to final signatures.

Exhibit "A"

Amendments to the Bay Harbor Islands Buildings and Construction Code

CHAPTER 5 - BUILDINGS AND CONSTRUCTION

ARTICLE II. – ~~PLANNING AND ZONING BOARD~~ DESIGN REVIEW BOARD APPROVAL

Sec. 5-20. - Contents of preliminary plan.

For the purposes of this article, preliminary plans for a building shall consist of the following:

- (a) An artist's or architect's colored drawings of all sides of the structure as completed.
- (b) A landscape architect's colored drawings of the landscaping on all sides.
- (c) An architect's drawing of the parking area showing the parking spaces and a plot plan.
- (d) An architect's plans of representative floors of a multifamily building designating typical apartment layouts, or of the entire single-family unit.
- (e) A description and samples of all materials to be used.
- (f) An architect's official computation of the lot coverage of the proposed structure in conformance with town ordinances.
- (g) A series of colored aerial photographic representations (i.e., front/rear/sides) of the subject site with the proposed site improvements superimposed onto the subject site illustrating how the new proposed project relates to neighboring properties (scale/compatibility).
- (h) Color renderings. A series of colored graphic architectural representations (i.e., front/sides/rear) illustrating how the new proposed project relates to neighboring properties.
- (i) Submittal of an impact analysis report (IAR) demonstrating compliance with the adopted concurrency Level of Service (LOS) requirements listed in subsection [11-8.4](#) of the Town's Code of Ordinances. The applicant shall pay for cost of preparing the IAR and be responsible for the town's cost of reviewing and processing said report, including town staff and outside consultants deemed necessary by the town.
- (j) Traffic impact analysis. As part of the impact analysis report (IAR) each application, unless specifically exempted, shall provide an estimate of the expected vehicular trips to be generated by the new development. The analysis shall include estimates for average daily trips, a.m. peak hour trips, and p.m. peak hour trips. If a previous land development project existed on the site, the analysis shall include a comparison of the trips generated by the previous development and new development noting the estimated increase or decrease in trips. If deemed necessary by the town manager for

a major development project, based on the quantity of expected trip counts or expected neighborhood impacts, the town may require a full-scale traffic study, the contents of which shall comply with the minimum criteria on file with the town. Such full-scale traffic study shall be prepared by a consulting engineer retained by the town, at the applicant's full expense.

Sec. 5-21. - Definition of "final working plans."

For the purposes of this article, "final working plans" are those plans together with specifications which meet all requirements of the building code for the issuance of a building permit.

Sec. 5-22. - Preliminary plan approval prior to submission of final working plans.

Preliminary plans must be approved by the ~~planning and zoning~~ design review board prior to the submission of final working plans of any building.

Sec. 5-23. - Time for submitting final working plans.

Final working plans must be submitted to the town manager within 365 days of the approval of the preliminary plans. If not submitted within that time, the approval of the preliminary plans is automatically vacated. The town manager may extend the 365-day period for no more than 180 days.

Sec. 5-23.01. – ~~Planning and zoning~~ Design review board membership; appointment; vacancies; terms; removal; meetings; officers; and quorum.

(a) *Members.* ~~The town council will resign as members of the planning and zoning board effective September 10th, 2012 as per Ord. No. 939. Thereafter, the a separate planning and zoning board was created that will henceforth effective December X, 2021 be called a~~ Effective November 30th, 2021, the planning and zoning board which heretofore existed, shall be retitled as the design review board, shall consisting of seven members. Up to five of the members shall be presently employed full time or were employed full time in the field of engineering, architecture, land use and zoning law, city planning, construction, or any other field which substantially relates to the planning and development of real estate. The professional members are not required to be residents of Bay Harbor Islands. The two remaining members shall be residents of the town for a minimum of one year and they are not required to possess any professional license or professional designation. Each member of the ~~planning and zoning~~ design review board shall serve on the ~~planning and zoning~~ design review board for a two-year term unless they resign, are no longer able to serve, or are otherwise removed as set forth in subsection (d).

(b) *Staggered board.* The ~~planning and zoning~~ design review board shall be a staggered board. As such, as a one-time event in 2020, three of the seven appointed members appointed by the town council (who shall be selected randomly through a lottery type drawing") shall serve on the ~~planning and zoning~~ design review board for a one-year term. After the 2020 appointments, each member shall be appointed to serve on the ~~planning and zoning~~ design review board for two-year terms as set forth in subsection (a), above.

(c) *Appointment to the ~~planning and zoning~~ design review board.* Each town council member shall submit one or more persons as candidates for consideration by the town council for appointment to the ~~planning and zoning~~ design review board. In order for a candidate to be appointed to the ~~planning and zoning~~ design review board, the candidate must meet the membership requirement of subsection (a) and must be approved by at least five town council members.

(d) *Vacancies.* Should a ~~planning and zoning~~ design review board member resign, lose the residency requirement of subsection (b), be removed pursuant to subsection (d), or otherwise not be able to serve on the ~~planning and zoning~~ design review board for whatever reason, the member's vacancy shall be filled pursuant to subsection (b).

(e) *Removal of members.* The town council, upon the vote of at least five council members, may remove any ~~planning and zoning~~ design review board member, with or without cause, at any time. Any member who misses three consecutive regularly scheduled ~~planning and zoning~~ design review board meetings or misses five meetings in any 12-month period may be removed from the ~~planning and zoning~~ design review board.

(f) *Meetings.* ~~The~~ One regularly scheduled ~~planning and zoning~~ design review board meeting shall occur in the evening on ~~either~~ the first Tuesday ~~and third Tuesday~~ of every month or as otherwise needed. If additional meeting(s) during the month is desired, the chairperson or at least two members of the board may request a meeting.

(g) *Officers.* One member shall be elected by the ~~planning and zoning~~ design review board as chairperson. One member shall be elected by the ~~planning and zoning~~ design review board as vice-chairperson. The chairperson and vice-chairperson shall serve a term of one year. A new election shall occur at the conclusion of the one-year term. In the event that the chairperson position becomes vacant within the one-year term, the vice-chairperson shall be appointed as chairperson for the duration of the prior chairperson's term and the ~~planning and zoning~~ design review board shall elect a member to the vice-chairperson position for the duration of the prior vice-chairperson's term. The chairperson shall preside at all ~~planning and zoning~~ design review meetings. In the chairperson's absence, the vice-chairperson shall preside. The chairperson shall submit any and all reports and recommendations of the ~~planning and zoning~~ design review board to the town council. The town shall provide a secretary for the ~~planning and zoning~~ design review board and the town clerk shall be the custodian of all records, books, and journals of the ~~planning and zoning~~ design review board.

(h) *Quorum.* Four present members shall constitute a quorum.

(i) *[Rules, regulations.]* The town council shall promulgate such rules and regulations as may be reasonably necessary to govern the operations of the ~~planning and zoning~~ design review board in performance of its duties. Proper public meeting decorum shall occur, with respect for landowners, developers, and design professionals.

Sec. 5-23.1. - Architectural and aesthetic review of plans; failure to comply with plans as agreed.

Purpose. The purpose of this section is to promote compatibility and cohesiveness in architectural design while preserving, to the extent deemed appropriate, the Town's historic architectural and neighborhood character, providing a framework for new and redevelopment reviews that respond to the existing context of the built environment and

open spaces. The design review board shall review and evaluate applications as to whether the design of the new or redevelopment and/or improvements within the Town are compatible with existing development, are of cohesive architectural character, provide sufficient buffering of uses from public property and rights-of-way and adjacent properties, and are consistent with all codes and/or supplemental design criteria, and meeting protocols approved by the town council by ordinance, resolution or other action and kept on file with the Town Clerk. The purpose and duties set forth above are meant to be compliant with ss. 163.3202 relative to single-family and two-family development reviews and approvals.

(a) ~~The planning and zoning design review~~ board shall examine, approve, approve with conditions, or disapprove the site development plans prior to the issuance of a building permit in any matter subject to its jurisdiction after consideration of whether the following criteria are complied with:

(1) The plan for the proposed structure or project is in conformity with ~~good taste~~, good design and in general, contributes to the image of the town as a place of beauty, spaciousness, harmony, taste, fitness, broad vistas and high quality.

(2) The proposed structure or project is not, in its exterior design and appearance, of inferior qualities such as to cause the nature of the local environment or evolving environment to materially depreciate in appearance and value.

(3) The exterior building components and exterior architectural features shall have attractive and cohesive architectural character.

(4) The orientation, appearance, and design of exterior architectural features of new and existing buildings and structures, and/or modifications to existing buildings and structures, shall indicate sensitivity to and shall be compatible with the streetscape and adjacent property, enhance not detract from the appearance of surrounding properties, and create or maintain view corridors.

(5) Landscaping and paving materials shall ensure a cohesive relationship with and enhancement of the overall site plan design.

(6) Buffering materials shall ensure that headlights from vehicles, noise, light, and mechanical equipment are adequately shielded from public view, adjacent properties, and sidewalks.

~~(3)~~ (7) The proposed structure is in conformity with standards of this Code and other applicable ordinances insofar as the location and appearance of the buildings and structures are involved.

~~(4)~~ (8) The proposed structure or project is ~~in harmony~~ consistent with other actual and proposed developments in the general area, considering the following additional criteria:

a. Site layout, orientation, location of structures and relationship to one another and to open spaces, ~~in~~ and topography.

- b. Harmonious relationship with existing and proposed adjoining developments, avoiding both excessive variety and monotonous repetition, but allowing similarity of style, if warranted.
- c. Maximum height, area, setbacks and overall masks as well as parts of any structure (buildings, walls, screens, towers or signs) and effective concealment of all mechanical equipment.
- d. Building design, materials, and colors to be sympathetic with surroundings.
- e. Harmony of materials, colors, and composition of low sides of a structure which are visible simultaneously.
- f. Consistency of composition and treatment. The choice of materials and their usage shall be conducive to regular maintenance and durability, given the Town's location to surrounding saltwater bodies.
- g. Location and type of planting with due regard for climatic conditions, preservation of specimen and landmark plantings upon a site, and proper irrigation to insure maintenance of all plant materials.
- h. Design and appropriateness of signs, as well as interior and exterior lighting of signs.
- i. Graphics, as understood in architectural design.
- j. The design review board shall not have jurisdiction over the number, types or layout of interior rooms or spaces in single-family homes or two-family homes. but may offer nonbinding suggestions in design.

(b) If the above criteria are met, the application shall be approved. Conditions may be applied when the proposed building or structure does not comply with the above criteria and shall be such as to bring said structure or project into conformity. If any application is disapproved, the ~~planning and zoning~~ design review board shall detail in its findings the criterion or criteria that are not met. The action taken by the board shall be reduced to writing, signed by the chairman, and a copy thereof made available to the applicant upon request. Any action taken by the ~~planning and zoning~~ design review board may be appealed to the town council, whose decision on appeal shall be final. If the town council approves a land development application after consideration by the design review board (Gateway site / B-1 Business District building height / RM-3 building height / appeals / other), the action of the town council shall take precedence over the actions of the board.

(c) Subsequent to ~~planning and zoning~~ design review board approval, if the proposed structure or project is not constructed in ~~accordance~~ substantial conformity with the plan proposed and approved by the ~~planning and zoning~~ design review board, no certificate of occupancy shall be issued, and a fine may be levied against a real property owner in an amount not to exceed \$250.00 per day per unit for each day of continued violation. And in the event that a certificate of occupancy has been issued previously, it shall be revoked subject to revocation and no further occupancy shall be permitted until the proposed structure or project is brought into substantial conformity with the plan approved by the ~~planning and zoning~~ design review board. Provided

further, in the event that occupancy is not discontinued, then a fine shall be levied in ~~the an~~ amount ~~of up to~~ \$250.00 per day per unit for each day of continued occupancy until the proposed structure or project is brought into substantial conformity with the plan approved by the ~~planning and zoning~~ design review board. ~~The town manager, or their designee(s), may approve minor modifications to final working plans and building permit plans that do not significantly alter the original design based on in order to meet building or fire code requirements, or other project refinements, provided the modifications do not conflict with any conditions of approval imposed by the design review board, and are otherwise in substantial conformity with the approved plans.~~

Sec. 5-24. - Time for obtaining building permit.

A building permit must be obtained within 90 days of the approval of the final working plans. The town manager may extend this period for no more than 90 days.

Sec. 5-25. - Submission of plans on behalf of record owner.

All preliminary plans and final working plans must be submitted to the ~~planning and zoning~~ design review board on behalf of the record owner of the real property upon which the building is to be constructed.

Alba Chang

From: Joseph Geller <Joseph.Geller@gmlaw.com>
Sent: Friday, October 8, 2021 8:54 PM
To: Joshua D. Fuller; Joshua Fuller; Elizabeth Tricoche; Isaac Salver; Robert Yaffe; Stephanie Bruder; Molly Diallo; Jordan W. Leonard
Cc: Michael J. Miller; Mike Mesa; Maria Lasday; Jenice Rosado; Alba Chang
Subject: opinion on Applicability of HB 401 to BHI P&Z Board procedures
Attachments: BHI HB 401 Staff Analysis Sept 2021.pdf

The undersigned was requested to opine on the effect of recently-adopted HB 401 on the operations of the Town's Planning and Zoning Board.

I have consulted with Michael Miller, the Town's Planning Consultant, and at my request, he prepared a staff analysis of HB 401 and of the Town Codes which relate to it.

A copy of that report is attached hereto and referenced herein.

As Mr. Miller points out, while HB 401 principally relates to the Florida Building Code (FBC), one section revises Chapter 163, specifically Section 163.3202, Land Development Regulations.

In pertinent part, it limits the authority of local governments to apply their LDR's to single family and two-family (duplexes) homes, subject to certain limitations and exemptions.

The limitations and exemptions are listed in Mr. Miller's memorandum.

The question presented is whether the Town is prohibited from exercising LDR control over single and two-family homes (there are certain limitations and exceptions, like height, bulk, orientation, lot location, and buffering which are still permitted), or whether we can utilize one of the seven (7) listed exemptions in order to continue to operate as we have done previously.

My opinion follows herewith.

The seven (7) exemptions from the applicability of the new law are listed in Mr. Miller's memorandum.

He indicates that he believes, as a planner, that Exemptions 1,2,4 and 5 are clearly not available to the Town. In my legal opinion, the Town does not qualify for those exemptions.

Accordingly, I will focus on those where there is at least some argument available to the Town. Those are Exemptions 3,6 and 7.

Exemption 3 states that the LDR's in question "are adopted pursuant to and in compliance with Chapter 553", FS. Chapter 553 is the enabling statute for the Florida Building Code (FBC). Mr. Miller thought this might possibly apply to BHI.

In a sense, all LDR's might be said to be adopted pursuant to the FBC. The exemption is extremely vague, and read expansively, would virtually negate the entire bill.

That's one reason I do not believe it will be read that way.

I think it is more likely that it is interpreted to apply to things which are adopted due to a specific mandate of the FBC. That is much narrower.

In sum, I do not think it likely that this exemption does us much good.

Exemption 6 is for dwellings "located in a planned unit development or master planned community" created by a local governing body.

Mr. Miller provided a historical perspective as to the Town's creation by Shepard Broad as one integrated mixed-use development, in a single plat, which plat was approved by Dade County in 1946.

Accordingly, he theorizes that BHI could qualify as a master planned community.

Since both the original deed restrictions and the original Land Development Regulations have been superseded, I don't know that it is accurate to describe the Town as a master planned community, if it ever was.

I also don't think that language is in keeping with modern usage, where I think master planned community is more likely intended to be similar to the other term used, planned unit development (PUD).

Kudos to Mr. Miller for being creative, and I certainly can't rule it out, since it's a brand new statute which has not yet been judicially interpreted, but I'm skeptical.

That brings up to exemption #7, for dwellings located within a jurisdiction which "has a design review board or architectural review board."

The Town does not presently have either one of those entities.

Mr. Miller points out that certain of the duties ascribed to our P&Z Board in the Town Code are similar in nature to the duties assigned to design and architectural boards in nearby municipalities.

This is an interesting observation, but I don't think it is enough. The plain language of the statute is that a DRB or an ARB must exist, and we don't have one. Equivalence of duties is not enough.

However, Mr. Miller also suggests another, relatively simple, alternative: amend the Town Code to change the name of P&Z to ARB or DRB.

This might actually work. Emphasis, however, on the "might".

Nothing I have seen explicitly prohibits this. Nothing authorizes it either. Since it's a new statute, no court has been called upon to interpret it.

I am skeptical that the answer could be so easy. The statute was adopted to cure a perceived problem, one of overreach by cities in regulating one and two family homes.

I doubt the author of the legislation would be happy that the effect of their new statute can be blunted by a simple name change.

I have heard some suggestion that, in order to take advantage of this exemption, a municipality needed to have a qualifying entity on the books before the effective date of the new statute, which was July 1, 2021.

Even if that is true, a name change for an already existing entity might be different than creation of an entirely new entity.

Still, speaking practically, this course of action might (that word again) result in a legal challenge to the Town's actions. Because it is a new statute, it is impossible to accurately predict how the courts would rule in what is called a case of first impression.

What is inarguable is that, if the Town simply allowed the new statute to take effect as it is intended, and stopped attempting to regulate the things which the statute prohibits in one and two family homes, while continuing to regulate those which are allowed, including all of those elements in multi-family (3 and above) buildings, there is no potential liability to the town.

We can't be sued for complying with the new law.

If the Town Council decides to simply let the new law take effect as intended, we should still amend the Town Code to delete the now-unenforceable language.

If the Town Council instead wishes to try to avoid the effect of the new law, and continue with the current level of review of one and two family homes, then we will prepare a Code amendment with at least a name change, and maybe some further revisions as well, possibly including some findings suggested by other elements of Mr. Miller's memorandum.

I would be happy to answer any questions anyone may have about the foregoing.

Joseph S. Geller, Esq.
Greenspoon Marder. LLP



Joseph S. Geller, Esq.

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To: achang@bayharborislands-fl.gov [Remove](#) this sender from my allow list

From: joseph.geller@gmlaw.com

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**TOWN OF BAY HARBOR ISLANDS
COMMUNITY DEVELOPMENT
MEMORANDUM**

To: Mayor & Town Councilmembers
Maria Lasday – Town Manager
Joseph S. Geller Esq. – Town Attorney
Town of Bay Harbor Islands

From: Michael J. Miller, AICP 
Consultant Town Planner

Date: September 17th, 2021

Subject: Town of Bay Harbor Islands, Florida
2021 Florida House Bill (HB) 401
Land Development Regulations Related to Building Design Elements
May Not be Applied to Single-family / Two-family Dwellings – Exemptions
Analysis of Possible Impacts to Town
MMPA Acct. No. 01-0702-0500

ISSUE

During the 2021 Florida Legislative Session a Bill (HB 401) was approved mostly related to changes in the statutes governing the Florida Building Code (FBC) (Ch. 553 F.S.). However, also included was an unrelated change to Chapter 163.3202 that regulates Land Development Regulations. The Governor approved HB 401 and the effective date of the changes was July 1st, 2021. The changes to the Florida Building Code are mostly procedural but also address FEMA flood map issues as well. While the majority of changes to the FBC enabling laws may not affect local governments very much, the changes to Chapter 163 concerning limitations on Land Development Regulations as applied to single-family and two-family (duplex) can significantly impact local governments. Many local governments are just learning of these changes and trying to understand their impacts. While a number of exemptions were successfully added to mitigate their impacts on some communities, others do not fall conveniently into one or more of the exemptions. Some local governments may not care about architectural controls or the appearance of their communities but others, particularly planned higher-end communities, are outraged. Some communities have created unique areas with specified architectural styles that would be banned (Coral Gables (Mediterranean Revival) / Boca Raton (Mizner) / Davie (Western) / etc., adopted limited exterior building color palettes, and architectural guidelines. It is widely expected that a request to modify / repeal the Chapter 163.3202 amendments will be filed next year and repeatedly thereafter, as well as legislation to ban the state from interfering with local government land development controls.

**Town of Bay Harbor Islands
2021 Florida House Bill (HB 401)
Land Development Regulations Related to Building Design Elements
May Not be Applied to Single-family / Two-family Dwellings – Exemptions
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As related to the Land Development Regulation changes that affects a local government's control of single-family and two-family (duplex) dwellings, in summary, HB 401 included an amendment to create a new section (5)(a) as follows:

(5)(a) Land Development Regulations relating to building design elements may not be applied to a single-family home or two-family dwellings unless:

Note: Seven (7) exemptions are included which will be expanded upon below. Of importance is one of the key exemptions in the new provisions do not apply to typical Zoning Code criteria such as building height, bulk, orientation, or location on a lot (setbacks), or the use of buffering / screening to minimize adverse physical / visual impacts, or to protect the privacy of neighbors. But those regulations that are defined as "Building Design Elements" could be banned.

See the attached Florida Statute excerpts from HB 401 and the Florida House of Representatives Staff Final Bill Analysis for HB 401. The staff's research focuses on what several other states have adopted (Arkansas / Georgia / North Carolina / Tennessee) – not a perceived Florida problem. It is not clearly stated what led to this change, or why this amendment was included in a Bill on changes to update the Florida Building Code enabling legislation, as the Ch. 163.3202 changes have nothing to do with the Florida Building Code.

As defined in HB 401 / Chapter 163.3202 the term "Building Design Elements" means a local government cannot regulate the following, unless one or more of the exemptions is met:

- External building colors
- The type of style of exterior cladding material
- The style or materials of roof structures or porches
- The exterior nonstructural architectural ornamentation
- The location or architectural styling of windows or doors
- The location or orientation of the garage
- The number and types of rooms
- The interior layout of the rooms

As to one of the allowed exemptions, the new Ch. 163.3202 text includes in subsection (5)(b) definitions for a "Planned Unit Development" or "Master Planned Community". Chapter 163.3184 of the Community Planning Act has similar but different definitions of "Master Development Plan" or "Master Plan". These may be intended to be different things, but it is not clear and can be interpreted differently.

Finally, subsection (5)(c) states these new laws do not affect the validity of or enforceability of private covenants or other contractual agreements related to building design elements.

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My first reaction, and those of most of the Florida Planning Association (FAPA) legal scholars / professional City Planners, as discussed at the recent annual state planners conference held in Downtown Miami in early September of this year, questioned how this new statute text is remotely related to a matter of State importance / significance – most believe this should be a local government and community resident decision. Why are only single-family homes / duplexes excluded from common building design element standards and architectural comments to encourage good design will be banned? The vast majority of the Town's residents live in multi-family complexes that will still be subject to the Town's architectural criteria / comments, as well as commercial development (equal protection / treatment under the law) – why exclude a small group of residents). Should the PZB members be instructed or guided in better / more respectful public commentary and protocols – I would say yes based on some recent reviews.

I have discussed this issue with Ms. Lasday (Town Manager), Mr. Geller (Town Attorney), Mike Mesa (Bldg. Official), and several Town staff members involved in the land development review / approval process, to understand the Town's reaction to this state law mandate, to analyze the Bill's impact to the Town's current land development review / approval process, to consider if any of the exemptions may apply to the Town, to consider historical / recent Planning & Zoning Board (PZB) actions and comments on single-family homes designs, examine the Town's Codes, and possible administrative changes / Code amendments to either comply with an allowable state exemption, or restrict the PZB / staff actions. Again, the new Ch. 163.3202 changes only apply single-family homes and two-family developments (the Town has only a few duplexes left intermingled on the East Island).

The Town will be presented with the new HB 401 provisions, this staff report and will need to discuss its options – as may other local governments are now doing. We understand the PZB members will be invited to a future Town Council meeting(s) to discuss this issue and consider possible actions. Any interference by the state in local government matters has always bothered me – I have always been a local government control advocate. If the Town feels that limitations for approvals of certain land uses are needed that should be a local decision. Much of my analysis of HB 401 was to identify as many of the exemptions as possible for the Town.

Following is a listing of the Ch. 163.3202 exemptions and our MMPA commentary as to whether the Town could comply at present with one or more of the allowed state exemptions, or if Code amendments could be made to fully comply, or if the Town's land development review process should change.

163.3202 Land development regulations.

(5)(a) Land development regulations relating to building design elements may not be applied to a single-family or two-family dwelling **unless**:

1. The dwelling is listed in the National Register of Historic Places, as defined in s. 267.021(5); is located in a National Register Historic District; or is designated as a historic property or located in a historic district, under the terms of a local preservation ordinance;

MMPA Comment: Miami-Dade County via County Code Chapter 16A acts as the Historic Preservation agency for all of the county – both incorporated / unincorporated areas. Some cities have their own Historic Preservation codes / staff but must comply with follow the County's minimum criteria. The Town retained its own historic consultant in 2006 to prepare a study, and the county has extensively studied the Town as to historical significance. While some structures are older (over 50 years), and some noted architects were involved in the design of some of the original structures, very few were reported as noteworthy. The predominate architectural style in the 1940s - 1960s is referred to as Mid-Century / Miami Modern. This issue has been heavily discussed by the County / Town and the Town's current policy is that no areas of the Town or any structure should be designated without an owner's consent. One multifamily structure was designated several years ago by the M-D Historic Preservation Board, but the designation was overturned by the County Commission, as the owner objected. As of September 2021, no area of the Town or any structure has been designated.

Town does not qualify for this exemption.

2. The regulations are adopted in order to implement the National Flood Insurance Program;

MMPA Comment: None of the Town's Land Development Regulations related to building design elements are a result of implementing the National Flood Insurance Program (NFIP). The Town's Code regulations mandating that structures comply with FEMA FIRM flood elevation criteria still applies.

Town does not qualify for this exemption.

3. The regulations are adopted pursuant to and in compliance with Chapter 553;

MMPA Comment: Chapter 553 of the State Statutes is the Florida Building Code (FBC) enabling statute. The Town has adopted the Florida Building Code by reference (Code Sec. 5-1). MMPA believes all of the Town's Land Development Regulations, including any building design element regulations in the Zoning and Planning Code, and other Code sections were adopted pursuant to and in compliance with Chapter 553. Chapter 553 has multiple subsections. The above listed exemption is not specific as to which portion of Chapter 553 applies – only that the regulations were adopted pursuant to and in compliance with Chapter 553.

The Town possibly qualifies for this exemption. Further research and explanation from DEO / other enforcement agency staff may be necessary to determine if the Town meets this exemption.

4. The dwelling is located in a community redevelopment area, as defined in s. 163.340(10);

MMPA Comment: None of the Town has been officially designated as a Community Redevelopment Area (CRA) pursuant to the statute citation noted.

Town does not qualify for this exemption.

5. The regulations are required to ensure protection of coastal wildlife in compliance with s. 161.052, s. 161.053, s. 161.0531, s. 161.085, s. 161.163, or chapter 373;

MMPA Comment: None of the Town's Land Development Regulations related to building design elements are required to ensure protection of coastal wildlife.

Town does not qualify for this exemption.

6. The dwelling is located in a planned unit development or master planned community created pursuant to a local ordinance, resolution, or other final action approved by the local governing body; or

MMPA Comment: The term Planned Unit Development (PUD) is a modern planning & zoning term that typically means a larger scale private development with multiple phases or development sites. However, as to the Town being a "master-planned community", the Town was created / built solely by Shepard Board as one integrated mixed-use development and fully platted in one plat (PB 46 / PG 5 DCR) and covered by a common set of Deed Restrictions (early land development / zoning rules) so it may qualify. However, MMPA clearly believes the Town is a master-planned community for the same reasons. The community was created via a final action approving the Town's plat by Miami-Dade County in 1946 (there was no Town at that time).

New Chapter 163.3202 also has a separate definition of a planned unit development (PUD) and master planned community than exists in other statutes (Ch. 163.3164(31)) but is unclear. Section 163.3164 appears to refer more to a Master Development Plan / Master Plan (possibly a Comprehensive Plan or similar planning document) as described in the definition and for longer term planning purposes.

MMPA believes the Town qualifies for this exemption, as the Town was designed and built as a phased mixed-use development with two (2) original islands and a common set of land development regulations (Deed Restrictions) that were replaced by modern Land Development Regulations / Zoning Code regulations.

7. The dwelling is located within the jurisdiction of a local government that has a design review board or architectural review board.

MMPA Comment: While the Town does not have an entity officially called an "architectural review board" or "design review board" the Town's Planning and Zoning Board (PZB) appears to have the same / similar duties as those entities listed in Code Sec. 5-23.1 (architectural and aesthetic review of plans / review of materials and colors / etc.). About half of the existing PZB members are architects, the rest are engineers, real estate professionals, etc. with detailed knowledge of architecture and design.

MMPA believes the Town may qualify for this exemption, as the Town's PZB has the same / similar duties and functions as nearby ARB (BHV) / DRB (Miami Beach). If the Town wanted to utilize this exemption, the Town could amend its Code to set aside any questions as to the exemption by changing the name of the entity to explicitly comply with the state exemption.

(b) For purposes of this subsection, the term:

1. "Building design elements" means the external building color; the type or style of exterior cladding material; the style or material of roof structures or porches; the exterior nonstructural architectural ornamentation; the location or architectural styling of windows or doors; the location or orientation of the garage; the number and type of rooms; and the interior layout of rooms. The term does not include the height, bulk, orientation, or location of a dwelling on a zoning lot; or the use of buffering or screening to minimize potential adverse physical or visual impacts or to protect the privacy of neighbors.

MMPA believes the Town may qualify for at least some of these exemptions, as the Town's Land Development Regulations (Zoning Code / Others) do not address exterior cladding mandates, exterior architectural ornamentation, the location or architectural styling of windows or doors, orientation of garages, the number or types of rooms, or interior room layouts. The Town Council (acting as PZB at that time) adopted a Color Palette in 2008. Without color guidelines for single-family homes the Town could see (as examples) a Lime Green / Purple / Black / Red / you name it house colors. Roof materials are regulated by Sec 5-18 of the Code and list acceptable materials – there is no dictate to use only one material. The Town has adopted articulation standards for "boxy" single-family homes, like many cities have. The PZB occasionally comments on the overall design of some homes including the details of articulation proposed, window symmetry, etc.

2. "Planned unit development" or "master planned community" means an area of land that is planned and developed as a single entity or in approved stages with uses and structures substantially related to the character of the entire development, or a self-contained development in which the subdivision and zoning controls are applied to the project as a whole rather than to individual lots.

MMPA believes the Town may qualify for this exemption, as the Town was master planned as one entity by Shepard Broad in 1946 and was platted as one entity. The developer established common Deed Restrictions (land development regulations) for the entire community and uniformly enforced them prior to and even after the Town adopted Zoning regulations

(c) This subsection does not affect the validity or enforceability of private covenants or other contractual agreements relating to building design elements.

MMPA Comment: The developers original and extended Deed Restrictions have expired several years ago.

Town does not qualify for this exemption.

SUMMARY

During the 2021 Florida Legislative Session a Bill (HB 401) was approved mostly related to changes in the statutes governing the Florida Building Code (FBC) (Ch. 553 F.S.). However, also included was an unrelated change to Chapter 163.3202 that regulates Land Development Regulations. The Governor approved HB 401 and the effective date of the changes was July

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1st, 2021. While the majority of changes to the FBC enabling laws may not affect local governments very much, the changes to Chapter 163 concerning limitations on Land Development Regulations as applied to single-family and two-family (duplex) can significantly impact local governments. Many local governments are just learning of these changes and trying to understand their impacts. While a number of exemptions were successfully added to mitigate their impacts on some communities, others do not fall conveniently into one or more of the exemptions. MMPA was requested to examine HB 401 in greater detail and prepare an analysis of its possible impacts to the Town. MMPA believes the Town could be considered exempt from HB 401, or portions thereof, based on several of the allowable exemptions. In our opinion the Town has been a “master-planned community” since its inception in 1946. The Planning & Zoning Board's duties listed in Sec. 5-23.1 are the same / similar to those of an ARB or DRB – which are automatically exempt – if the Town agreed and wanted to ensure unquestionable compliance the name of the PZB could be modified to match the statute exactly. Based on the confirmation of adoption of LDRs to be in compliance with the FBC the Town could also be exempt. In any case, we feel the PZB could use some training and guidance as to better meeting protocol and respect for applicants (architects / contractors / owners).

Town of Bly (Hanson Island)
 1991 (Hanson Island) (H8-001)
 and the applicant has agreed to Building Design Elements
 that will be applied to single-family and two-family dwellings - Exceptions
 7 days in possible limits to the Town
 1991 (H8-001)

1991. While the majority of changes to the FDC existing laws may not seem to be government's / any other the changes to Chapter 183 concerning limitations on lot development (application as applied to single-family and two-family dwellings) can significantly impact local government. Many local governments are just learning of these changes and trying to understand their impacts. While a number of exceptions were successfully submitted to the Board on some communities, others do not feel conveniently into one or more of the exceptions. MMFA was requested to examine H8-001 in greater detail and present an analysis of its possible impact to the Town. MMFA believes the Town could be considered exempt from H8-001 if options listed based on several of the allowable exceptions. In an opinion the Town has been a master-planned community since its inception in 1990. The Planning & Zoning Board has been in Sec 8-23.1 and the same is similar to those of an ADA or ORS - with the community exempt - if the town speed and wanted to request a modification to the name of the FDC could be modified to match the statute exactly. Based on the content of adoption of LDRs to be in compliance with the FDC the Town could also be exempt. In any case, we feel the FDC could use some timing and guidelines to better meeting protocol and respect for applicants (architects / contractors / owners).

ISSUE / BACKGROUND INFORMATION

During the 2021 Florida Legislative Session a Bill (HB 401) was approved mostly related to changes in the statutes governing the Florida Building Code (FBC) (Ch. 553 F.S.). However, also included was an unrelated change to Chapter 163.3202 that regulates Land Development Regulations. The Governor approved HB 401 and the effective date of the changes was July 1st, 2021. The changes to the Florida Building Code are mostly procedural but also address FEMA flood map issues as well. While the majority of changes to the FBC enabling laws may not affect local governments very much, the changes to Chapter 163 concerning limitations on Land Development Regulations as applied to single-family and two-family (duplex) can significantly impact local governments. Many local governments are just learning of these changes and trying to understand their impacts. While a number of exemptions were successfully added to mitigate their impacts on some communities, others do not fall conveniently into one or more of the exemptions. Some local governments may not care about architectural controls or the appearance of their communities but others, particularly planned higher-end communities, are outraged. Some communities have created unique areas with specified architectural styles that would be banned (Coral Gables (Mediterranean Revival) / Boca Raton (Mizner) / Davie (Western) / etc., adopted limited exterior building color palettes, and architectural guidelines. It is widely expected that a request to modify / repeal the Chapter 163.3202 amendments will be filed next year and repeatedly thereafter, as well as legislation to ban the state from interfering with local government land development controls.

As related to the Land Development Regulation changes that affects a local government's control of single-family and two-family (duplex) dwellings, in summary, HB 401 included an amendment to create a new subsection (5)(a) as follows:

(5)(a) Land Development Regulations relating to building design elements may not be applied to a single-family home or two-family dwellings unless:

Note: Seven (7) exemptions are included which will be expanded upon below. Of importance is one of the key exemptions in the new provisions do not apply to typical Zoning Code criteria such as building height, bulk, orientation, or location on a lot (setbacks), or the use of buffering / screening to minimize adverse physical / visual impacts, or to protect the privacy of neighbors.

As defined in HB 401 / Chapter 163.3202 the term "Building Design Elements" means a local government cannot regulate the following, unless one or more of the exemptions is met:

- External building colors
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163.3202 Land development regulations.

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1. The dwelling is listed in the National Register of Historic Places, as defined in s. 267.021(5); is located in a National Register Historic District; or is designated as a historic property or located in a historic district, under the terms of a local preservation ordinance;
2. The regulations are adopted in order to implement the National Flood Insurance Program;
3. The regulations are adopted pursuant to and in compliance with Chapter 553;

Note: Ch. 553 of the State Statutes is the Florida Building Code (FBC) enabling statute.

4. The dwelling is located in a community redevelopment area, as defined in s. 163.340(10);
5. The regulations are required to ensure protection of coastal wildlife in compliance with s. 161.052, s. 161.053, s. 161.0531, s. 161.085, s. 161.163, or chapter 373;
6. The dwelling is located in a planned unit development or master planned community created pursuant to a local ordinance, resolution, or other final action approved by the local governing body; or
7. The dwelling is located within the jurisdiction of a local government that has a design review board or architectural review board.

MMPA Comment: While the Town does not have an entity officially called an “architectural review board” or “design review board” the Town’s Planning and Zoning Board (PZB) appears to have the same / similar duties as those entities listed in Code Sec. 5-23.1 (architectural and aesthetic review of plans / review of materials and colors / etc.). About half of the existing PZB members are architects, the rest are engineers, real estate professionals, etc. with detailed knowledge of architecture and design.

(b) For purposes of this subsection, the term:

1. “Building design elements” means the external building color; the type or style of exterior cladding material; the style or material of roof structures or porches; the exterior nonstructural architectural ornamentation; the location or architectural styling of windows or doors; the location or orientation of the garage; the number and type of rooms; and the interior layout of rooms. The term does not include the height, bulk, orientation, or location of a dwelling on a zoning lot; or the use of buffering or screening to minimize potential adverse physical or visual impacts or to protect the privacy of neighbors.

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2. “Planned unit development” or “master planned community” means an area of land that is planned and developed as a single entity or in approved stages with uses and structures substantially related to the character of the entire development, or a self-contained development in which the subdivision and zoning controls are applied to the project as a whole rather than to individual lots.

(c) This subsection does not affect the validity or enforceability of private covenants or other contractual agreements relating to building design elements.