



CITY ATTORNEY OPINION

To: City Council
From: John Agnew, City Attorney
Date: September 7, 2025

LEGAL ISSUE: Whether a voter referendum of the qualified electors of the City (*i.e.*, Sanibel residents registered to vote in Sanibel) is required to transfer any residential density rights from one parcel to another.

BACKGROUND: When a 34-acre property ("Subject Property") was being considered for possible acquisition by Lee County's Conservation 20/20 program, discussion raised by and through City Council about whether the Subject Property's entitlement to 24 residential dwelling units could be transferred to one or more different parcels within the City limits. While the Conservation 20/20 program declined to pursue a purchase of the Subject Property, questions related to the permissibility of transferring development rights from one parcel to another remain. In connection with the planned joint workshop meeting between City Council and Planning Commission, City Council requested an opinion as to whether a voter referendum would be required to accomplish any transfer of residential development rights.

APPLICABLE REGULATIONS AND ANALYSIS: Residential development density is regulated by the Sanibel Charter, the *Sanibel Plan*, and the Sanibel Land Development Code ("LDC"). The Sanibel Charter is the source of authority for a potential voter referendum and is triggered when there is a proposal to increase residential development density as established in the Sanibel Plan, as constituted on May 4, 2004.

Specifically, Section 3.10.2 of the Sanibel City Charter provides as follows:

Actions to increase the residential development density as established in the Sanibel Plan, as constituted on May 4, 2004, except for rounding upward of fractional allocations of fifty percent (50%) or more to the next whole number, ***may be taken by the city only by ordinance approved by a majority of the qualified city electors*** voting at the next general election or a special election called for such purpose; provided, however, that nothing contained in this Section 3.10.2 shall preclude the city council from permitting residential densities in excess of those established in the Sanibel Plan, where the purpose is 1) to provide incentives for the Below Market Rate Housing Program, or 2) to permit redevelopment of existing parcels up to the number of existing dwelling units on May 4, 2004, provided the redevelopment is otherwise in conformance with the Sanibel Plan and the Land Development Code. Any law or regulation which is in conflict with this Section 3.10.2 is hereby repealed.

(emphasis added)

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Thus, as stated in the Charter, any actions to increase residential development density as established in the *Sanibel Plan*, as constituted on May 4, 2004, other than for Below Market Rate Housing (“BMRH”) or for redevelopment of existing parcels up to grandfathered maximums, must be approved by city electors (i.e., voter referendum). While there presently exists a State preemption prohibiting such a referendum process relative to any land development regulation, Charter Section 3.10.2 was lawful and in effect prior to the effective date of such preemption.¹

So, the relevant analysis turns to the specific meaning of what constitutes an “increase [to] residential development density established in the *Sanibel Plan*, as constituted on May 4, 2004.” Particularly, the analysis is whether the density cap is considered in the island-wide aggregate, on an individual parcel basis, or by some other means.

The residential development density established in the *Sanibel Plan*, as constituted on May 4, 2004, allows for approximately 9,000 dwelling units.² As detailed in *Sanibel Plan* Section 3.6.2 (Future Land Use Element), the distribution of these residential dwelling units is in accordance with the density allocations in the Development Intensity Map of the *Sanibel Plan*, which is incorporated into the LDC. As stated in the Background Discussion within the Future Land Use Element, the purpose of the cap of approximately 9,000 dwelling units is to minimize the hazards associated with “hurricane safety, adequate delivery of services and natural resource protection.” (*Sanibel Plan* at p. 206). Continuing in the Background Discussion within the Future Land Use Element, the *Sanibel Plan* provides that although island-wide increases in density are not generally supportable:

[t]here are circumstances...under which residential density could be increased for a specific site if mitigating considerations are found to exist that would outweigh potential drawbacks and work toward achieving other objectives of the *Sanibel Plan* [including] ...

To promote further conservation of environmentally sensitive lands by creating incentives to set aside sensitive land from development, such as the transfer of development rights.

....
(*Sanibel Plan* at p. 212)

This reference in the Background Discussion of Section 3.6.2 (Future Land Use Element) is the only reference within the *Sanibel Plan* to any consideration of the potential transfer of development rights, and the suggestion is it could be appropriate if the development rights were being transferred from an environmentally sensitive land to one(s) less environmentally sensitive.

¹ In 2014, the State of Florida enacted Section 163.3167(8), Florida Statutes, which preempts a referendum process regarding any land development regulation, local comprehensive plan amendment, or map amendment, unless it was lawful and in effect on June 1, 2011.

² See generally *Sanibel Plan* (2013), Background Discussions within Sections 1.1, 1.2, 3.3.5, and 3.6.2. As noted in the Background Discussion in Section 1.1, there were no increases in allowable dwelling units from 1989 through the 2013 revisions of the *Sanibel Plan*, so the current (2013-revised).

Sanibel Plan Section 4.1.1 (Future Land Use Map Series) identifies the Official Maps that, in aggregate, constitute the Future Land Use Map of the Sanibel Plan. Among those identified is the Development Intensity Map, “which indicates the maximum number of dwelling units permitted for each parcel of land throughout the City of Sanibel.” (*Sanibel Plan* at p. 235). *Sanibel Plan* Part 5.1 (Introduction) provides:

Except as permitted in this Plan, ***no land may be developed under the Land Development Code at a residential development intensity greater than that designated on the official Development Intensity Map adopted herewith.*** Nor may the permitted residential development intensity of any land be increased through the Land Development Code without a corresponding amendment to this Plan and the Development Intensity Map.

(*Sanibel Plan* at p. 241) (***emphasis added***)

The LDC is the implementing tool of the *Sanibel Plan*. The Development Intensity Map established in the *Sanibel Plan* is incorporated into the LDC via LDC Section 126-242 (Maps; status). As stated therein, the incorporated Development Intensity Map is dated February 1989. This is the same map edition that was in force on the May 4, 2004 date referenced in Sanibel Charter Section 3.10.2.

There are only two references to the potential transfer of development rights anywhere within the LDC. One is in LDC Section 126-99 – Alternative shoreline stabilization project (see subsection (2)(b), discussing examinations to alternatives to shoreline stabilization, including transfer of development rights), and the other is within LDC Section 126-560 – Undeveloped lands, providing as follows:

If any wetlands conservation lands are undevelopable for even a single dwelling unit or other beneficial use because of the requirements and limitations of this article, the owner of such lands may apply for such amendments to the Sanibel Plan and of sections 78-1 through 78-11; chapter 86; chapter 94; chapter 98; chapter 106; chapter 110; chapter 118; chapter 122; and articles II through XV of this chapter as are necessary to permit the development of one dwelling unit or other beneficial use thereon, upon such terms and conditions as the city council deems reasonably necessary to accomplish the objectives of this article insofar as possible. If such amendments are denied, the city shall, within six months thereafter, purchase the lands from the owner. The purchase price shall be, in the discretion of the city council, either in the form of a cash payment equal to the fair market value of the undevelopable lands as determined by a qualified appraiser mutually chosen by the city and the landowner, or in the form of transferable development rights pursuant to any program which might be adopted by the city council by ordinance for the issuance, transfer and use of such rights.

(***emphasis added***)

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Neither of these LDC Sections, which reference the *potential* of transferring development rights, provides for an actual mechanism to transfer development rights, and LDC Section 126-560 expressly recognizes that a transferable development rights program does not yet exist, stating that such a transfer would be “pursuant to any program which might be adopted....”

CONCLUSION: My first-blush interpretation of what constitutes an “increase [to] residential development density established in the *Sanibel Plan*, as constituted on May 4, 2004” was that the plain language appeared merely to set a cap on aggregate residential density. However, upon further research and consideration, my opinion is the density established in the *Sanibel Plan*, as constituted on May 4, 2004, established density on a parcel-by-parcel basis. Specifically, the *Sanibel Plan* (through the adopted Development Intensity Map) clearly establishes the “maximum number of dwelling units permitted for each parcel of land throughout the City of Sanibel.” These calculations form the established residential development density in the *Sanibel Plan*, and the aggregate numbers are a mere summary of those calculations. Further, an interpretation limited to aggregate density considerations ignores the reality that nearly all parcels that might receive a transfer of density rights would then be nonconforming to the *Sanibel Plan*, for having density greater than that which the adopted Development Intensity Map permits.

This opinion is consistent with the interpretation of Planning Director Paula McMichael and the interpretation of legislative intent offered in public meetings by Planning Commissioner Larry Schopp, one of the drafters of Sanibel Charter Section 3.10.2. It is also consistent with the opinion shared by my predecessor, Ken Cuyler, at a joint City Council and Planning Commission workshop meeting on January 15, 2008.

So, to lawfully and appropriately accomplish the transfer of any development rights from one parcel to another, which would result in the receiving parcel having residential development density in excess of that which is provided by adopted Development Intensity Map, it is my opinion that such transfer would require passage of an Ordinance by City Council, with subsequent approval by referendum. Additionally, in accordance with *Sanibel Plan* Section 5.1, such a transfer would also require amending the Sanibel Plan and the Development Intensity Map.