

## CITY COUNCIL AGENDA STATEMENT



**Meeting Date:** August 8, 2023  
**To:** Honorable Mayor & City Council Members  
**From:** Brian Shea, Planning Director  
**Through:** George Garrett, City Manager

**Agenda Item:** **Ordinance 2023-12**, Amending Chapter 107, Article 2 Entitled “Transfer Of Building Rights”, Specifically Section 107.17. Entitled “General Provisions”, Of The City Of Marathon Land Development Regulations; Providing For The Repeal Of All Code Provisions And Ordinances Inconsistent With This Ordinance; Providing For Severability; Providing For Inclusion In The Code; Providing For The Transmittal Of This Ordinance To The State Department Of Economic Opportunity; And Providing For An Effective Date Upon The Approval Of This Ordinance By The Department Of Economic Opportunity In Accordance With State Law.

### **RECOMMENDATION:**

The Planning staff recommends approval of the Ordinance to further clarify the general provisions as they apply to the process for the Transfer of Building Rights and the duration of the use of the right.

**APPLICANT:** City of Marathon

**REQUEST:** Amend City of Marathon Land Development Regulations in order to further clarify the general provisions as they apply to the process for the Transfer of Building Rights and the duration of the use of the right.

### **Proposed Changes:**

Section 107.17 General Provisions

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F. Duration of Right to Use: After its transfer, the right to use the TBR would extend only for the period in which the owner of the receiving site must complete the conditions of development. The Director may approve an additional transfer should the development not occur. The additional transfer shall document the original sending site in the Deed of Transfer to ensure compliance with the provisions of this Article.

### **Alternate Compliance Review Criteria**

Since there are no internal Comprehensive Plan change review criteria available in Chapter 102, Article 6, those that would apply for an LDR text change request (Chapter 102, Article 7) are useful. The basis for the LDR text change criteria is the same as for a Comprehensive Plan change ultimately.

Section 102.26(B) of the Land Development Regulations requires that the following standards and criteria be considered for any proposed text amendment. Each criteria and explanation of relevance to this proposed amendment are listed below:

**A. The need and justification for the change;**

The proposed amendment codifies the existing Administrative Interpretation (attached for reference). The City Council and staff understand that projects may not be completed as planned and approved under conditions of development. Should that occur, the building right(s) originally transferred under the approvals may then become available for thoughtful and managed development elsewhere in town.

**B. The consistency of the proposed amendment with the Comprehensive Plan; and**

The proposed Ordinance meets three principal areas of concern reflected in the City's Comprehensive Plan. First, the proposed amendment seeks to meet all the necessary requirements that all new development and redevelopment protect the environment. Second, the Ordinance does not allow any additional impact on environmentally sensitive areas. Third, the proposed amendment seeks to maintain the traditional community character of Marathon, which is so closely tied to the environment.

**C. Whether the proposed change shall further the purposes of the LDRs, and other City Codes, regulations and actions designed to implement the Comprehensive Plan.**

The proposed regulations do further the basic goals and premises outlined in the introductory to the City's Comprehensive Plan as follows (highlighting for emphasis):

“With the knowledge that the City needs redevelopment and new development to provide the necessary improvements to guarantee the residents of the City a clean, healthy environment and a sound economy in which to live and enjoy their families, it is the desire and intent of the City through the Goals, Objectives and Policies of the adopted Comprehensive Plan and Land Development Regulations implementing the Plan to protect our character, environment and viability through:

- Protection of the small-town family feel of the community
- Continued utilization of the established mixed-use pattern of the community
- Protection of the heritage of the commercial fishing industry
- Acknowledgement and protection of a character that is unique to the Keys
- Protection of existing and increased affordable housing opportunities
- Implementation of effective surface water management strategies
- Systematic removal of failing and inadequate on-site wastewater disposal systems
- Maintenance and management of central wastewater and stormwater facilities
- Protection and enhancement of sensitive upland, wetland, and submerged land habitat
- Protection for the existing uses, densities, and intensities
- Providing new investment and reinvestment opportunities
- Ensuring new development and redevelopment protects the environment
- Ensuring new and redevelopment compliments and enhances community character
- Implementation of thoughtful, managed growth.”

**CONCLUSION:**

The proposed Amendments are consistent with and furthers the goals of the City of Marathon Comprehensive Plan and Land Development Regulations.

**RECOMMENDATION:**

The Planning staff recommends approval of the Ordinance to further clarify the general provisions as they apply to the process for the Transfer of Building Rights and the duration of the use of the right.

**Sponsored By:** Garrett  
**Planning Commission Public Hearing Date:** June 26, 2023  
**City Council Public Hearing Date:** July 11, 2023  
August 8, 2023  
**Enactment Date:** August 8, 2023

**CITY OF MARATHON, FLORIDA  
ORDINANCE 2023-12**

**AN ORDINANCE OF THE CITY OF MARATHON, FLORIDA, AMENDING CHAPTER 107, ARTICLE 2 ENTITLED “TRANSFER OF BUILDING RIGHTS”, SPECIFICALLY SECTION 107.17. ENTITLED “GENERAL PROVISIONS”, OF THE CITY OF MARATHON LAND DEVELOPMENT REGULATIONS; PROVIDING FOR THE REPEAL OF ALL CODE PROVISIONS AND ORDINANCES INCONSISTENT WITH THIS ORDINANCE; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR THE TRANSMITTAL OF THIS ORDINANCE TO THE STATE DEPARTMENT OF ECONOMIC OPPORTUNITY; AND PROVIDING FOR AN EFFECTIVE DATE UPON THE APPROVAL OF THIS ORDINANCE BY THE DEPARTMENT OF ECONOMIC OPPORTUNITY IN ACCORDANCE WITH STATE LAW.**

**WHEREAS**, the City of Marathon (the "City") has adopted a Comprehensive Plan which has been found to be in compliance by the State Department of Economic Opportunity ("DEO"), pursuant to Chapters 163 and 380, Florida Statutes; and

**WHEREAS**, it is the City’s intent to amend the LDRs to ensure redevelopment of TBRs should approved development not commence; and

**WHEREAS**, the City does not want to unduly constrain development within the City of Marathon, so long as the growth is managed and environmentally appropriate; and

**WHEREAS**, the City Council finds it necessary, desirable, and proper to adopt the amendments to the Land Development Regulations corresponding to a similar amendment to the City’s Comprehensive Plan to reflect changing conditions, pursuant to Sections 163.3191 and 163.3178(2)(f) Florida Statute.; and

**WHEREAS**, this Ordinance, thus passed at its second reading, shall be transmitted to DEO for review and approval,

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA THAT**

~~Strikethrough~~ = deletion

**bold underline** = addition

**SECTION 1.** The above recitals are true, correct, and incorporated herein by this reference.

**SECTION 2.** Amend the Land Development regulations, Chapter 107, “General Development Standards,” Article 2, “Transfer of Building Rights,” Section 107.17 as depicted in Exhibit A.

**SECTION 3.** The provisions of this Ordinance are declared to be severable and if any section, sentence, clause or phrase of this Ordinance shall for any reason be held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Ordinance but they shall remain in effect, it being the legislative intent that this Ordinance shall stand notwithstanding the invalidity of any part.

**SECTION 4.** The provisions of this Ordinance constitute an amendment to the Land Development Regulations as defined by State law. Accordingly, the City shall forward a copy of this Ordinance to the Department of Economic Opportunity for review and approval pursuant to Sections 380.05(6) and (11), Florida Statutes.

**SECTION 5.** This Ordinance shall be effective immediately upon approval by the Department of Economic Opportunity pursuant to Chapters 163 and 380, Florida Statutes.

**ENACTED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, THIS 8<sup>TH</sup> DAY OF AUGUST 2023.**

**THE CITY OF MARATHON, FLORIDA**

\_\_\_\_\_  
**Luis Gonzalez, Mayor**

AYES:

NOES:

ABSENT:

ABSTAIN:

**ATTEST:**

\_\_\_\_\_  
Diane Clavier, City Clerk

**APPROVED AS TO FORM AND LEGALITY FOR THE USE  
AND RELIANCE OF THE CITY OF MARATHON, FLORIDA ONLY:**

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Steve Williams, City Attorney

<sup>1</sup>Additions to existing text are shown by underline/red print; deletions are shown as ~~strikethrough~~



# CITY OF MARATHON, FLORIDA

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www.ci.marathon.fl.us

## MEMORANDUM Planning Department

**DATE:** October 20, 2021

**TO:** Planning Staff, Legal

**FROM:** Brian Shea, Planning Director

**SUBJECT:** Administrative Interpretation 2021-01 – Interpretation of the Chapter 107 Article 2 Entitled Transfer of Building Rights

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### **BACKGROUND:**

Questions have arisen regarding the TBR/TDR process in Chapter 107 Articles 2 and 3. It has been suggested by staff that the language should be read to mean that building and/or development rights may only be transferred one time. Said another way, it has been suggested that once a building and/or development right is transferred from site A to site B, that right can never be transferred from site B to site C, even if the right has not been built and/or used.

### **ASSESSMENT:**

A copy of the existing Chapter 107 Article 2 is attached herein as Exhibit 1.  
Below is an excerpt from Chapter One of the Comprehensive Plan pertaining the TBRs.

#### Policy 1-3.5.16 Program for Transfer of Density and Building Rights (TDR's and TBR's)

a. The transfer of density and building rights within the City's boundaries shall attempt to achieve the following:

1. Protect environmental resources in balance with the protection of property rights;
2. Encourage the replacement of substandard structures, non-conforming structures, structures within environmentally sensitive habitat; structures subject to repetitive flood damage, and units or non-residential square footage which exceeds density limitations;
3. Facilitate redevelopment and revitalize the commercial centers by concentrating mixed use activities;
4. Facilitate the redevelopment and revitalization of hotels and motels in the City;
5. Protect housing affordability and facilitate the provision of new affordable housing units throughout the City;
6. Redistribute existing residential units or densities from more environmentally sensitive properties to less environmentally sensitive properties to encourage infill development and achieve planned densities without increasing the overall density;
7. Protect environmentally sensitive sites through the removal of existing dwelling units or allocated development rights;
8. Encourage the placement of conservation easements on environmentally sensitive or flood prone parcels of land;



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9. Further the public good and the goals, objectives and policies of the Plan;
10. Protect housing affordability and facilitate the provision of new affordable housing units throughout the City.

### c. Transfer of Building Rights (TBRs)

1. Transferable Building Rights (TBRs) shall only be transferable from a FLUM category of lower density to one of equal or higher density as defined in Table 1-1 of the Comprehensive Plan. Properties with a FLUM category of Conservation shall not be eligible as TBR receiver sites. Transferable Building Rights (TBRs) are only transferable to receiver site properties whose habitats are deemed by the City Biologist to be less sensitive than the sender site properties as defined in policy 4-1.5.8
2. The transfer of TBRs is subject to approval by the City based on the criteria established in c. 1. and 2. above. All transfers of TBRs must identify the removal of the TBRs from the sender site and their transfer to the receiving site and be recorded in the chain of title for both properties.
3. Alternatively, TBRs may be "banked" with the City for a period not to exceed two (2) years. TBRs so banked must identify the removal of the TBRs from the sender site and that they have been banked with the City pursuant to a specific agreement with the City, which shall be recorded in the chain of title of the sending site.

### **INTERPRETATION:**

Pursuant to Section 102.138, the Director of Planning is authorized to interpret all provisions of the LDRs. Further Section 100.06.B states that "In the event that any question arises concerning the application of regulations, performance standards, definitions, development criteria, or any other provision of the LDRs, the Director shall be responsible for interpretation and shall look to the Plan for guidance."

The intent of the Comprehensive Plan and the LDRs is clear, to move existing building rights from the sending site to the receiver site. Previous adopted versions of the Comprehensive Plan directed that LDRs be developed and adopted to facilitate the transfer of units from over dense and environmental properties to aid in infill development of less environmentally sensitive lands. This is further expanded on in Section 107.13 of the LDRs.

Based upon 107.17.F, the right is only valid for use for so long as it takes to complete the proposed development on the receiver site. This is why a description of the proposed development is required as part of 107.16.B of the transfer process. Additionally, a concept meeting is encouraged per 107.16.A to understand any limitations that may be imposed on both the sending and receiving sites based upon those proposed developments/redevelopments. Therefore, having rights temporarily sit on a property is not the intent of the code.

Banking of rights is only enumerated in the Comprehensive Plan as noted above. If an applicant's intent is to temporarily have a right float, then it must be addressed in a specific agreement with the City. This allows for the City to act as a temporary repository for the rights. In the instance of Conditional Use approvals, the approval is valid for one (1) year per Section 102.79.C. Section 102.79.D allows the Director to grant a one-time extension not to exceed one (1) year. Therefore, the City is able to act as the repository for the allocations based upon the proposed Conditional Use approval. Another example in which the City would act as the "bank" would be as part of the platting process by holding the allocations while the parcels are being platted



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and legal descriptions created for the new receiver sites. The specific agreement mentioned in the Comprehensive Plan could be accomplished as a stand-alone Development Agreement or incorporated into a Development Agreement tied to a Conditional Use or other development approval. This may allow for a time period to exceed the 2 years if found to be consistent with the LDRs upon approval from Council per Florida Statute.

There are two known instances where a transfer has previously occurred, and a second transfer is proposed. The first is 00326770-000000 in which there was a Conditional Use and Development Agreement proposed in 2019 to build affordable housing. The second instance required a TBR to occur to resolve a code case, that was then assumed into a much larger Conditional Use and Development Agreement. These, and any other multiple TBR applications done prior to this administrative interpretation will have to be addressed on a case-by-case basis.

In short, a TBR is to go from Site A to Site B. A TBR is not supposed to then go from Site B further to Site C. However, a TBR can, with an agreement, go from Site A to “bank” at the City, and eventually land at Site B.

Brian Shea  
Planning Director, AICP





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## **EXHIBIT 1**

## ARTICLE 2. - TRANSFER OF BUILDING RIGHTS

### Section 107.13. - Purpose and Intent.

The purpose of this Article is to provide for the transfer of existing lawfully established dwelling units, transient units, and commercial floor area from their existing locations to other locations in the City. Through the transfer of building rights, it is the intent of this Article to reduce and reallocate excess densities; provide alternatives to BPAS through the use of existing building rights; eliminate uses which are inconsistent with these regulations and the Comprehensive Plan; encourage the redevelopment and revitalization of the City's existing commercial centers; to preserve and protect environmentally sensitive lands; protect existing affordable housing; provide incentives for the creation of additional affordable housing and recognition of private property rights.

### Section 107.14. - Types of Transfers.

Transfer of building rights is limited to the following activities:

- A. Transferring lawfully established commercial floor area from one (1) site to another site.
- B. Transferring a lawfully established transient unit from one (1) site to another site.
- C. Transferring a lawfully established dwelling unit from one (1) site to another, more specifically:
  1. Removing a market rate dwelling unit from one (1) site and rebuilding on another site as a market rate or deed-restricted affordable dwelling unit.
  2. Removing a deed-restricted affordable dwelling unit; a dwelling unit that is subsidized by or constructed with public money (including, but not limited to, the Monroe County Land Authority, SHIP, HOME, CDBG, etc.); or a permanent RV from one (1) site and rebuilding as a deed-restricted affordable dwelling unit on another site.

### Section 107.15. - Site Criteria.

#### A. *Sending Site Criteria:*

1. The parcel must have a documented building right.
2. The sending site shall not have any open permits or active code violations.
3. All bonds, assessments, back city taxes, fees and liens (other than mortgages) affecting the parcel shall be paid in full prior to recordation of the warranty deed for the transfer of the building rights.

#### B. *Receiving Site Criteria:* The parcel must:

1. Be classified by the City Biologist as less environmentally sensitive than the sending site, as scored using the BPAS scoring criteria, established in Article 1 of this Chapter applicable to the type of use;
2. Be zoned to allow the requested use; and
3. Meet all provisions of the LDRs and the Comprehensive Plan relating to the type and magnitude of the proposed development.

Section 107.16. - Transfer Process.

- A. The developer of a receiving site is encouraged to schedule a concept meeting with staff prior to submission of an application for transfer. The purpose of the meeting is to discuss the development and/or redevelopment of the sending and receiving sites and to understand any limitations that may be imposed upon the sending and receiving sites.
- B. The developer of a receiving site shall make application for the approval of the transfer of the building right(s) on a form provided by the City, and provide such information requested by the City to approve the transfer. At a minimum, the information shall include the following:
  1. Identification of the sending and receiving sites;
  2. Proof of ownership of the receiving site and the building right(s) from the sending site; and
  3. A description of the proposed development or redevelopment of the sending and receiving sites.
- C. The City will review the application to determine:
  1. Compliance with the receiving site criteria;
  2. If the proposed use of the receiving site can be permitted as of right or requires conditional use approval. Development plans and approvals for the receiving site shall be subsequently processed as provided in the Comprehensive Plan and the LDRs according the magnitude and type of the development proposed for the site; and
  3. The validity of the sending site building right(s) (e.g. the building right(s) have a valid "Determination of Building Right" issued by the City as per Article 23 "Verification of Building Right" of Chapter 102 and the right(s) has not been previously transferred).
- D. Upon approval, the City will issue the receiving site a TBR permit using a unique identifier number for tracking and monitoring by the City. This permit may include conditions of approval.

Section 107.17. - General Provisions.

In addition to the affordable housing requirements of Section 107.18, below, the transfer of building rights shall be subject to the following:

- A. *Deed of Transfer:* Prior to the issuance of a building permit authorizing the development of the TBR on the receiving site, a deed of transfer shall be recorded in the chain of title of the sending site containing a covenant prohibiting the further use of the building right(s) utilized;
- B. *Warranty Deed:* A warranty deed shall be recorded in the chain of title of the receiving site evidencing the transfer of the building right; however, all bonds, assessments, back City taxes, fees and liens (other than mortgages) affecting the parcel shall be paid in full prior to recordation of the warranty deed for the transfer of the building right; and
- C. *Sending or Affordable Housing Site Compliance:* Prior to issuance of a Certificate of Occupancy on the receiving site, the sending site and, if applicable, the Affordable Housing Site, must be brought into compliance with the requirements of the Code and any conditions of approval required by the TBR permit must be met. These conditions may include, but are not limited to:
  1. Bringing the sending site and, if applicable, the Affordable Housing Site, into compliance with landscaping, bufferyards, waste treatment, stormwater, and access requirements;
  2. In the case of a nontransient dwelling unit, the structure containing the building right to be transferred may be demolished and a cash-in-lieu payment pursuant to Subsection 107.18 B. hereof shall be made to the City, or must obtain a BPAS allocation to either continue use of the existing structure on the sending site or, if demolished, to rebuild the structure on the sending site or, if applicable, the Affordable Housing Site; and
  3. The owner of such structure(s) shall upgrade the roof, electric and plumbing of any structure to meet the most recent requirements of the Florida Building Code, and must provide storm shutters that comply with the Florida Building Code. If the structure is rebuilt, the Certificate of Occupancy for such structure must be obtained prior to issuance of the Certificate of Occupancy on the receiving site.
- D. *Environmental Mitigation:*
  1. For parcels which contain tropical hardwood hammocks, palm hammocks or high quality wetlands, as determined by the City Biologist, from which less than all building rights have been transferred, the following will be required:
    - (a) A restrictive covenant shall be recorded with the Monroe County Clerk of the Court, at the applicant's expense, restricting transfer of building rights back to the parcel; and
    - (b) The sending site shall be restored pursuant to a restoration plan approved by the

City Biologist. The restoration shall be certified as completed by the City Biologist within six (6) months from the approval of the transfer.

2. For parcels which contain tropical hardwood hammocks, palm hammocks or high quality wetlands, as determined by the City Biologist, from which all building rights have been transferred, the following will be required:

- (a) A Grant of Conservation Easement shall be recorded with the Monroe County Clerk of the Court, at the applicant's expense, permanently restricting the sending site as open space; and
- (b) The sending site shall be restored pursuant to a restoration plan approved by the City Biologist. The restoration shall be certified as completed by the City Biologist within six (6) months from the approval of the transfer.

- E. *Allocation Availability:* The City will endeavor to make available to applicants hereunder affordable housing BPAS allocations for purposes of meeting the affordable housing requirements of this Article. The City, however, shall have no obligation to make such allocations available to any particular application hereunder, and shall have no liability to any applicant hereunder or any third party if additional affordable housing BPAS allocations have not been authorized by the State Department of Community Affairs or are otherwise not available.
- F. *Duration of Right to Use:* After its transfer, the right to use the TBR would extend only for the period in which the owner of the receiving site must complete the conditions of development.

#### Section 107.18. - Affordable Housing Requirements.

An applicant proposing to transfer any non-transient dwelling unit building right must comply with one (1) of the following "Affordable Housing" requirements:

- A. *Replacement:* For each non-transient dwelling unit building right transferred as market rate, the applicant may choose to reconstruct or rehabilitate not less than 30 percent of an affordable deed restricted dwelling unit on the sending site, the receiving site or some other acceptable site in the City (the "Affordable Housing Site"). In the event of reconstruction, this shall include, but is not limited to, bringing the sending site or the Affordable Housing Site, as the case may be, into compliance with all setbacks, stormwater, flood elevation, landscaping, bufferyards, and open space.
- B. *Building code, and fire code requirements:* In the event of rehabilitation, this shall include, but is not limited to; bringing the sending site and any of its remaining structures into compliance with all stormwater, landscaping, building code (but only as to roof, electric,

plumbing and storm shutters), and fire code requirements.

- C. *Affordable Housing Program Fund:* In lieu of Subsection A. above, the applicant may choose, for each dwelling unit building right transferred as market rate, to make a cash payment to the City's affordable housing program fund in an amount not less than 10 percent (to be reviewed at least annually and which may be adjusted from time to time by majority Resolution of the City Council) of the affordable housing cash-in-lieu payment per building right then in effect, as amended from time to time by Resolution of the Council (e.g. in 2006, one (1) building unit equals \$200,000 payment to affordable housing fund).
- D. *Land Donation:* In lieu of the foregoing, the applicant may choose to donate a buildable parcel located in the City suitable for the development of affordable housing with a value that meets the minimum requirements of Subsections A. and B. above, such parcel to be acceptable to the City in its reasonable discretion.
- E. *Alternative Compliance:* The applicant may choose, with the City's consent, some combination of the above Subsections.

(Ord. No. 2009-12, § 2, 3-31-2009)