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To: Mayor and Village Council

Date: August 29, 2012

From: Eve A. Boutsis, Village Attorney  
Darby Delsalle, P&Z Director

Re: Neighborhood Protection  
Ordinance 2<sup>nd</sup> Workshop

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## INTRODUCTION

This report provides an analysis of the suggestions presented at the first Workshop held on August 8, 2012, regarding the proposed regulations commonly referred to as the "Neighborhood Protection Ordinance" (NPO). This report is presented as part of the ongoing discussion between the Mayor and Village Council, community, and Village Staff. The document attached to this report is not intended, nor formatted, to be the final ordinance for consideration and adoption. It instead provides a suggestion as to where each of the proposed provisions would best fit within the Land Development Regulations (LDR), or the basis for Staff recommendation not to include a proposed provision. The report is designed to follow the comments cited on the August 8, 2012, Workshop document for ease of reference. Those portions taken from the original document are now shaded in gray. Strike-throughs reflect elements not incorporated into a particular section of the LDR (as demonstrated by those portions of text that are underlined for insertion). Some portions were not incorporated into the existing provisions as certain elements did not receive supporting consensus of the Council. Staff continues to seek additional guidance, as detailed in the comments below, so that a comprehensive ordinance(s) may be prepared.

## BACKGROUND

On April 16, 2012, at a Committee of the Whole (COW) meeting, Council Person Joan Lindsay requested the imposition of a "Zoning in Progress" (ZIP) procedure to implement revisions to the LDR as it relates to neighborhood protection. Council Person Lindsay advised that she desired to provide guidelines for nonresidential uses allowed within residential districts so as to preserve the overall residential quality of Village neighborhoods and to provide a fair and equitable process and guidelines for issuing development orders. She stated that the proposed neighborhood protection regulations are intended to simplify the current process of imposing conditions on developments, and to provide a fair and equitable system for all by defining specific criteria for: setbacks, buffers, construction staging, athletic fields and amenities, landscaping, traffic, parking related conditions, lighting, noise, operations, historic/archaeological, unity of title, enforcement, and structures, among other issues.

Pursuant to Section 30-30.10(a) of the LDR, the Mayor and Village Council chose to pursue a ZIP upon their own initiative. On May 21, 2012, following public hearing, the Mayor and Village Council adopted the zoning in progress resolution for all residentially zoned properties larger than

one (1) acre, including the Live Work sub-district within the FT&I District. As a result of approving the ZIP, the Village Council then directed staff to prepare a moratorium ordinance which would expire the earlier of adoption of the neighborhood protection regulations or four (4) months from adoption of the Moratorium Ordinance. On July 9, 2012, the Council adopted the moratorium so as to only affect nonresidential uses of over one acre in size, in residential districts.

At the direction of the Village Council, a Workshop was held on August 8, 2012, to review the notes that had been submitted by Council Person Joan Lindsay to the Village Attorney with regards to the regulations sought for inclusion into the LDR so that the public would have an opportunity for comment and input. No portion of that document submitted at that Workshop was intended to be a comprehensive analysis of the items contained therein. However, staff did submit certain strikethroughs and additions (underlining) for those portions that may have resulted in a conflict of interest, an obstruction of vested or anticipated development right, and/or present a potential conflict with the Burt J. Harris Act or RLUIPA. Those portions of the document included italicized text explaining the reason for the strikethroughs or additions.

Once further direction is provided by the Council, it is anticipated that a first reading of the proposed NPO ordinance may occur as early as October 1, 2012, with second reading potentially on November 5, 2012. The moratorium is set to expire on November 9, 2012 or until such time that an ordinance is adopted which seeks to fulfill the intent of the imposed moratorium, whichever comes first. Any extension of the Moratorium may only be granted by the Mayor and Village Council as further discussed in the section below. Should the Moratorium expire subsequent to first reading of the ordinance but prior to a second reading thereof, Zoning In Progress Rules shall apply until the conclusion of the second reading or the proposed ordinance expires.

## **ANALYSIS**

It is staff's recommendation that any suggestions relating to existing LDR, shall remain in the existing LDR and not be restated in the draft NPO. This suggestion is made to avoid unnecessary redundancies and to also avoid scrivener errors or conflicts should any one provision be amended in the future without consideration of the other. Staff recommends the creation of a development review check list to cover the concern of perhaps not applying a section of the existing LDR (this item would not be an ordinance, rather it would be included as an attachment to a zoning application). Not all sections have expanded explanations as those provisions may be straight forward or present no particular or obvious conflict. Any portion of the analysis that corresponds with a note shall include the comment number so that it may easily be cross-referenced. Portions of Section 14 of this analysis include staff suggestions not previously presented at the August 8, 2012 Workshop document. However, the comments are included in order to ensure greater consistency between the existing LDR and the proposed modifications contemplated as part of the NPO. These edits should bring the various portions (existing and proposed) into alignment with prevailing precedent and standards relating to zoning. The LDR modifications and consolidations proposed by Staff are not intended to increase or decrease the review regulations. However, the modifications derived from the Workshop and Council input may add additional criteria.

## 1. UNITY OF TITLE

Existing LDR provisions already provide for the majority of the suggested regulation. Language is proposed to prevent issuance of permits until the requisite criteria is satisfied [DD1][DD2].

## 2. REQUIRED ZONING WORKSHOP

The suggestions from this section are proposed to be inserted into Division 30-110 together with Division 30-60.15. The combined regulation is to be re-titled and amended to include all privately held public assembly uses (see Section 14 below for fuller explanation) [DD3]. In so doing, it provides equity for development review consideration. The equitable review procedure minimizes any arguments relating to a possible RLUIPA claim, as all the various public assembly uses would be subject to the same process. The Zoning Workshop item is proposed to ensure that after an application is filed, and prior to the public hearing, at least one Workshop will be scheduled. A second Workshop could be utilized, if so requested during the first Workshop, and scheduled at that time. This provision was modeled after Cutler Bay however, unlike with Cutler Bay, the second Workshop is not required. The Workshop permits the attendance of the Mayor and Village Council provided, they withhold any and all comment on the project at those meetings [DD8]. The Village Attorney recommends that each council person disclose their attendance at the applicable public hearing to ensure no inadvertent violation of Jennings.

Staff seeks direction as to the scope of this provision as the discussion at the August 8, 2012 Workshop focused on the single-family zoning districts. Will this process apply to the Live Work District, or the multi-family districts of the Village? The moratorium included all residential districts, other than the mixed-use districts (minus Live Work). Thus, it appears from the discussion at the Workshop of August 8, 2012, that this requirement would be excluded from the commercial and remainder of the mixed-use districts. Is it the direction of the Council to apply the review process to residential districts, exclusive of the multifamily districts and the Live Work District in the FT&I [DD4]? Staff recommends that the same review process should be utilized through-out the various zoning districts (other than the Mixed-Use Districts<sup>1</sup> that have an administrative review process) to ensure uniformity, and as the proposed Workshop process would allow the Applicant to address any concerns from the community.

Based upon the direction of the Village Council at the August 8, 2012 Workshop, the provision relating to a Community Relations Committee was stricken [DD9]. The remainder of the comments offered for this portion are self-explanatory and do not appear to present any particular conflict [DD5][DD6][DD7].

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<sup>1</sup> The FT&I mixed use district is intended to follow a development pattern more consistent with urban streetscapes. The VMU district is created to follow a suburban office park model, which already includes a restricted buffer requirement with a "centralized-use" in the middle of the property. The residential districts utilize a suburban design model, whereby the use of buffering would be more appropriate.

### **3. PRECONSTRUCTION – CONSTRUCTION – BUILD OUT CONDITIONS**

The LDR site plan review processes (section 30-30.5 and 30-110) are intended to provide general procedures that seek to delineate setbacks, and locations of proposed improvements. It is not intended to provide detailed plans needed for construction, as that review would occur during permitting. Therefore, much of the construction related suggestions of the August 8, 2012 Workshop would be most appropriately applied during the permitting process, and not during the site plan approval process. To do otherwise may inordinately burden the applicant during a process aimed at the establishment of the conceptual development plan.

Many of the suggested provisions derived during the August 8, 2012, Workshop, for this section already exist within current Code. Those suggestions include standards for dust, odor [DD10][DD23], fencing [DD11], hours of operation [DD13], construction staging [DD15], maintenance of operations (MOT) [DD16], and noise [DD18]. As such, these provisions were not included. However, Staff did include additional language with regard to the dust provision to include particulate matter [DD12][DD24]. The remainder of the proposed site plan review criteria is recommended to remain as adopted.

Those suggestions proposed for inclusion into the future NPO ordinance include: delineation of access points for construction vehicles [DD17]; locations for construction staging, including construction trailers [DD19][DD20]; and the prohibition from storing construction material in Village controlled right-of-ways [DD21]. Staff recommends including a 60 day time frame to the provision which requires removal of the construction trailer(s) [DD14]. The aforementioned provisions are recommended to be enforced at the time of permitting.

At present, the Village does not regulate tree removal as Miami-Dade County retains jurisdiction. Though the Village could assume the responsibility, it would come at great expense to the Village, as detailed at comment [DD24]. Staff continues to work with the County to ensure compliance with their tree ordinance (default code) and as such, this provision is not suggested for inclusion into the NPO.

### **4. ATHLETIC FIELDS AND AMENITIES:**

Staff included most of the suggested athletic field and amenity(ies) language discussed during the August 8, 2012 Workshop into the proposed NPO. Additional comment on certain discussion items related to the proposed amendments are herein provided. The suggested provision which limits utilization of the facilities appears to be difficult to enforce. An institution is intended to exist over many years, and participation in activities by outside groups may vary over time. Knowledge of what uses are taking place could be difficult for Staff to ascertain. For example, it would be difficult for staff to monitor whether a Girl Scout troop, a local athletic league, or some other unspecified nonprofit group providing a community service is using a site. If such information from the institution is not readily provided, the Village would have to seek injunctive relief or seek other legal remedy to obtain the proof of any such violation. If the use becomes a “commercial enterprise” with noticeable impacts on the community, the action would be obvious and more readily enforceable. Ultimately, the Village is to make a policy determination as to whether it desires to preclude certain civic activities from taking place. For example, if the Village lacks the facilities,

space, or funding, does it desire to preclude CPR training, swimming safety classes, etc., from being provided within the community at sites able to accommodate the use from being provided from within the community? Does the Village want to preclude itself from being able to partner with these institutions to provide these services [DD29]?

In Section 5, below, there is language which provides for landscape buffers of varying sizes predicated upon the size of the property. The proposed buffers function as de facto setbacks. Staff desires clarification as to the request to include additional setback(s) for athletic amenities from the requested landscape buffer. The landscape requirement may potentially impact the remaining land available to accommodate buildings, ball fields and play areas [DD30][DD32].

There did not appear to be a consensus of the Council to require an acoustical engineer during the site plan review process, thus the item was not included [DD108]. Existing Code provides a measurable and enforceable noise ordinance. All uses must comply with the noise code. Regardless of the particulars of any given development, existing LDR would apply in the case of a noise violation [DD31].

Please note, lighting of recreational areas for homes is currently permitted. This form of lighting is typically provided for swimming pools and tennis courts or other types of court games. The current proposal is to prohibit such lighting for recreational areas which would include court games and swimming pools. If this rule is applied should not it equally apply to residential homes [DD35]? To do otherwise may result in an unequal application of the law to other uses within a similar zoning district.

## 5. LANDSCAPING AND BUFFERS

The Village Council is considering requiring increased landscape buffers for nonresidential uses located within a residential district. The proposal includes prohibiting the inclusion of play areas as part of the landscape pervious area calculation. Additionally, the proposal suggests implementing a dense planting schematic within the enlarged buffer. If implemented, the modification would likely affect development of the property as it pertains to the available lot coverage ratio, minimum classroom space per student, open space ratio, minimum pervious area, play areas, setbacks, landscape buffers, and parking facilities, among other standards. In light of the proposal, staff sought to understand the potential impact the proposed modification may have when attempting to site a public assembly use [DD41]-[DD65].

*Methodology of analysis:* The subject of staff's analysis concentrated on school uses as that use has more site specific, land intensive needs due to play area requirements and class room space per child. This inquiry was necessary, because, should the impact result in a significant diminution of development rights provided under exiting LDR, there could be claims relating to property rights.

In an effort to evaluate the possibility of such an outcome, staff analyzed the potential impact of the suggested modifications proposed during the August 8, 2012, Workshop. Attached at Exhibit A are a brief summary of the findings of the analysis. In conducting the analysis, staff selected six (6) properties of varying sizes. The selected parcels ranged in size from approximately two (2) acres to twenty (20) acres. In the interest of being neutral, none of the selected properties are located within

the Village. Existing LDR provisions were then applied to the selected parcels. The second portion of the analysis then applied the proposed modifications as suggested at the August 8, 2012 Workshop. The analysis assumed each parcel was zoned E-M, Estate Modified Single-Family District, and E-1, One Acre Estate Single-Family District, as these two districts are the most common zoning designations found within the Village. The control variable utilized to conduct the evaluation was "maximum permitted student enrollment" as it is a reasonable assumption that student enrollment is what would determine revenue for the institution. Existing LDR<sup>2</sup> provides for a maximum student enrollment ratio that is triggered by the size of the property. The factors used in the analysis enabled staff to determine how much land area, in acres, was required to provide for various elements of a school development at maximum permitted enrollment. Principal factors in the review were lot coverage ratio, minimum classroom space per student, pervious area ratio (landscaping), landscape buffers, required play areas, and parking/stacking facilities. The analysis included the suggested 35 and 75 foot landscape buffers as utilized in Islamorada's Landscape Manual. It is that document which formed the foundation Council Person Lindsay's original suggestion to increase landscape buffers and planting density. The factors utilized in the analysis also included the proposed preclusion of play areas from the landscape calculation, additional setbacks for those uses and a dense tree buffer as proposed by Islamorada. Please note the analysis formula is only capable of arriving at broad generalities with regards to allocation of space for the various elements of a school development and in no way can serve to replace the more rigorous exercise associated with site plan preparation and design. However, for comparison purposes, the tool can provide a broad understanding of the feasibility of the use in relation to the existing Code and the proposed standards.

*Findings:* Staff found that the existing LDR, absent the proposed amendments, tended to minimally favor larger parcels with regards to achievement of full developable rights. This is not to say that smaller parcels could not achieve full enrollment. They could, however, at some loss to their maximum lot coverage ratio, achieve full enrollment. Generally, the present LDR appears to be balanced with regards to the development rights it offers. Application of the proposed 35 and 75 foot landscape buffers, additional setbacks, and preclusion of play areas in landscaping calculations, result in significantly limited development options. Again, in applying the same control variable, full enrollment could not be achieved unless the E-M zoned property exceeded approximately thirteen (13) acres in size. Please note, however, the modifications would result in a developable area of less than a 1/3 of that permitted under existing LDR. Even at twenty (20) plus acres, development at full student enrollment could not be achieved for the E-1 District<sup>3</sup>. At no point in the analysis did the proposed standards accommodate maximum permitted lot coverage.

Utilization of the standards contained in the Landscape and Buffer Manual of Islamorada, would result in an 8 to 10 time increase in the number of trees and shrubs required under the existing LDR<sup>4</sup>. Further, such a dense planting would require trees to be planted 12 feet on-center, possibly precluding native species, such as Live Oaks, Mahoganies, and Gumbo Limbos, and other native friendly trees such as Royal Poinciana, Jacaranda, or the Golden Rain Tree. Because these trees have

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<sup>2</sup> The Village Code relating to charter schools and private schools was modeled after the provisions contained in the Miami-Dade County Code.

<sup>3</sup> The E-1 Zoning District is generally more restrictive than E-M as it has a larger open space requirement and thus a smaller lot coverage ratio. It is also less prevalent throughout the Village than the E-M District.

<sup>4</sup> The standard would be inconsistent with the Village's tree requirements under its Landscaping Code.

larger canopy requirements, they would not be able to develop properly. It is worth noting, current LDR requires a 35 foot plantings on-center for swale trees. There was a recommendation in the in the August 8, 2012 Workshop document, of 25 foot on-center plantings for all trees. However, this 25 foot on-center planting formula is not compatible with the Islamorada manual. It appears that the Islamorada manual is geared to lower scale island plantings more typical for the Keys and not the suburban areas of Miami-Dade County. The Keys are considered an environmental protected area, and are provided heightened protection under State law. The manual contemplates a dense buffer along streets. Between uses, there is a buffer, but, the denser and more intensive buffers are within the residential zoning district and required for all such uses permitted therein. The Public/Semi-Public Services (schools, churches, etc.) have amongst the lesser restrictive buffering requirements when contiguous to other properties regardless of use. Commercial uses have the least restrictive buffers, and industrial uses amongst the most restrictive, particularly when adjacent to different uses. The 75 foot buffer is solely contemplated for the street front, not for separations between properties.

*Legal Considerations:* The Village, in moving forward with the proposed revisions must be able to justify its actions and demonstrate that the revisions do not inordinately burden or directly restrict/limit the use of real property such that the owner is permanently unable to attain its reasonable investment-backed expectation(s)<sup>5</sup>. Staff cannot determine whether the revisions would be considered an “inordinate burden” as delineated in 70.001, et seq., Florida Statutes. It is however clear the properties studied could not achieve full development parameters as provided by existing Code. In order to resolve any claims, and to ensure that property rights are protected, staff recommends a modification to the buffer requirements, so that it is not based solely upon the lot size. Alternatively, the width and depth of the lot should be taken into consideration. Moreover, all properties within a zoning district should be provided similar regulations relating to buffers and landscape to withstand judicial scrutiny. Regardless, due to the composition of the existing LDR, any modification of the buffers would likely affect the property rights of smaller lots, under five acres.

## 6. TRAFFIC

Existing LDR permits the Village to request additional studies when addressing the review of a given development proposal. Routinely that has included a traffic study, whose preparation and peer review, is paid for by the applicant. Further, Code provision guides staff review by requiring consideration of:

“volume of traffic to be generated, pattern of traffic, site circulation, conflicts with adjacent road traffic; number of and proximity of driveways, location and proximity of median cuts, visual clearances or obstructions, angle and location of driveways, intersections with roads, elevation of the driveways in reference to the road, and any other factors that may affect the safety and welfare of the public”(30-70.4(c))[DD66].

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<sup>5</sup> Standard delineated in the Bert J. Harris Act, Chapter 70, Florida Statutes.

Based upon the August 8, 2012 Workshop, Staff has modified the provision to require that the individual performing the study be a licensed traffic engineer [DD72]. For the study to be considered competent substantial evidence, the report must be prepared by a qualified expert, most often a licensed traffic engineer. Therefore, practice has required a licensed engineer, although not explicit in the existing LDR. Although already required in the Comprehensive Plan, another provision was added requiring compliance with roadway minimum level of service (LOS) standards [DD67]. Please note, those portions of the Village designated an Enterprise Zone, would continue to be exempt from this requirement as the County retains home rule authority of this designation.

Most of the remaining traffic related suggested provisions can be included within the NPO ordinance however, some come with additional comments. First, pursuant to the direction of the August 8, 2012 Workshop, was to not place the control of the applicant's traffic engineer under the auspices of the Planning Director. Staff agrees, as doing so could have created an awkward review process that could have resulted in competing traffic studies, a due process concern, and unnecessary costs to the applicant [DD72]. Second, the provision that required access to property from a principal roadway could effectively prohibit private public assembly uses from certain residentially zoned properties all together. Therefore, it is suggested to insert the words "where possible" so that the intent can be achieved without elimination of a development right [DD68][DD71]. Third, Staff has concerns that the Village requires the hiring of its police officers. The parties can agree to use police officers, but, without agreement, the provision may be challengeable. The use of Village officers may lead to lack of coverage, and also create other liabilities [DD69]. Staff is still investigating this issue. Fourthly, staff seeks direction from the Council regarding the additional setback from the requested landscape buffer as discussed in Section 4 above [DD77].

## 7. PARKING RELATED CONDITIONS

The majority of the proposed suggestions relating to parking are recommended for inclusion into the NPO ordinance, with some modification. First, a prohibition on parking structures will result in a larger portion of the lot needed for surface level parking. This becomes a factor given the proposed modifications found above at sections 4 and 5, particularly as it relates to play areas and landscape buffers [DD80][DD81]. Third, given the desire to provide for an enhanced landscape buffer requirement, the suggested provision requiring parking areas to be "screened" appears redundant [DD85]. Please note the comments of this Section include the suggestions requested at Section 12 below.

## 8. LIGHTING

Many of the lighting related suggestions exist in the Code. The following are already required: submission of a lighting plan, prevention of lighting spillage, the shielding of light fixtures and maximum light standards. The proposed modifications do request the imposition of a more stringent standard of lighting for nonresidential uses at the property line and off the property. Existing LDR permits lighting of courts, playfields and ball fields as a matter of right provided certain conditions are met. This provision equally applies to single-family homes as well as nonresidential uses. It is also worth noting that the County Code, through its home rule authority, requires some level of continuous illumination of parking lots, at night (Chapter 8C of Miami-Dade

County Code). Any standard inconsistent with Miami-Dade County may violate their home rule authority. Most codes and industry standards recommend lighting levels of .5 foot candles at the property line. To create a more restrictive standard for nonresidential uses in residential districts could lead to challenges. Staff is not sure if such a claim could be a due process, RLUIPA or a Burt J, Harris claim. Further, there was a concern raised at the August 8, 2012, Workshop that there should be some illumination off-site due to driveways, identifying markers and security. Given that all such improvements requiring illumination are to be separated from the property line by dense landscape buffers, the suggested provision for more stringent standards at the property line and off property may be moot [DD87][DD88][DD91][DD92].

The up lighting and soffit lighting provision was left in the document though it was not clear whether there was a consensus moving forward on this item. Staff seeks further direction regarding the lighting requirements [DD89]. It is also suggested that if the lamp posts are limited to a maximum height of fifteen (15) feet, that such restriction apply to all residentially zoned properties [DD90]. Staff does recommend consistency in all lighting provisions – whether for single-family homes or nonresidential uses, as the effects to adjacent properties would be the same regardless of use. There needs to be a legitimate basis to support such a distinction, and to preclude a Harris Act claim. Staff recommends that the action not inordinately burden or directly restrict/limit the use of real property such that the owner is permanently unable to attain its reasonable investment-backed expectation(s).

## 9. NOISE

Most of the noise related requests have not been incorporated into the Code, as they already exist in the Code. However, Staff has retained the requested suggestion to provide operational hours for a public address system. It is worth noting that the special event permit would provide some exception to the application of the provision requested [DD103]. As a practical matter, applying a decibel standard to demolition and alarms does not work. Demolition is regulated by the process of pulling a demolition permit. It would be regulated under standard provisions for construction. To implement such a regulation would effectively prohibit all construction. With regards to alarms, the intent of an alarm is to be heard across property lines so as to alert the community to the reason for the alarm [DD105]. There was no consensus of the Council to require an acoustical engineer during the site plan review process, thus the item was not included [DD108].

## 10. OPERATIONS

Existing Code provides for hours of operations for service vehicles and refuse trucks at Section 30-62.29(e)(7) and (15) [DD110]. The proposed screening provision was included however the point may be moot given the proposed dense landscape requirement. The hours of operation for nonresidential uses were included in the draft. However, the criteria are vague, thus making implementation and enforcement subjective. Some definition or details as to implementation should be included. Additional direction from Council regarding this item is requested [DD109].

## **11. TRASH PICKUP LOCATION:**

Existing LDR already requires dumpsters to be screened, thus the provision was not included to avoid redundancy [DD115]. The setback provision from the landscape buffer was included as a modification however please see discussion at Section 4 of this report regarding such setbacks [DD114].

## **12. LOADING ZONE LOCATIONS**

This element is addressed and incorporated into Section 7 of this report.

## **13. ENFORCEMENT**

The requested enforcement related suggestions are already provided for by existing Code. The only recommended change is to modify the fine consistent with Chapter 162, Florida Statutes, for a city our size [DD121].

## **14. MISCELLANEOUS**

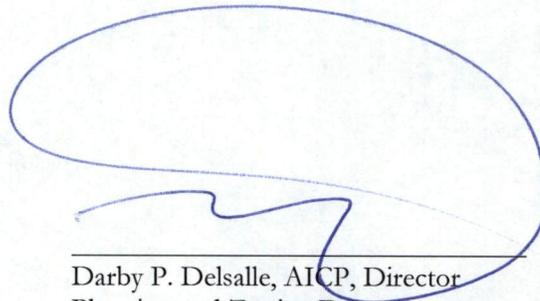
Part of the August 8, 2012, discussion was to provide "defined" criteria for nonresidential uses in residential districts. These uses were covered by different sections of the Code. To create a uniformly applied set of procedures to apply to all privately held, public assemblage uses, Staff recommends striking Division 30-60.15, Public Assembly Uses, and incorporate the relevant language into Section 30-110 (Private Schools and Child Care Facilities). The remainder of 30-60.15 would be removed from the LDR. This consolidation would provide for public assembly uses, where not in conflict with Dade County Home Rule Authority, to go to public hearing. Current Code provides more than one process for reviewing the different types of public assembly uses. The modification would ensure one process exists, thus precluding a RLUIPA claim due to inequitable criteria or treatment. This action would require re-aligning those uses presently identified as a "conditional use" to a "public assembly use" under the modified Section 30-110. The standard afforded is consistent with the conditional use section, and at certain provision, more specific. Staff believes this modification may minimize potential claims of disparate treatment amongst these types of uses [DD125]. As proposed, all public assembly uses (other than traditional public schools) shall be subject to the public hearing process. The public hearing process and requirements preclude the possibility of applying for an administrative (diminutive) variance request. See Section 30-30.3(d). As such, this modification was not included. Additionally, section 30-30.3(c), solely allows a substantial compliance review that would decrease impacts (which decreases are minimal) and would not interfere with the conditions contained in the resolution [DD126].

During the August 8, 2012 Workshop, the Council asked if there was a way to "grandfather" the existing nonresidential sites so that moving forward, they would not be affected by the regulations contemplated by the proposed NPO. Section 30-10.4, like most other municipal codes, defines and delineates the parameters of the Village's regulations relating to nonconforming uses [DD124]. These regulations uniformly provide the rules which govern all replacement structures, uses, and discontinuation of those structures and uses. The principal protection afforded legal nonconforming uses and structures are their continued use, hence, they are not abandoned,

discontinued, or damaged/destroyed in excess of 50% of their replacement value. Inclusion of a provision to allow for development contrary the prevailing nonconforming code would render the section meaningless. It would also require maintenance of multiple sets of codes, those repealed as the result of an amendment, and the newly amended code. The result is multiple and differing standards of development for the same use type. Thus, failure to adhere to consistent standards of nonconformity would lead to claims of disparate treatment and possible reverse spot zoning. It is worth noting, existing LDR provides for a relief process, via a variance, when application of prevailing Code is out of sync with the develop-ability or unique feature of a particular property. Based upon the foregoing and standard zoning practice, it is the recommendation not to create different standards between similar uses. The Village should adhere to Section 30-10.4.

**FISCAL/BUDGETARY IMPACT:** The fiscal/budgetary impact is undetermined.

**RECOMMENDATION:** Staff seeks direction from the Mayor and Village Council in order to complete the draft ordinance(s) for presentation for first reading.



Darby P. Delsalle, AICP, Director  
Planning and Zoning Department