PERSSON, COHEN & MOONEY, P.A. ATTORNEYS AND COUNSELORS AT LAW

MEMORANDUM

TO:	Mayor Schneier and Town Commissioners	
CC:	Tom Harmer, Town Manager	
FROM:	Maggie D. Mooney, Esq., Town Attorney	
DATE:	June 12, 2021	
RE:	Jewfish Key and Vessel Noise Regulation	

I. History and Background.

Since 2015, residents on the north end of Longboat Key have expressed concerns to the Town Commission about the non-motorized noise emanating from vessels anchored between the Longboat Key's main island and Jewfish Key. The primary source of the lodged complaints has to do with the volume of music that emanates from anchored vessels on holidays, weekends and other times of the day when the vessel owners and their guests are "partying" on the water. The music disturbs residents and property owners with homes adjacent to the shoreline.

The issue of the regulation of such vessel noise was brought before the Town Commission following the request of several Land's End residents in March 2016. After reviewing state statutes governing vessel regulations, it was unclear whether non-motorized vessel noise was pre-empted by state law. Specifically, Chapter 327, Florida Statutes, contains certain pre-emptions that restrict local government regulatory authority within Florida's Intracoastal Waterway and also the regulation of certain motorized vessel noise. The statutory language contained within Chapter 327, Florida Statutes, a review of caselaw, and coordination with the Florida Fish and Wildlife Commission ("FWC") (the state agency charged with administering Chapter 327) did not provide the necessary clarification on the issue.

Chapter 327, Florida Statutes, entitled Florida's Vessel Safety law relates to vessel safety considerations, vessel operations, includes water craft requirements, establishes uniform waterway marking requirements, and contains pre-emptions (local government) restrictions on what can and cannot be regulated by local governments.

Specifically, Florida Statutes 327.60, entitled "Local regulations; limitations" contains the following pre-emptions in sections (1) and (2) of the statute:

327.60 Local regulations; limitations.—

(1) The provisions of this chapter and chapter 328 shall govern the operation, equipment, and all other matters relating thereto whenever any vessel shall be operated upon the waters of this state or when any activity regulated hereby shall take place thereon.

(2) This chapter and chapter 328 do not prevent the adoption of any ordinance or local regulation relating to operation of vessels, except that a county or municipality may not enact, continue in effect, or enforce any ordinance or local regulation:

(a) Establishing a vessel or associated equipment performance or other safety standard, imposing a requirement for associated equipment, or regulating the carrying or use of marine safety articles;

(b) Relating to the design, manufacture, or installation of any marine sanitation device on any vessel, except as authorized in subsection (4);

(c) Regulating any vessel upon the Florida Intracoastal Waterway;

(d) Discriminating against personal watercraft;

(e) Discriminating against airboats, for ordinances adopted after July 1, 2006, unless adopted by a two-thirds vote of the governing body enacting such ordinance;

(f) Regulating the anchoring of vessels outside the marked boundaries of mooring fields permitted as provided in s.327.40, except for:

1. Live-aboard vessels; and

2. Commercial vessels, excluding commercial fishing vessels;

(g) Regulating engine or exhaust noise, except as provided in s. 327.65; or

(h) That conflicts with any provisions of this chapter or any amendments thereto or rules adopted thereunder.

See, Fla. Stat. 327.60 (1), (2).

Additionally, Section 327.65, entitled "Muffling devices" addresses vessel noise. That statutes provides the following regulations relative to engine noise and noise pollution:

327.65 Muffling devices.—

(1) The exhaust of every internal combustion engine used on any vessel operated on the waters of this state shall be effectively muffled by equipment so constructed and used as to muffle the noise of the exhaust in a reasonable manner. The use of cutouts is prohibited, except for vessels competing in a regatta or official boat race, and for such vessels while on trial runs.

(2)(a) Any county wishing to impose additional noise pollution and exhaust regulations on vessels may, pursuant to s. 327.60(2), adopt by county ordinance the following regulations:

1. No person shall operate or give permission for the operation of any vessel on the waters of any county or on a specified portion of the waters of any county, including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following sound levels at a distance of 50 feet from the vessel: for all vessels, a maximum sound level of 90 dB A.

2. Any person who refuses to submit to a sound level test when requested to do so by a law enforcement officer is guilty of a misdemeanor of the second degree, punishable as provided in s. <u>775.082</u> or s. <u>775.083</u>.

(b) The following words and phrases, when used in this section, shall have the meanings respectively assigned to them in this subsection.

1. "dB A" means the composite abbreviation for the A-weighted sound level and the unit of sound level, the decibel.

2. "Sound level" means the A-weighted sound pressure level measured with fast response using an instrument complying with the specification for sound level meters of the American National Standards Institute, Inc., or its successor bodies, except that only a weighting and fast dynamic response need be provided. See, Fla. Stat. 327.65.

In reading the above two statutes at the time the issue was presented, and discussing the matter with the General Counsel for (FWC), there was no instructive case law or advisory opinions on whether non-motorized boat noise on the water could be regulated by a municipal ordinance or whether it was pre-empted by either of the above cited statutes. In 2015, there also was no guidance provided by FWC as to whether the expansive definition of the Florida Intracoastal Waterway (as defined in Section 327.02(15), Florida Statutes) included the entirety of Sarasota Bay or whether the intention was to refer to navigable channel. Accordingly in 2015, Town Commission agreed that the Town would request a Florida Attorney General Opinion to clarify whether the subject of non-motorized noise could be regulated by the Town.

Copies of the May 3, 2016 Attorney General Opinion request from the Town to Attorney General Pam Bondi, and the August 2, 2016 *informal* response from Gerry Hammond (Senior Assistant Attorney General to Pam Bondi) are attached as Exhibits 1 and 2, respectively. Contemporaneously, the Town also explored and pursued the following:

1. In December 2015, the Town explored modifying Chapter 130, Town Code to incorporate objective decibel standards into the Town Code. At that time, the Town's Police Department obtained quotes for an acoustical consulting services to establish ambient sound levels at various locations in the Town to establish appropriate decibel levels for incorporation into the Town Code. Estimated costs for the engagement of a sound consultant, decibel level instrument, and police officer training was a minimum cost of \$23,365.00; and an additional acoustic camera (for measuring distant sound) was estimated to cost approximately \$50,000.00. See, Exhibit 3 December 22, 2015 Memorandum from Deputy Chief Rubino to Dave Bullock, Town Manager and Powerpoint. The Town Commission declined to proceed with the sound proposal presented.

2. The Town was invited to present to the Manasota League of Cities (November 2016) and the Florida League of Cities (FLC) Policy Forum (September 2016) on the issue of the Attorney General Opinion, sound on the waterways, and potential legislation that could be pursued to clarify jurisdictional noise issues. Presentations and suggested legislation was presented at that time at both meetings. See, Exhibit 4, Powerpoint to the Florida League of Cities. Neither body supported the pursuit of legislative amendments to clarify the Intracoastal Waterway definition or municipal authority to regulate non-motorized sound.

Following the Florida Attorney General's August 2016 informal opinion, and the lack of support from FLC to amend sections of Chapter 327, Florida Statutes, the Town has followed the guidance provided within the advisory opinion and refrained from enforcing the Town's noise ordinance against vessels. Recently, residents and property owners on the north end of Longboat Key have submitted numerous complaints to the Town regarding non-motorized/music emanating from anchored vessels. Such complaints have resulted in the Town Commission requesting that the above issues be reexamined.

In re-visiting the issue of noise on water, the Town Commission has various options available to it. While some involve revisiting the legal (jurisdictional) issues created by the 2016 Attorney General Opinion, other options and alternatives include the Town's pursuit of certain vessel restriction/exclusion zones that may create further buffers between anchored vessels and upland land owners, increasing marine patrol, and exploring the removal of the sand shoal/sand bar area. These options, and others, are discussed in greater detail below.

II. Revisiting the Town's Jurisdiction and the 2016 Attorney General Opinion.

Florida Attorney General opinions are considered advisory in nature and not binding in a court of law. Nevertheless, they are considered "persuasive authority" that local governments in particular may request to address questions of state law. Informal attorney general opinions (like the one issued to the Town in 2016) are considered of more limited application.

The 2016 Florida Attorney General Opinion ("AGO") stated the Town does not have jurisdiction to regulate vessels within the "Intracoastal Waterway" and rendered a particular determination that the Town was preempted from enforcing its sound ordinance in such waterbody. Recently, resident from the Town's north end have provided supplemental legal arguments (based upon federal law) that the Florida Intracoastal Waterway is the narrowly defined (100 ft. in width) federal nautical channel; and not the entire breadth of Sarasota Bay. While the navigational channel interpretation was explored in 2016, such a construction was not contained in the statutory definition of "Florida Intracoastal Waterway" as set forth in Section 327.02(15), Florida Statutes, the Florida Administrative Code rules, nor in any caselaw or binding authority. Further, the statutory definition of Florida Intracoastal waterway has not changed since 2016. However, recently this Legislative Session, the Florida Legislature has made reference within one of the bills (SB 1086) that amended a section of Chapter 327 to "the marked channel of the Florida Intracoastal Waterway" further supporting the argument that the "Florida Intracoastal Waterway" was intended to mean the navigable channel. See, SB 1086 (2021 Legislative Session). The combination of the federal law, 1972 legislative history, plus the recent 2021 legislation, lends itself to a colorable argument that the 2016 Attorney General Opinion should be revisited to specify that the location of the sand shoal (outside the navigable channel) is not within the Intracoastal Waterway; and therefore, not an area that the Town is pre-empted from enforcing its ordinance upon.

The Town could revisit this issue presented in the 2016 Attorney General Opinion and re-affirm its authority to enforce local ordinances (including noise regulations) on the vessels that anchor in the sand shoal area adjacent to Jewfish Key. Among the options available to the Town, the Town can:

1. Request that Attorney General Moody's Office clarify/revisit the 2016 prior opinion. Specifically, the Town could request that the Florida Attorney General revisit the definition of the "Florida Intracoastal Waterway" and its boundaries, and adopt an interpretation that the pre-emption in Florida Statutes 327.60 only applies in the navigational channel. This approach would involve adoption of a Resolution of the Town Commission and the submission of a written request and Memorandum of Law to the Attorney General's office. Should the Attorney General agree with this analysis, this would be the most conservative approach to ensure that the prior 2016 advisory opinion would be superseded by a new advisory opinion should a dispute ever arise about the Town's authority to enforce its sound ordinance on vessels within the shoreline surrounding the Town.

2. Ignore the 2016 Attorney General interpretation and rely upon the additional federal research, 1972 legislative history, and recent 2021 legislation in future interpretations of the Town's regulatory authority. This approach would have the Town disregard the prior Attorney General opinion (within the public realm) and have the Town modify its observance of the opinion over the past 5 years. Such a pivot in position can be done, however, it would place the Town in a defensive position having to explain the Town's departure/position if there was a challenge to a noise violation/citation. In such a challenge, the 2016 Attorney General Opinion would likely be an issue that would have to be addressed and distinguished. 3. A declaratory relief (lawsuit) could be filed in the 12th Circuit Court on the issue of law relative to the definition of the Florida Intracoastal Waterway. A declaratory relief action requests that the circuit court interpret the applicable law and render a determination. A declaratory relief action is binding precedent/legal authority (as compared to Attorney General Opinions which are considered persuasive authority). The Town could file a suit against a party in interest (meaning a potential violator of the Town's sound ordinance or state agency), or the Town could defend against such a suit for enforcement of the Town's ordinance(s). Depending on whether a state agency is a named party in the action, the case could be heard locally. However, if a state agency is named in a declaratory relief action, then, such cases can be removed to a Tallahassee court.

Of the options listed above, we recommend option 1, as the pursuit of a revised Attorney General Opinion on the same topic would allow the Town to seek clarification on the topic without having to engage or defend the topic in litigation on the subject matter.

III. Town's Noise Ordinance.

The Town's Noise Ordinance laws was modified in 2005 and is found within Section 130.02, Town Code. The Town's Code restricts unreasonable sound that "annoys, disturbs, injures, or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities." Music emanating from sources like radios, cds, dvds, or similar devices, fall within the Town's regulatory authority; however, the current ordinance may be difficult to enforce because it lacks sufficient objective standards and criteria to clearly regulate the unwanted behavior. Noise regulations are subject to First Amendment protections, regulations cannot be "content based" and they cannot be unduly vague. The current ordinance could be challenged on one or more grounds. A more in depth discussion of these standards is provided in a separate Memorandum dated June 13, 2021, attached as Exhibit 5. To the extent the Town anticipates future enforcement actions based upon the Town's noise regulation, it is advisable for the Town to incorporate more objective standards (i.e., decibel and/or distance measurable standards) into the Town's regulatory process. Incorporating such standards within the Town's ordinance will also likely require the acquisition of measurement equipment and training of the Town's officers who will need to enforce such regulations.

IV. Boat Restricted Areas, Vessel Exclusion Zones & Anchoring Limitation Areas.

There are several Florida Statutes that regulate vessel operation, anchoring and speed(s) that can be evaluated to determine whether there are areas along the Town's shorelines that can be further restricted to prevent vessel anchorage and operations in certain designated areas.

Section 327.46, Florida Statutes, grants authority to FWC and local governments (counties and cities) to establish ordinances for "any purpose necessary to protect the safety of the public if such restrictions are necessary based on boating accidents, visibility, hazardous currents or water levels, vessel traffic congestion or other navigational hazards, or to protect seagrasses on privately owned submerged lands. "Fla. Stat. 327.46(1). In most instances, FWC has to review the locally adopted ordinance and determine by substantial competent evidence that the ordinance is necessary to protect public safety such that some sort of statistical or factual basis is needed to justify the boating restricted area. Additionally the U.S. Coast Guard and Army Corps of Engineers (ACOE) must also be consulted in the establishment of certain vessel restriction/exclusion area.

Pursuant to the Florida Statute 327.46, such municipal ordinances can establish the following areas to further public safety:

A. <u>Idle speed, no wake boating restricted areas</u>:

- When the area is within 500 ft (or 300 ft) of certain public vessel launch areas used by the general public, or marine fueling station or within 300ft of any lock structure. *See*, Fla. Stat. 327.46 (1)(b)(1).
- When the area is within 300 ft. of an area where there are visibility issues. *See*, Fla. Stat. 327.46 (1)(c)(1).

B. Slow speed, minimum wake boating restricted areas:

- When the area is within 300 ft of certain bridge infrastructure or certain linear waterways. *See*, Fla. Stat. 327.46 (1)(b)(2).
- When the area has visibility issues, unsafe levels of vessel traffic congestion, navigational hazards, areas of accidents or significant threats to boating safety. *See*, Fla. Stat. 327.46 (1)(c)(2).

C. <u>Vessel exclusion zones:</u>

- When the area is designated as a public bathing beach or swim area, or within 300 ft of a flood control structure. *See*, Fla. Stat. 327.46 (1)(b)(3).
- When the area is reserved exclusively as a canoe trail or for nonmotorized vessels, for a particular activity and user group separation to protect safety of those participating in such activity. *See*, Fla. Stat. 327.46 (1)(c)(3).

- SB 1086 (discussed below) also provides that vessel exclusion zones must be marked with FWC uniform waterway markers.
- D. Boating Restricted Area to protect Seagrasses:
- May only be applied for by a private property owner of the state submerged lands. *See*, Fla. Stat. 327.46 (1)(d).
- Privately owned submerged land owners must apply to the FWC for waterway markers to mark the boat restricted zone.

In addition to the above reference provisions available for municipal ordinance adoption, other Florida Statutes specifically restrict vessel anchoring in certain urban areas or near public facilities. These statutes prohibit vessel anchoring in the following areas.

- E. Anchoring limitation areas:
- Florida Statutes 327.4108 specifies certain delineated waterways in "densely populated urban areas" (mostly in the South Florida region) that have been deemed anchoring limitation areas where vessels cannot anchor during certain times of day.
- New legislation SB 1946 and SB 1086 (both passed during 2021 Legislative Session), amends Florida Statutes 327.4108¹ and includes authority for counties to designate areas within their jurisdiction as anchoring limitation areas.
- SB 1946, allows counties to establish "anchoring limitation areas" adjacent to urban areas that have residential docking facilities and significant recreational boating traffic.
- Counties are only authorized to designate 10% of a particular county's navigable waterways as an anchoring limitation area.
- Designated areas must be less than 100 acres in size and cannot include any portion of the marked Intracoastal Waterway channel.
- Requires signage within the area, buoy installation and maintenance by the county.
- Limits anchoring for more than 45 consecutive days in a 6 month period.
- A County must provide notice to the FCW 30 days before introducing such an ordinance.
- FWC's role in this process is limited to publication requirements (no real oversight over this process).

¹ As of the date of this Memorandum, neither SB 1946 nor SB 1086 have been acted upon by the Governor. Unless specifically vetoed by the Governor, SB 1946 legislation will take effect "upon becoming a law" which means that it can become law with the Governor's signature or through inaction by the Governor. SB 1086 provides for an effective date of July 1, 2021.

See, Fla. Stat. 327.46 and SB 1086.

- F. Other Anchoring or Mooring Restrictions
- Florida Statutes 327.4109 currently prohibits anchoring or mooring within 150 feet of any marina, boat ramp, boat yard, or other vessel launching area, or 500 ft. of a superyacht repair facility.
- SB 1086 amended the existing anchoring restriction to further clarify that the 150 ft. prohibition on anchoring is a restriction measured from any "public" vessel launching or loading facility.
- This legislation clarifies that any publicly used vessel launch (including but not limited to a kayak launch) could create a prohibited anchoring restriction area, where vessels cannot anchor.

There may be existing areas in the Town that qualify for one or more of the above listed vessel restrictions, exclusion zones or anchoring restrictions that could prevent vessels from anchoring in or around areas on the north end of Longboat Key. These vessel and anchoring restrictions, if implemented, could have secondary effects of creating vessel buffer areas that limit vessels from anchoring immediately adjacent to the waterfront properties. As the applicability of these restrictions depends upon the presence of public and/or private resources, the infrastructure at the north end of the island would need to be evaluated to determine whether there are any qualifying areas where speed, anchoring restrictions or exclusion zones could be applied.

V. Marine Patrol Response

While the Town Commission have received emails from waterfront residents regarding their perspective on vessel nuisance behavior, the Town Commission may want to hear from the Police Department on their perspective as well. Specifically, the Town Commission may want to discuss with the Town's Police Department their assessment of the noise issue(s) and the Department's available resources. Such a discussion should include the following topics:

A. Noise complaints received by the Police Department.

- 1. Frequency of complaints.
- 2. Is there compliance when a complaint is received?
- 3. Do additional patrols mitigate negative behavior?
- 4. Staffing/Equipment issues.
- 5. Interagency/government cooperation.

To the extent that the Marine Patrol continues responding to nuisance behavior on the shorelines of Longboat Key, the Town's marine patrol may also want to consider other enforcement tools (besides local noise ordinance violations) that potentially could also be violated by the vessel owner/operators during unrestrained "parties" on the water. Specifically, Florida Statutes provide various other vessel safety requirements that can be evaluated by marine patrol officers (in some instances without probable cause). Some of the vessel safety requirements (provided for by Florida Statutes) that can be evaluated by the on duty marine patrol officer, and the commensurate fines for violations, include (but are not limited to) the following:

Boating safety identification card - \$50 civil fine;

- 1. Operating in excess of speed \$50 civil fine;
- 2. Carry safety equipment/personal floating devices;
- 3. Interference with navigation \$50 civil fine;
- 4. Marine sanitation devices \$50 civil fine; and
- 5. DUI/Testing Driving/actual operation. Violations can result in suspension of license and \$500 civil fine.

While some vessel safety laws can only be enforced while vessels are in operation, other safety standards (like safety equipment and vessel registration) can be enforced by any marine officer without probable cause. More enforcement efforts relating to existing statutory vessel safety standards, may curtail nuisance behavior and/or alleviate some of the unruly, "partying" abuse that is being reported by residents as occurring.

VI. Pursue Legislative fix.

The adoption of SB 1086 (relating to operation and safety of vessels) during the 2021 Legislative Session provided recommended clarification that FWC sought for several years. According to FWC officials, SB 1946 (relating to anchoring limitations) was not advanced by the state agency. Often when large pieces of legislation are adopted, there are opportunities in the following Legislative Sessions to clarify issues that were not addressed. These subsequent pieces of legislation are called "glitch bills." A glitch bill clarifying or supplementing the changes advanced in SB 1086 or SB 1976 could be pursued. Proposed legislative changes to Chapter 327, Florida Statutes could include legislation that:

1. Clarifies that the Intracoastal Waterway is the navigational channel, which would make definition consistent with recent references (from SB 1086) that refer to the Intracoastal Waterway as a "channel".

2. Recognizes local government authority to regulate nonmotorized noise on water.

Typically, changes to general laws (Florida Statutes) are pursued in conjunction with state lobbying organizations like the Florida League of Cities (FLC), Florida Association of Counties (FAC) or the Manasota League of Cities. Additionally, since the Florida Fish and Wildlife Conservation Commission (FWC) is charged with administering the vessel and anchorage regulations for the state, there should be coordination with this state agency as well, and legislative requests can also be considered by the FWC's Commission. Recent conversations with FWC officials have indicated that at the present time, the agency does not anticipate advancing any legislation in 2022. If this approach is desired, the Town should begin discussions with the Town's state lobbyist to determine whether opportunities for legislation during the 2022 Legislative Session are available, and what coordinated efforts should be initiated.

VII. Revisit the Removal of Sand from the Jewfish Key sand bar area.

Whether or not the sand shoal area at the northwest side of Jewfish Key could be dredged and used as beach renourishment sand is a question that has been posed for discussion. In response to that question, the Town reached out to various environmental consultants (legal and engineers) to determine whether this is feasible. Attorney Deborah Getzoff (environmental counsel) advised that at a minimum various state and federal permits would need to be obtained to dredge the shoal/sand bar for use as beach fill.

A. Federal approvals:

- 1. The U.S. Army Corps of Engineers would need to issue a permit pursuant to Section 10 of the Rivers and Harbors Act and the Clean Water Act for the dredge area and for any fill below high water. Since this appears to be an inlet flood shoal, any proposed dredge areas would probably require a modeling study to determine possible dredge locations, hydro graphics, and effects on the inlet and navigation channels. For any beach placement, a sand study would need to be done to determine compatibility of the material.
- 2. The Corps may need to do a Feasibility Study, which would take a substantial period of time.
- 3. The Army Corps permit review process would include coordination with the National Marine Fisheries Service and the U.S. Fish and

Wildlife Service relating to any listed species or habitat areas. This could be a lengthy process.

- 4. Approval may also be needed from the U.S. Coast Guard for the dredging.
- B. State Approvals:
- 1. The Florida Department of Environmental Protection will require an Environmental Resource Permit (ERP) for both dredging and filling below the line of mean high water pursuant to Chapter 373, Florida Statutes. This would be a Joint Coastal Permit pursuant to s. 373.427, Florida Statutes, which would combine the ERP with the permit needed for beach fill from the FDEP Coastal section and with the approvals from the Board of Trustees of the Internal Improvement Trust Fund for material removal and placement of any beach fill seaward of the Erosion Control Line or the line of mean high water pursuant to Chapter 253 Florida Statutes.
- 2. Part of the s. 373.427 Joint Coastal Permit for any beach fill activities seaward of the Erosion Control Line or the line of mean high water would be issued pursuant to s. 161.041, Florida Statutes. A coastal construction control line permit pursuant to s. 161.053, Florida Statutes may be required for beach fill above the Erosion Control Line or line of mean high water.
- 3. The shoal location appears to be within the Sarasota Bay Outstanding Florida Water pursuant to Rule 62-302.700 (9)(i), Florida Administrative Code. This designation requires the applicant to provide reasonable assurances that the proposed activity is clearly in the public interest pursuant to s. 373.414, Florida Statutes.
- 4. There may be a drafted Inlet Management Plan for Longboat Pass that includes consideration of this location that may have been filed with FDEP. If one exists, it may have draft provisions related to dredging in this location that would require consideration by Manatee County for any permitting process. If the Plan has not been adopted, it would not necessarily determine FDEP permit action, but it may raise issues to be considered by the Department in the review process.
- 5. State permitting would include coordination with the Florida Fish and Wildlife Conservation Commission relating to listed species at the state level.
- 6. There may also be approvals required by the West Coast Inland Navigation District.

A copy of Deborah Getzoff's email relating to the above permitting requirements is attached as Exhibit 6.

Dr. Al Browder concurred with the permitting assessment from Ms. Getzoff. Dr. Browder also provided Town Staff with a projection of anticipated costs for such permitting and indicated:

This includes significant geotechnical investigation (perhaps as much as \$50,000) and costly numerical morphodynamical inlet modeling with sediment budget analysis for the Longboat Pass system (perhaps \$300,000 to \$500,000, depending on the level of new field data collection and calibration required). In addition to these costs, the permitting process will require a cultural resource assessment, environmental assessments, possible seagrass mitigation requirements, and the development of a proposed Inlet Management Plan for FDEP (derived from the studies described herein).

Further, Dr. Browder indicated that the above study would not guarantee that FDEP would issue a permit to dredge all or a portion of the shoal area. He opined that the sand will be the best quality during the first dredge and would fill with progressively finer material so it may not be the best renewable sand source. A summary of Dr. Browder's opinion is attached as Exhibit 7.

If the Town Commission would like to explore the pros and cons of dredging the sand shoal area and the potential expense and time necessary to accomplish such an objective, then it would be advisable to have the Town's consultants present to the Town Commission on this topic.

VIII. Conclusion

Conversations with FWC representatives have indicated that the vessel noise issue(s) that the Town's waterfront residents are experiencing are the similar to other waterfront property complaints throughout the state. Further, FWC has also indicated that there is not a single "fix" to the vessel noise problems.

Accordingly, the options and topics discussed above are provided for the Town Commission's consideration and discussion because there may need to be a multi-option approach developed to effectively address non-motorized vessel noise on the waters surrounding Longboat Key. The Town Commission is requested to review the options outlined in this Memorandum (and supporting exhibits) and provide direction to the Town Manager and Town Attorney on the next steps the Commission would like to pursue. EXHIBITS:

- 1. May 3, 2016 Attorney General Opinion Request from the Town Attorney to Attorney General Bondi.
- 2. August 2, 2016 Information Attorney General Opinion response from Gerry Hammond, Senior Assistant Attorney General.
- 3. December 22, 2015, Memorandum and Powerpoint presented by Deputy Chief Frank Rubino to the Town Commission.
- 4. September 2016 Powerpoint to the Florida League of Cities relating to the Attorney General Opinion issued to the Town.
- 5. Memorandum on Noise Ordinance Enforcement and Recommendation, dated June 14, 2021 from the Town Attorney's Office to the Town Commission.
- 6. June 8, 2021, Email from Deborah Getzoff relating to sand removal around Jewfish Key.
- 7. June 13, 2021, Email from I. Brownman summarizing conversation with Dr. Al Browder.

Persson & Cohen, P.A.

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* Board Certified City, County and Local Government Law

May 3, 2016

The Honorable Pamela Bondi Florida Attorney General Department of Legal Affairs The Capitol PL-01 Tallahassee, Florida 32399-1050

> RE: Town of Longboat Key's Request for an Attorney General Opinion on the Authority to Regulate Nuisance Sound by Local Ordinance on the Intracoastal Waterway

Dear Attorney General Bondi:

On behalf of the Town of Longboat Key ("Town"), I am formally requesting an opinion on the ability of a municipality to adopt and enforce a local sound regulation that would include an application of such ordinance to non-motorized noise emanating from certain vessels anchored in and around sand shoal areas located within the Intracoastal Waterway.

Lakewood Ranch 6853 Energy Court Lakewood Ranch, Florida 34240 Venice 217 Nassau Street S. Venice, Florida 34285 Pamela Bondi, Esquire May 3, 2016 Page 2

FACTS

The Town is a 10 mile barrier island located in both Manatee and Sarasota Counties. The Northern end of Longboat Key which is located in Manatee County consists of a primarily residential community known as the "Village". Included within the municipal boundaries are two additional islands known as Sister Key and Jewfish Key. These 2 islands are only accessible by boat and located within Sarasota Bay, eastward of the main land area of the Town. The northernmost island, Jewfish Key, has several residential homes located on the island. In between Jewfish Key and the main land section of Longboat Key is a sand shoal area. A map of this area is included for your reference and consideration.

On long weekends and holidays the sand shoal area is a popular gathering location for vessels to anchor, and for boater to engage in general "partying" activities. Frequently the boaters and/or their passengers anchor, drink alcoholic beverages, and listen to loud music that is amplified by speakers located on the anchored vessels. The amplified music emanating from some of these anchored vessels carries across the Intracoastal Waterway and can be heard by property owners on the Sarasota Bay side of the Town, particularly within the Village. A large number of residential property owners in the Village have expressed concern and frustration regarding the disturbance of their peace and solitude arising from the loud music played by vessels anchored on the sand shoal area within the Intracoastal Waterway. Additionally, an area at the South end of the Town also within the Intracoastal Waterway faces a similar issue where boats will routinely anchor and congregate, resulting in the same types of noise. Over the years the Town has also received complaints from residents in this area about the loud music emanating from anchored vessels in this area.

Due to the concern expressed by residents, the Town Commission is exploring options relating to enforcement of locally adopted sound ordinances relating to disturbing levels of sound, including those levels from speakers. Importantly, the Town is considering the possibility of an acoustical sound analysis for the intent of establishing acoustical measurements of ambient sound levels for inclusion in a noise ordinance. The Town desires to control disturbing nuisance noise within its jurisdictional boundaries regardless of the source of the sound. The noise ordinance would be applicable throughout the Town, including in the sand shoal areas referenced above. Importantly, the Town would not regulate any aspect of boat equipment, navigation or operation noise under its noise ordinance. Paméla Bondi, Esquire May 3, 2016 Page 3

DISCUSSION

The Town researched this issue under applicable nuisance sound regulations, examined preemption issues, and reviewed Florida Statutes, case law, Attorney General Opinions, and Fish and Wildlife Conservation (FWC) Commission regulations for any potential conflict in laws. The Town is confident in its ability to constitutionally regulate annoying or disturbing nuisance noise. However, a potential statutory ambiguity has led the Town to question its authority with respect to nuisance noise emanating from vessels on the Intracoastal Waterway even though such noise is unconnected with vessel operation, vessel safety or navigation. Although there is no direct legal guidance or precedent, the Town does not believe that enacting and enforcing a nuisance noise regulation would create a conflict in laws under either Florida Statutes or the FWC regulations governing vessel operation or safety even though such regulation would be enforced on Florida's Intracoastal Waterway.

The Town recognizes its ability to regulate nuisances, and specifically sound, under the Police Power. Easy Way of Lee County, Inc. v. Lee County, 674 So.2d 863 (Fla. 2d DCA 1996), relying on Reeves v. McConn, 631 F.2d 377(5th Cir. 1980). Courts have repeatedly held regulations of nuisance sound as an inherent authority of local governments so long as there are no constitutional violations in the drafting or application of the regulation. State v. Catalano, 104 So.3d 1169 (Fla. 2011). In Catalano the Florida Supreme Court upheld the "plainly audible" standard against a void for vagueness constitutional challenge; a regulation could be determined to be unconstitutionally vague if 1) it fails to give individuals of common and ordinary intelligence adequate notice of prohibited conduct, or 2) it lacks objective enforcement standards, lending itself to arbitrary enforcement. Id. Additionally, amplified sound regulations could trigger First Amendment considerations, which must be narrowly tailored in order to not restrict free speech rights more than necessary and not be unconstitutionally overbroad. See Daley v. City of Sarasota, 752 So.2d 124 (Fla. 2d DCA 2000), interpreting Ward v. Rock Against Racism, 491 U.S. 781 (1989). Furthermore, the Town's Home Rule Power grants the Town the authority to pass regulations within its jurisdictional boundaries for any municipal purpose, and to protect the life, health, safety and welfare of its citizens. Article III, § 2(b), Florida Constitution; Florida Statute § 166.021 (2016).

Boating on the waterways of the State is a highly regulated activity. Due to the desire to keep boating laws and regulations as uniform as possible throughout the State, Florida has adopted legislation governing minimum boating equipment requirements and navigational standards. The Town has examined the applicable statutes in Florida Statutes, Pamela Bondi, Esquire May 3, 2016 Page 4

Chapter 327, governing vessels, and associated case law to determine to what extent waterway regulations have been preempted to the State Legislature or delegated to the FWC. Under Florida Law, there is either express or implied preemption. <u>Sarasota Alliance for Fair Elections, Inc. v. Browning</u>, 28 So.3d 880, 886 (Fla. 2010). In order for there to be an express preemption, the legislature must specifically state its intent through clear and unambiguous language. *Id., citing City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006); <u>Phantom of Clearwater, Inc. v. Brevard County</u>, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005), *approved in Phantom of Brevard*, Inc. v. Brevard County, 3 So.3d 309 (Fla. 2008). An express preemption removes any doubt regarding the legislative intent to be the sole authority with respect to a given subject. However, there is no such express preemption in Florida Statutes regulating vessels on Florida's waterways.

Implied preemption can be more difficult to ascertain and must be inferred. <u>Lake</u> <u>Hamilton Lakeshore Owners Assn. v. Neidlinger</u>, 182 So.3d 738, (Fla. 2d DCA 2015)("Implied preemption is judicially imposed and reflects a decision by the judiciary to fill a void left by the failure of the legislature to provide explicit legislative directive of preemption."), *citing* <u>Phantom</u>, 894 So.2d at 1019. In order to make such an inference, a Court must determine that the legislation is so pervasive as to evidence an intent to preempt the particular area, and additionally that there are strong public policy reasons for the finding of legislative preemptions. <u>Sarasota</u>, 28 So.3d at 886, *citing Phantom*, 894 So.2d at 1018. When making a determination of whether or not the legislature's preemption is implied, the Court must look at the whole law, including its object and policy, as well as "the nature of the power exerted by the legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute..." *Id., citing <u>State v. Harden</u>*, 938 So.2d 480, 486 (Fla. 2006).

The Town's concern is whether or not an implied preemption exists under Florida Statutes, Chapter 327, with respect to the regulation of vessels in Florida's Intracoastal Waterways. While the Florida Legislature has not expressly preempted the entire body of regulations related to vessel operation on the navigable waters of the State, it has delegated most of its regulatory authority to the FWC. The manner in which the legislation was drafted leaves an ambiguity in the effect, intent and policy of the Legislature when it comes to municipal regulations in the Intracoastal Waterways.

The sandy shoal areas depicted in the enclosed map are all located in the jurisdictional limits of the Town in an area of Sarasota Bay designated as within Florida's Intracoastal Waterway. The Florida Intracoastal Waterway is defined by statute as follows:

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327.02 Definitions.—As used in this chapter and in chapter 328, unless the context clearly requires a different meaning, the term:

(12) "Florida Intracoastal Waterway" means the Atlantic Intracoastal Waterway, the Georgia state line north of Fernandina to Miami; the Port Canaveral lock and canal to the Atlantic Intracoastal Waterway; the Atlantic Intracoastal Waterway, Miami to Key West; the Okeechobee Waterway, Stuart to Fort Myers; the St. Johns River, Jacksonville to Sanford; the Gulf Intracoastal Waterway, Anclote to Fort Myers; the Gulf Intracoastal Waterway, Carrabelle to Tampa Bay; Carrabelle to Anclote open bay section, using the Gulf of Mexico; the Gulf Intracoastal Waterway, Carrabelle to the Alabama state line west of Pensacola; and the Apalachicola, Chattahoochee, and Flint Rivers in Florida...

Florida Statutes §327.60 limits a local governments ability to adopt local regulations relating to the operation of vessels. Specifically, Florida Statute § 327.60 (2016) states (*emphasis added*):

327.60 Local regulations; limitations.

(1) The provisions of this chapter and chapter 328 shall govern the operation, equipment, and all other matters relating thereto whenever any vessel shall be operated upon the waters of this state or when any activity regulated hereby shall take place thereon.

(2) Nothing in this chapter or chapter 328 shall be construed to prevent the adoption of any ordinance or local regulation relating to operation of vessels, except that a county or municipality shall not enact, continue in effect, or enforce any ordinance or local regulation:

(a) Establishing a vessel or associated equipment performance or other safety standard, imposing a requirement for associated equipment, or regulating the carrying or use of marine safety articles;

(b) Relating to the design, manufacture, installation, or use of any marine sanitation device on any vessel;

(c) <u>Regulating any vessel upon the Florida Intracoastal Waterway;</u>

(d) Discriminating against personal watercraft;

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(e) Discriminating against airboats, for ordinances adopted after July 1, 2006, unless adopted by a two-thirds vote of the governing body enacting such ordinance;

(f) Regulating the anchoring of vessels other than live-aboard vessels outside the marked boundaries of mooring fields permitted as provided in s. <u>327.40;</u>

(g) Regulating engine or exhaust noise, except as provided in s. <u>327.65;</u> or

(h) That conflicts with any provisions of this chapter or any amendments thereto or rules adopted thereunder.

(3) Nothing in this section shall be construed to prohibit local governmental authorities from the enactment or enforcement of regulations which prohibit or restrict the mooring or anchoring of floating structures or live-aboard vessels within their jurisdictions or of any vessels within the marked boundaries of mooring fields permitted as provided in s. <u>327.40</u>. However, local governmental authorities are prohibited from regulating the anchoring outside of such mooring fields of vessels other than live-aboard vessels as defined in s. <u>327.02</u>.

The intent of this general law appears to be to preempt a local government's ability to regulate the operation of waterborne vessels as this power is specifically delegated to other administrative agencies including the FWC. *Florida Statute* § 327.04 (2016). The above-referenced statute and its broad prohibition on the regulation of vessels makes its unclear whether the statute preempts the ability of a local government, like the Town, to enforce sound regulations emanating from vessels located within the Intracoastal Waterway. Nevertheless, the Town believes that the Legislature's intent was to solely restrict local governments from regulating the *operation* of vessels on the Intracoastal Waterway, rather than to restrict local governments from regulating a nuisance occurring within its jurisdictional limits.

Florida Statute § 327.02(30) defines "operate" as follows:

"'Operate' means to be in charge, in command of, or in actual physical control of a vessel upon the waters of this state, to exercise control over or to have responsibility for a vessel's navigation or safety while the vessel is underway upon the waters of this state, or to control or steer a vessel being towed by another vessel upon the waters of the state." Paméla Bondi, Esquire May 3, 2016 Page 7

The Town's intent in enforcing a sound regulation on the sandy shoal areas is <u>not</u> to regulate the operation of vessels but to prevent nuisance sound that is disturbing the Town's residents. Such a regulation would have no effect on the means of actual physical control of a vessel for navigational or safety purposes while within the Town's jurisdictional boundaries of the Intracoastal Waterway. Nevertheless, one of the potential areas where such locally adopted sound regulations would be enforced is located within the Intracoastal Waterway.

The only judicial guidance with respect to a potential preemption emanates from the Lake Hamilton case. Lake Hamilton Lakeshore Owners Assn. v. Neidlinger, 182 So.3d 738 (Fla. 2d DCA 2015). In this case, the property owners association sought judicial review of the lower tribunal's decision that no private cause of action could be found for nuisance against an airboat tour company operating on the waterways adjacent to the association's constituents. Id. As part of its analysis, the Court examined whether or not there was an implied preemption that could be derived from an examination of Florida Statute §§ 327.60, 327.65 and 327.04. Id. The Court specifically found that "an intent to occupy the field of nuisance law cannot be discerned. What is identifiable is a legislative intent to prohibit local governments from discriminating against airboats. The legislative scheme does not reflect a strong public policy rationale to deprive a citizen of the right to avail themselves of a remedy for nuisance." Id. In a footnote, however, the Court goes on to explain that this analysis does not involve the exercise of regulatory power by a local government, nor is a local regulation tied to a common law claim of nuisance. Id. Thus the question of a regulatory preemption is somewhat unresolved, although the considerations contained in this Court's opinion appear to directly relate to a potential judicial determination that neither an examination of the statutory scheme or a public policy rationale would result in a finding of implied preemption with respect to nuisance regulations.

The FWC has promulgated administrative regulations under the Florida Administrative Code that permit local jurisdictions to establish boating restricted areas. F.A.C., Rule 68D-23.105. However, the Attorney General's Office has already opined that this is not an option for a local government dealing with a noise abatement issue. See AGO 2005-58 stating that the County must revisit the issue of adopting a noise pollution ordinance rather than circumvent the regulation by using laws designed for implementing safety and navigational standards. Unfortunately two aspects on this opinion leave the underlying issue unresolved for the Town of Longboat Key. First, the opinion addresses a Florida Statute that has since been repealed by the legislature. This statute provided that if a local jurisdiction expended funds to patrol, regulate or maintain maritime activities within its jurisdiction, it could regulate vessels resident within its boundaries. See Florida Statute §

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327.22 (2009), repealed by Laws of Florida, Chapter 2009-86. The Bill analysis for this statute's repeal does not provide any context or evidence the legislature's intent regarding its decision to repeal this section. See <u>House of Representatives Staff Analysis</u>, CS/HB 1423 (2009), <u>http://archive.flsenate.gov/data/session/2009/House/bills/analysis/pdf/h1423c.GGPC.pdf</u>.

The second aspect that complicates the Town's analysis of this issue is the examination of Florida Statute § 327.65 in AGO 2005-58. The Attorney General's Office redirects Citrus County to this statute, which specifically provides the framework for which a County may enact regulations to control noise pollution, including specifying the authority to do so within the Intracoastal Waterway. The opinion states that this statute provides both the authority and parameters for local legislation imposing noise pollution regulations without any further analysis of this statute. *Id.*

The plain language of the relevant portions of Florida Statute § 327.65 (2016) reads as follows:

327.65 Muffling devices.-

The exhaust of every internal combustion engine used on any vessel operated on the waters of this state shall be effectively muffled by equipment so constructed and used as to muffle the noise of the exhaust in a reasonable manner. The use of cutouts is prohibited, except for vessels competing in a regatta or official boat race, and for such vessels while on trial runs.
 (2)(a) Any county wishing to impose additional noise pollution and exhaust regulations on vessels may, pursuant to s. <u>327.60</u>(2), adopt by county ordinance the following regulations:

1. No person shall operate or giver permission for the operation of any vessel on the waters of any county or on a specified portion of the waters of any county, including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following levels at a distance of 50 feet from the vessel: for all vessels, a maximum sound level of 90 dB A.

2. Any person who refuses to submit to a sound level test when requested to do so by a law enforcement officer is guilty of a misdemeanor of the second degree, punishable as provided in s. <u>775.082</u> or s. <u>775.083</u>.

(b) The following words and phrases, when used in this section shall have the meanings respectively assigned to them in this subsection.

Pamèla Bondi, Esquire May 3, 2016 Page 9

1. "dB A" means the composite abbreviation for the A-weighted sound level and the unit of sound level, the decibel.

2. "Sound level" means the A-weighted sound pressure level measured with fast response using an instrument complying with the specification for sound level meters of the American National Standards Institute, Inc., or its successor bodies, except that only a weighting and fast dynamic response need be provided.

Utilizing the rules of statutory construction, an examination of the plain and unambiguous language of this section would appear to reveal that the legislative intent of the above statutory provision was to limit local governments' authority over a vessel's equipment and associated noise specific to such equipment. The sole reference to "noise pollution" regulation appears in the statutory section discussing regulating muffling devices used on boat motors, rather than the loud and raucous noise from loud gatherings and music usually associated with nuisance sound. The rules of statutory construction require that effect be given to every word in the statute when determining intent, and words and phrases should not be treated as mere surplusage when interpreting a statute. See Quarantello v. Leroy, 977 So.2d 648 (Fla. 5th DCA 2008); Larimore v. State, 2 So.3d 101 (Fla. 2008). The only purpose for mentioning the authority for further noise pollution regulations in this statute is that to the extent the noise originates from the equipment and operation of vessels, such regulation is preempted to the State and FWC. However, without more, the statute does not address a local government's authority to impose and enforce a nuisance sound ordinance that is applicable throughout the Town's jurisdiction regardless of whether the noise is on the water or on the land.

Furthermore, when reading the provisions of §327.65, Florida Statutes, together and in connection with related statutory provisions, the legislative intent appears to be to provide uniform regulations for boating equipment and operation rather than to regulate nuisance sound. The rules of statutory construction provide that statutes must be read *in pari materia*, so that related portions are examined together to achieve a consistent whole. *Id.* The only time where the Legislature addresses noise in Florida Statutes, Chapter 327, regulating vessels is with respect to discriminating against air boats and when posturing regulations related to muffling devices. By including the noise pollution language in the statutory section addressing muffling devices, the legislative intent to be inferred is that only the noise pollution associated with vessel equipment related to navigation and safety is meant to be regulated by this provision. The impetus behind this statutory scheme is not to prevent a Pamela Bondi, Esquire May 3, 2016 Page 10

local government from enforcing a nuisance sound regulation within its jurisdiction, including those portions of its jurisdiction within the Intracoastal Waterway.

CONCLUSION

Based on the foregoing, the Town believes that it has the authority to enforce a nuisance sound ordinance throughout its jurisdictional boundaries including the Intracoastal Waterway. The Town is seeking an opinion from your office on whether the above listed Florida Statutes and law precludes the Town from enforcing its sound regulations on non-motorized noise emanating from vessels anchored in and around the sandy shoal areas within the Intracoastal Waterway. The Town believes that it has the authority to enforce its ordinances anywhere within its jurisdiction, including the Intracoastal Waterway, except with respect to boating equipment, and navigational and safety regulations as pre-empted by Florida Statute and delegated in the Florida Administrative Code by the FWC. The Town hopes that the Attorney General's Office will address the authority and parameters within its jurisdiction and within the Intracoastal Waterway.

Should you have any questions about this request or need any additional information from the Town, please do not hesitate to contact me.

Respectfully submitted,

Maggie D. Mooney-Portale

Maggie D. Mooney-Portale Town Attorney, Town of Longboat Key

cc:

Town Commissioners Dave Bullock, Town Manager Harold G. "Bud" Vielhauer, FWC General Counsel

Enc.

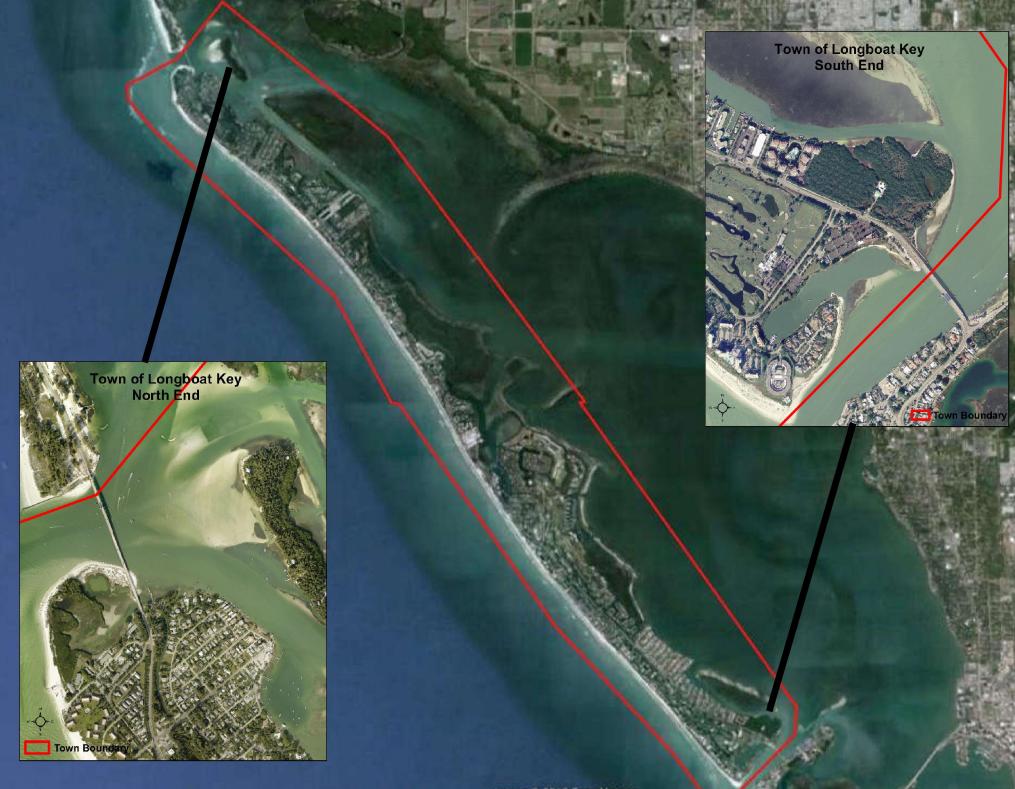


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PAM BONDI ATTORNEY GENERAL OFFICE OF THE ATTORNEY GENERAL Opinions Division

GERRY HAMMOND Senior Assistant Attorney General LL-04, The Capitol 400 S. Monroe Street Tallahassee, Florida 32399-1050 Telephone (850) 245-0158 Fax (850) 222-3839

August 2, 2016

Ms. Maggie D. Mooney-Portale Town Attorney, Town of Longboat Key Persson & Cohen, P.A. 6853 Energy Court Lake Ranch, Florida 34240

Dear Ms. Mooney-Portale:

On behalf of the Town of Longboat Key, you have requested this office's assistance in determining whether the Town of Longboat Key has the authority to adopt and enforce a local sound regulation that would include the application of such ordinance to non-motorized noise emanating from certain vessels anchored in and around sand shoal areas located within the Intracoastal Waterway. As more fully addressed in the discussion below, it would appear that the Town of Longboat Key is foreclosed from adopting any local sound ordinance or local sound regulation which would "regulat[e] any vessel upon the Florida Intracoastal Waterway" as provided in section 327.60(2)(c), Florida Statutes.

The Town of Longboat Key is a ten mile barrier island located in both Manatee and Sarasota Counties. The northern end of Longboat Key is located in Manatee County and includes within its municipal boundaries two additional islands. These islands are only accessible by boat and are located within Sarasota Bay. Between one of the Islands and Longboat Key is a sand shoal area which is within the Intracoastal Waterway.¹

¹ Section 327.02(12), Fla. Stat., defines the "Florida Intracoastal Waterway" as:

[&]quot;Florida Intracoastal Waterway" means the Atlantic Intracoastal Waterway, the Georgia state line north of Fernandina to Miami; the Port Canaveral lock and canal to the Atlantic Intracoastal Waterway; the Atlantic Intracoastal Waterway, Miami to Key West; the Okeechobee Waterway, Stuart to Fort Myers; the St. Johns River, Jacksonville to Sanford; the Gulf Intracoastal Waterway, Anclote to Fort Myers; the Gulf Intracoastal Waterway, Carrabelle to Tampa Bay; Carrabelle to Anclote open bay section, using the Gulf of Mexico; the Gulf Intracoastal Waterway, Carrabelle to

Ms. Maggie D. Mooney-Portale Page Two

According to your letter, the sand shoal area is a popular gathering place for vessels to anchor and for boaters to engage in partying activities. Frequently, the boaters listen to loud music that is amplified by speakers located on the anchored vessels. The amplified music is occasionally heard by property owners on the Sarasota Bay side of the Town. A number of residential property owners have expressed concern and frustration regarding the disturbance of their piece and solitude resulting from the loud music played by vessels anchored on the Intracoastal Waterway.

The Town Commission of Longboat Key is exploring options relating to enforcement of locally adopted sound ordinances relating to disturbing levels of sound, including those produced by speakers. The Town is considering the possibility of an acoustical sound analysis for the intent of establishing acoustical measurements of ambient sound levels for inclusion in a noise ordinance. You advise that the Town desires to control disturbing nuisance noise within its jurisdictional boundaries regardless of the source of the sound. The noise ordinance would apply throughout the Town including the sand shoal areas located within the Intracoastal Waterway. You have stated that you are confident in the Town's authority to adopt a noise ordinance and you have not requested any comment on that authority. You state that the Town would not, through this ordinance, regulate any aspect of boat equipment, navigation, or operation noise.

Of primary concern to the resolution of your question is section 327.60, Florida Statutes, entitled "[]ocal regulations; limitations." As the statute states:

The provisions of this chapter and chapter 328 shall govern the operation, equipment, *and all other matters relating thereto* whenever any vessel shall be operated upon the waters of this state or when any activity regulated hereby shall take place thereon. (e.s.)

The statute authorizes the adoption of ordinances or other local regulations relating to the operation of vessels with certain, specifically enumerated exceptions:

(2) Nothing in this chapter or chapter 328 shall be construed to prevent the adoption of any ordinance or local regulation relating to operation of

the Alabama state line west of Pensacola; and the Apalachicola, Chattahoochee, and Flint Rivers in Florida.

Ms. Maggie D. Mooney-Portale Page Three

vessels, except that a county or municipality shall not enact, continue in effect, or enforce any ordinance or local regulation:

*

(c) Regulating any vessel upon the Florida Intracoastal Waterway[.] (e.s.)

Thus, it is clear that the state has preempted² regulation of vessels on the Florida Intracoastal Waterway and that local governments have no authority to enact, continue in effect, or enforce "any3 ordinance or local regulation" that regulates any vessel on the Florida Intracoastal Waterway.4 The statute does not limit the prohibition to ordinances dealing with boat equipment, navigation, or operation noise, rather, the language of the statute addresses any ordinance or local regulation when the vessel is upon the Florida Intracoastal Waterway. In fact, other provisions of section 327.60, Florida Statutes, do limit the enactment of local ordinances regulating vessel equipment performance or safety standards; regulating the design, manufacture, installation, or use of marine sanitation devices on vessels; discriminating against personal watercraft; discriminating against airboats; regulating the anchoring of vessels outside mooring fields; regulating engine or exhaust noise; or regulations that may conflict with the provisions of Chapter 327, Florida Statutes, or the rules adopted pursuant to this chapter. The language relating to the Intracoastal Waterway is broad and does not limit local regulation to specific topics, rather, it completely removes vessels upon the Intracoastal Waterway from local regulation except as may be authorized therein and without regard to

² As provided in the Municipal Home Rule Powers Act, Ch. 166, Fla. Stat., Florida municipalities are authorized to "enact legislation concerning any subject matter upon which the state Legislature may act, except: ... (c) [a]ny subject expressly preempted to state or county government by the constitution or by general law[.]" See s. 166.021(3)(c), Fla, Stat.

³ See Ops. Att'y Gen. Fla. 74-311 (1974) and 09-31 (2009) in which this office has previously expressed its opinion that the term "any" may be read to mean "all" or "every."

⁴ And see Op. Att'y Gen. Fla. 05-58 (2005), concluding that Citrus County was prohibited from adopting an ordinance creating a boating restricted area near residential properties for the purpose of vessel noise abatement and stating that:

Chapter 327, Florida Statutes, and the administrative rules promulgated thereunder limit the authority of local governments to adopt noise abatement regulations and enforce those regulations on state waters. The county's authority to regulate is subject to the state's paramount power to regulate and control the use of its sovereign lands. A corollary to the requirement that regulations and restrictions of certain activities must be in furtherance of public health, safety, and welfare is that such regulation must not be in violation of constitutional protections afforded to the public for the use of, and access to, state sovereignt lands.

Ms. Maggie D. Mooney-Portale Page Four

whether areas of the Intracoastal Waterway may come within the geographical boundaries of a municipality.

In further support of this conclusion, the Florida Legislature has carved out a limited exception to this preemption with the provisions of section 327.65, Florida Statutes.⁵ While entitled "[m]uffling devices" and initially addressing the muffling of vessel engine exhaust, the statute goes on to address noise pollution on Florida waterways and provides that counties may, *pursuant to section 327.60(2)*, *Florida Statutes*, adopt noise pollution regulations. However, as noted above, section 327.60(2) authorizes, in subparagraph (g), the regulation of engine or exhaust noise. Thus, reading the statutes in pari materia,⁶ the authority of a county to regulate engine or exhaust noise on the Florida Intracoastal Waterway is authorized, but only as set

⁵ The statute provides:

327.65 Muffling devices.---

(1) The exhaust of every internal combustion engine used on any vessel operated on the waters of this state shall be effectively muffled by equipment so constructed and used as to muffle the noise of the exhaust in a reasonable manner. The use of cutouts is prohibited, except for vessels competing in a regatta or official boat race, and for such vessels while on trial runs.
 (2)(a) Any county wishing to impose additional noise pollution and exhaust regulations on vessels may, pursuant to s. 327,60(2), adopt by county ordinance the following regulations:

1. No person shall operate or give permission for the operation of any vessel on the waters of any county or on a specified portion of the waters of any county, including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following sound levels at a distance of 50 feet from the vessel; for all vessels, a maximum sound level of 90 dB A.

2. Any person who refuses to submit to a sound level test when requested to do so by a law enforcement officer is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(b) The following words and phrases, when used in this section, shall have the meanings respectively assigned to them in this subsection.

1. "dB A" means the composite abbreviation for the A-weighted sound level and the unit of sound level, the decibel.

2. "Sound level" means the A-weighted sound pressure level measured with fast response using an instrument complying with the specification for sound level meters of the American National Standards Institute, Inc., or its successor bodies, except that only a weighting and fast dynamic response need be provided.

⁶ When two statutes relate to common things or have a common or related purpose, they are said to be *in pari materia*, and where possible, that construction should be adopted which harmonizes and reconciles the statutory provisions so as to preserve the force and effect of each. See, e.g., Pritchard v. Jax Liquors, Inc., 499 So. 2d 926 (Fla. 1st DCA 1986), review denied, 511 So. 2d 298 (Fla. 1987), and Mann v. Goodyear Tire and Rubber Company. 300 So. 2d 666 (Fla. 1974).

Ms. Maggie D. Mooney-Portale Page Five

forth in section 327.65(2)(g), Florida Statutes.

In conclusion, it would appear that the Town of Longboat Key is foreclosed by the provisions of section 327.60(2)(c), Florida Statutes, from adopting a local sound ordinance or local sound regulation which would apply to or "regulat[e] any vessel upon the Florida Intracoastal Waterway."

Sincerely,

Franco ammond

Gerry Hammond Senior Assistant Attorney General

GH/tsh

LONGBOAT KEY POLICE DEPARTMENT

MEMORANDUM

DATE: DECEMBER 22, 2015

TO: Mr. Dave Bullock, Town Manager

FROM: Frank Rubino, Deputy Chief

SUBJECT: Update regarding sound measuring device for noise ordinance

In June of 2015 the town commission tasked the police department with researching the use of a sound measuring device and incorporating such such equipment and usage into the towns' noise ordinance.

In order to produce a noise ordinance that legally integrates decibel levels as a means of noise measurement, a study is needed to establish threshold compliant and non-compliant noise levels. Other jurisdictions who have incorporated decibel levels into their code of ordinances have relied upon such studies and incorporated those findings into their legislative record when establishing the appropriate levels of noise. The Police Department explored the expertise needed to establish such levels and found that Manatee County recently hired a company to complete such a study. That company was SIEBEIN ASSOCIATES, INC. Consultants in Architectural Acoustics located at 625 NW 60 Street, Suite C Gainesville, Florida 32607. This consultant has performed similar studies for multiple other jurisdictions (municipalities, counties, airports, etc.).

A phone conference was arranged with Senior Principle consultant Gary W. Siebein and the Towns interest in establishing sound levels within the Town Code. Mr. Siebein gave a proposal to take acoustical measurements of existing ambient sound levels at various locations in the Town and present the commission with a written analysis of the data at a Town Commission meeting. The minimum charge for the suggested work presented in the written proposal: \$12,465.00 (see attached proposal)

One of the scenarios presented during the phone consultation was the excessive noise coming from the waterway and/or sand bars where boaters anchor at the northeastern end of Longboat Key. The concern was whether it was possible to pinpoint with a certain degree of accuracy using the standard decibel meter which particular vessel was producing the noise to withstand a legal challenge. Mr. Siebein advised that even with a decibel meter an officer would have to be close enough to testify to the origin of the noise; however, he indicated that there is an instrument that may be used from a greater distance that can pinpoint a noise source with more accuracy. Mr. Siebein provided the company name and contact information.

Bill Gallagher of Scantek, Inc. Sound and Vibration Instrumentation and Engineering was contacted regarding this specialized equipment and he advised there is an instrument that can pinpoint the origin of the noise within several feet. The instrument is an acoustic camera that utilizes a tripod, computer and specialized training. The price for one of those instruments is approximately \$50,000.00 (see attached proposal)

The surrounding agencies that have decibel levels established within their code and utilize the decibel meter have not used them on the water. Rather; the decibel levels are used for specific neighborhoods and downtown areas that had noise complaints involving nightclubs, restaurants, airports, trains, etc.

Accordingly, to move forward with incorporating decibel levels into the Town Code, at minimum, the Town will incur the following expenses:

	Minimum Cost	\$23,365.00
•	Police Officer Training	\$1,500.00
•	Sound Consultant Decibel Level Instrument calibration)	\$12,465.00 \$9,400.00 (includes 2 units, warranty and
		• · · · · · · · · · · · · · · · · · · ·

Additional /Optional Equipment- Acoustic Camera- \$50,000.00

Additionally, the Town Attorney has advised that there may be other legal factors the Town Commission should consider before integrating a decibel level into the Town's Code and has expressed concern regarding the factors that could or could not be regulated through a decibel level on vessel operations. The Town Attorney will discuss several legal constraints in a separate memorandum.

In order to proceed forward with drafting a noise ordinance that measures ambient sound I would ask for direction on whether the town would like to move forward with the proposals presented.



Regulating Vessel Noise on the Florida Intracoastal Waterway

Manasota League of Cities November 10, 2016

Presented By: Maggie Mooney-Portale & Regina Kardash

TOWN OF LONGBOAT KEY



Local Governments can regulate sound on land within their jurisdiction.







Courts have repeatedly held regulations of nuisance sound as an inherent authority of local governments under the police power, so long as there are no constitutional violations in the drafting or application of the regulation.



Clear legal authority for local governments including municipalities to enforce nuisance noise and sounds within their jurisdiction on land.

Due to conflicts in language in existing Florida Statutes, the authority to regulate nuisance noise and sound pollution emanating from the water is less certain.





Why do we need to regulate nuisance sound on Florida's waterways?

Residents complain that noise emanating from the waterway can get out of control.





Chapter 327, Florida Statutes is Florida's Vessel Safety Law.

Generally, it provides standardized regulations relating to the operation of vessels on Florida's navigable waterways, including all of the inland lakes, rivers, and canals under the jurisdiction of the state.

These regulations provide general safety requirements for waterway markers, boating and driving safety, accident reporting, casualty/liability, vessel anchorage, operator impairment, vessel sanitation and vessel equipment matters.





Local regulation; limitations

Statutory language says that it <u>shall not</u> be construed to prevent the adoption of any ordinance or local regulation relating to the operation of vessels. F.S. § 327.60(2).

But then goes on to prohibit:

-"Regulating any vessel upon the Florida Intracoastal Waterway." F.S. § 327.60(2)(c).

-"Regulating engine or exhaust noise except as provided in F.S. § 327.65." F.S. § 327.60(2)(g).



Existing Law

Provides an option for a county to impose "additional noise pollution and exhaust regulation on vessels" by county ordinance provided that the county ordinance measured against a vessel does not exceed a maximum sound level of 90 dB A at a distance of 50 feet from the vessel. See, F.S. § 327.65

The statute is silent on the ability of a municipality to adopt and enforce a similar sound ordinance.



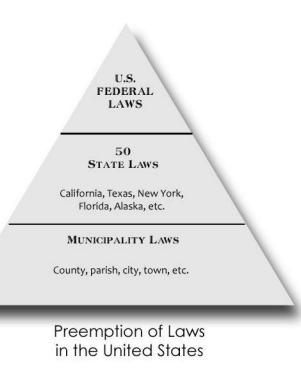
There is nothing explicitly stated in the Florida Statutes that expressly preempts a municipality from regulating non-motorized boat noise, however, there may be an argument that an implied preemption exists.

There is no instructive case law on this issue.





The Doctrine of Preemption



A preemption exists where local regulations <u>must</u> yield to state or federal legislation.

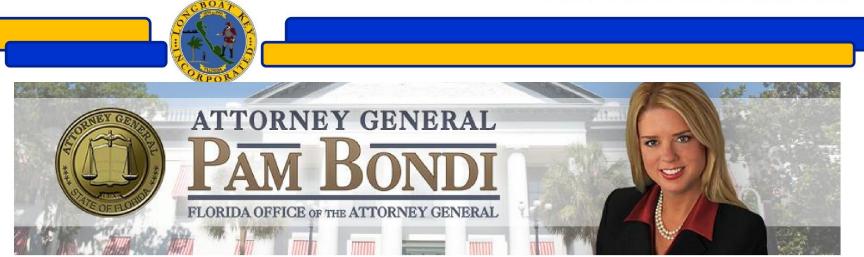
Preemptions can be express or implied. Express preemptions must be clearly stated by the legislature. Implied preemptions must be inferred and are judicially imposed.



The Town of Longboat Key requested an advisory opinion from the Florida Attorney General's office on the subject of whether the Town could regulate non-motorized sounds from vessels in the Intracoastal Waterway.

Florida Statutes seem to intend to preempt the regulation of vessel operations, and specifically motorized sound and vessel engine equipment.





8/2/16 Informal Opinion:

"Local governments have no authority to enact, continue in effect, or enforce 'any ordinance or local regulation' that regulates any vessel on the Florida Intracoastal Waterway"



"Thus, it is clear that the state has preempted regulation of vessels on the Florida Intracoastal Waterway and that local governments have no authority to enact, continue in effect, or enforce 'any ordinance or local regulation' that regulates any vessel on the Florida Intracoastal Waterway..."

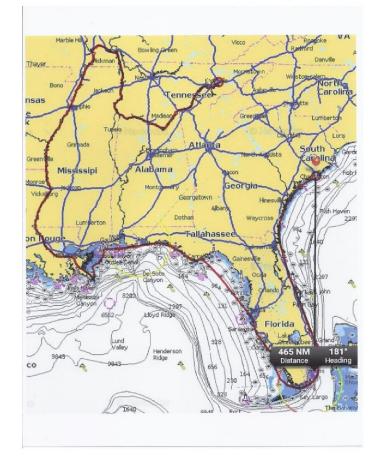
...In further support of this conclusion, the Florida Legislature has carved out a limited exception to this preemption with the provisions of section 327.65, Florida Statutes....reading the statutes in pari materia, the authority of a county to regulate engine or exhaust noise on the Florida Intracoastal Waterway is authorized, but only as set forth in section § 327.65(2)(a), Florida Statutes."

-Excerpts from August 2, 2016, Informal Attorney General Opinion



Where is the Florida Intracoastal Waterway?

(12) "Florida Intracoastal Waterway" means the Atlantic Intracoastal Waterway, the Georgia state line north of Fernandina to Miami; the Port Canaveral lock and canal to the Atlantic Intracoastal Waterway; the Atlantic Intracoastal Waterway, Miami to Key West; the **Okeechobee Waterway**, Stuart to Fort Myers; the St. Johns River, Jacksonville to Sanford; the Gulf Intracoastal Waterway, Anclote to Fort Myers; the Gulf Intracoastal Waterway, Carrabelle to Tampa Bay; Carrabelle to Anclote open bay section, using the Gulf of Mexico; the Gulf Intracoastal Waterway, Carrabelle to the Alabama state line west of Pensacola; and the Apalachicola, Chattahoochee, and Flint Rivers in **Florida**. See, F.S. § 327.02(12)





What does this mean for Florida's municipalities?

Municipalities are foreclosed from regulating noise on the Florida Intracoastal Waterway within their jurisdictions!









Proposed legislation for clarification:

Changes need to provide municipalities with authority to regulate vessel noise:

- 1. Clarify that the prohibitions on local government regulation on vessels on the Florida Intracoastal Waterway is for the <u>operation</u> of vessels. A minor change to F.S. § 327.60(2)(c).
- 2. Clarify that municipalities have the same powers and limitations as counties on the regulation of vessel noise. Allow cities to also adopt ordinances regulating engine, exhaust and noise pollution from vessels at the prescribed state levels (90 dB A at a 50 foot distance). Change F.S. § 327.65(2).

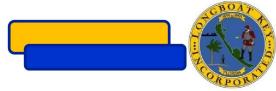


Proposed legislation for clarification:

Florida Statutes § 327.60 Local regulations; limitations:

(2) Nothing in this Chapter or Chapter 328 shall be construed to prevent the adoption of any ordinance or local regulation relating to operation of vessels, except that a county or municipality shall not enact, continue in effect, or enforce any ordinance or local regulation:

(c) Regulating <u>the operation of</u> any vessel upon the Florida Intracoastal Waterway;



Proposed legislation for clarification:

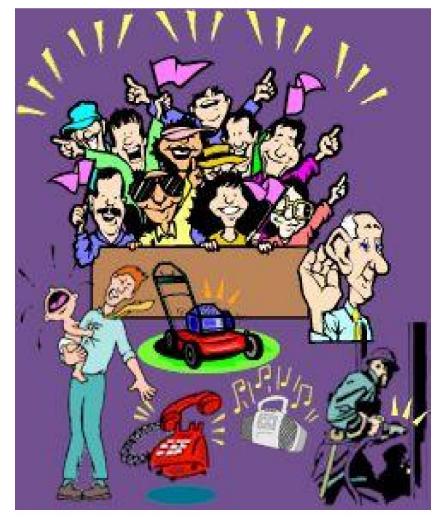
Florida Statutes § 327.65 Muffling devices:

(2)(a) Any county <u>or municipality</u> wishing to impose additional <u>noise pollution engine</u> and exhaust regulations, <u>or noise pollution regulations</u> on vessels may, pursuant to s. <u>327.60(2)</u>, adopt by county ordinance the following regulations:

1. No person shall operate or give permission for the operation of any vessel on the waters of any county on a specified portion of the waters of any county, including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following sound levels at a distance of 50 feet from the vessel: for all vessels, a maximum sound level of 90 dB A.

No person shall operate or give permission for the operation of any vessel on the waters of any county or municipality, including the Florida Intracoastal Waterway, in such a manner as to exceed an adopted county or municipal noise ordinance. Notwithstanding the foregoing, no ordinance may establish a sound level regulation applicable to a vessel that falls below a sound level of 90 dB A at a distance of 50 feet from the vessel.





Examples of 90 dB A:

- Lawn Mower
- Blender at 3 ft.
- Motorcycle at 25 ft.
- A Boeing 737 or DC-9 aircraft at one nautical mile before landing



Questions?

Maggie D. Mooney-Portale (mmooney@swflgovlaw.com) Regina A. Kardash (rkardash@swflgovlaw.com)

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Reply to: Lakewood Ranch

* Board Certified City, County and Local Government Law

May 3, 2016

The Honorable Pamela Bondi Florida Attorney General Department of Legal Affairs The Capitol PL-01 Tallahassee, Florida 32399-1050

> RE: Town of Longboat Key's Request for an Attorney General Opinion on the Authority to Regulate Nuisance Sound by Local Ordinance on the Intracoastal Waterway

Dear Attorney General Bondi:

On behalf of the Town of Longboat Key ("Town"), I am formally requesting an opinion on the ability of a municipality to adopt and enforce a local sound regulation that would include an application of such ordinance to non-motorized noise emanating from certain vessels anchored in and around sand shoal areas located within the Intracoastal Waterway.

Lakewood Ranch 6853 Energy Court Lakewood Ranch, Florida 34240 Venice 217 Nassau Street S. Venice, Florida 34285 Pamela Bondi, Esquire May 3, 2016 Page 2

FACTS

The Town is a 10 mile barrier island located in both Manatee and Sarasota Counties. The Northern end of Longboat Key which is located in Manatee County consists of a primarily residential community known as the "Village". Included within the municipal boundaries are two additional islands known as Sister Key and Jewfish Key. These 2 islands are only accessible by boat and located within Sarasota Bay, eastward of the main land area of the Town. The northernmost island, Jewfish Key, has several residential homes located on the island. In between Jewfish Key and the main land section of Longboat Key is a sand shoal area. A map of this area is included for your reference and consideration.

On long weekends and holidays the sand shoal area is a popular gathering location for vessels to anchor, and for boater to engage in general "partying" activities. Frequently the boaters and/or their passengers anchor, drink alcoholic beverages, and listen to loud music that is amplified by speakers located on the anchored vessels. The amplified music emanating from some of these anchored vessels carries across the Intracoastal Waterway and can be heard by property owners on the Sarasota Bay side of the Town, particularly within the Village. A large number of residential property owners in the Village have expressed concern and frustration regarding the disturbance of their peace and solitude arising from the loud music played by vessels anchored on the sand shoal area within the Intracoastal Waterway. Additionally, an area at the South end of the Town also within the Intracoastal Waterway faces a similar issue where boats will routinely anchor and congregate, resulting in the same types of noise. Over the years the Town has also received complaints from residents in this area about the loud music emanating from anchored vessels in this area.

Due to the concern expressed by residents, the Town Commission is exploring options relating to enforcement of locally adopted sound ordinances relating to disturbing levels of sound, including those levels from speakers. Importantly, the Town is considering the possibility of an acoustical sound analysis for the intent of establishing acoustical measurements of ambient sound levels for inclusion in a noise ordinance. The Town desires to control disturbing nuisance noise within its jurisdictional boundaries regardless of the source of the sound. The noise ordinance would be applicable throughout the Town, including in the sand shoal areas referenced above. Importantly, the Town would not regulate any aspect of boat equipment, navigation or operation noise under its noise ordinance. Paméla Bondi, Esquire May 3, 2016 Page 3

DISCUSSION

The Town researched this issue under applicable nuisance sound regulations, examined preemption issues, and reviewed Florida Statutes, case law, Attorney General Opinions, and Fish and Wildlife Conservation (FWC) Commission regulations for any potential conflict in laws. The Town is confident in its ability to constitutionally regulate annoying or disturbing nuisance noise. However, a potential statutory ambiguity has led the Town to question its authority with respect to nuisance noise emanating from vessels on the Intracoastal Waterway even though such noise is unconnected with vessel operation, vessel safety or navigation. Although there is no direct legal guidance or precedent, the Town does not believe that enacting and enforcing a nuisance noise regulation would create a conflict in laws under either Florida Statutes or the FWC regulations governing vessel operation or safety even though such regulation would be enforced on Florida's Intracoastal Waterway.

The Town recognizes its ability to regulate nuisances, and specifically sound, under the Police Power. Easy Way of Lee County, Inc. v. Lee County, 674 So.2d 863 (Fla. 2d DCA 1996), relying on Reeves v. McConn, 631 F.2d 377(5th Cir. 1980). Courts have repeatedly held regulations of nuisance sound as an inherent authority of local governments so long as there are no constitutional violations in the drafting or application of the regulation. State v. Catalano, 104 So.3d 1169 (Fla. 2011). In Catalano the Florida Supreme Court upheld the "plainly audible" standard against a void for vagueness constitutional challenge; a regulation could be determined to be unconstitutionally vague if 1) it fails to give individuals of common and ordinary intelligence adequate notice of prohibited conduct, or 2) it lacks objective enforcement standards, lending itself to arbitrary enforcement. Id. Additionally, amplified sound regulations could trigger First Amendment considerations, which must be narrowly tailored in order to not restrict free speech rights more than necessary and not be unconstitutionally overbroad. See Daley v. City of Sarasota, 752 So.2d 124 (Fla. 2d DCA 2000), interpreting Ward v. Rock Against Racism, 491 U.S. 781 (1989). Furthermore, the Town's Home Rule Power grants the Town the authority to pass regulations within its jurisdictional boundaries for any municipal purpose, and to protect the life, health, safety and welfare of its citizens. Article III, § 2(b), Florida Constitution; Florida Statute § 166.021 (2016).

Boating on the waterways of the State is a highly regulated activity. Due to the desire to keep boating laws and regulations as uniform as possible throughout the State, Florida has adopted legislation governing minimum boating equipment requirements and navigational standards. The Town has examined the applicable statutes in Florida Statutes, Pamela Bondi, Esquire May 3, 2016 Page 4

Chapter 327, governing vessels, and associated case law to determine to what extent waterway regulations have been preempted to the State Legislature or delegated to the FWC. Under Florida Law, there is either express or implied preemption. <u>Sarasota Alliance for Fair Elections, Inc. v. Browning</u>, 28 So.3d 880, 886 (Fla. 2010). In order for there to be an express preemption, the legislature must specifically state its intent through clear and unambiguous language. *Id., citing City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006); <u>Phantom of Clearwater, Inc. v. Brevard County</u>, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005), *approved in Phantom of Brevard*, Inc. v. Brevard County, 3 So.3d 309 (Fla. 2008). An express preemption removes any doubt regarding the legislative intent to be the sole authority with respect to a given subject. However, there is no such express preemption in Florida Statutes regulating vessels on Florida's waterways.

Implied preemption can be more difficult to ascertain and must be inferred. <u>Lake</u> <u>Hamilton Lakeshore Owners Assn. v. Neidlinger</u>, 182 So.3d 738, (Fla. 2d DCA 2015)("Implied preemption is judicially imposed and reflects a decision by the judiciary to fill a void left by the failure of the legislature to provide explicit legislative directive of preemption."), *citing* <u>Phantom</u>, 894 So.2d at 1019. In order to make such an inference, a Court must determine that the legislation is so pervasive as to evidence an intent to preempt the particular area, and additionally that there are strong public policy reasons for the finding of legislative preemptions. <u>Sarasota</u>, 28 So.3d at 886, *citing Phantom*, 894 So.2d at 1018. When making a determination of whether or not the legislature's preemption is implied, the Court must look at the whole law, including its object and policy, as well as "the nature of the power exerted by the legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute..." *Id., citing <u>State v. Harden</u>*, 938 So.2d 480, 486 (Fla. 2006).

The Town's concern is whether or not an implied preemption exists under Florida Statutes, Chapter 327, with respect to the regulation of vessels in Florida's Intracoastal Waterways. While the Florida Legislature has not expressly preempted the entire body of regulations related to vessel operation on the navigable waters of the State, it has delegated most of its regulatory authority to the FWC. The manner in which the legislation was drafted leaves an ambiguity in the effect, intent and policy of the Legislature when it comes to municipal regulations in the Intracoastal Waterways.

The sandy shoal areas depicted in the enclosed map are all located in the jurisdictional limits of the Town in an area of Sarasota Bay designated as within Florida's Intracoastal Waterway. The Florida Intracoastal Waterway is defined by statute as follows:

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327.02 Definitions.—As used in this chapter and in chapter 328, unless the context clearly requires a different meaning, the term:

(12) "Florida Intracoastal Waterway" means the Atlantic Intracoastal Waterway, the Georgia state line north of Fernandina to Miami; the Port Canaveral lock and canal to the Atlantic Intracoastal Waterway; the Atlantic Intracoastal Waterway, Miami to Key West; the Okeechobee Waterway, Stuart to Fort Myers; the St. Johns River, Jacksonville to Sanford; the Gulf Intracoastal Waterway, Anclote to Fort Myers; the Gulf Intracoastal Waterway, Carrabelle to Tampa Bay; Carrabelle to Anclote open bay section, using the Gulf of Mexico; the Gulf Intracoastal Waterway, Carrabelle to the Alabama state line west of Pensacola; and the Apalachicola, Chattahoochee, and Flint Rivers in Florida...

Florida Statutes §327.60 limits a local governments ability to adopt local regulations relating to the operation of vessels. Specifically, Florida Statute § 327.60 (2016) states (*emphasis added*):

327.60 Local regulations; limitations.

(1) The provisions of this chapter and chapter 328 shall govern the operation, equipment, and all other matters relating thereto whenever any vessel shall be operated upon the waters of this state or when any activity regulated hereby shall take place thereon.

(2) Nothing in this chapter or chapter 328 shall be construed to prevent the adoption of any ordinance or local regulation relating to operation of vessels, except that a county or municipality shall not enact, continue in effect, or enforce any ordinance or local regulation:

(a) Establishing a vessel or associated equipment performance or other safety standard, imposing a requirement for associated equipment, or regulating the carrying or use of marine safety articles;

(b) Relating to the design, manufacture, installation, or use of any marine sanitation device on any vessel;

(c) <u>Regulating any vessel upon the Florida Intracoastal Waterway;</u>

(d) Discriminating against personal watercraft;

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(e) Discriminating against airboats, for ordinances adopted after July 1, 2006, unless adopted by a two-thirds vote of the governing body enacting such ordinance;

(f) Regulating the anchoring of vessels other than live-aboard vessels outside the marked boundaries of mooring fields permitted as provided in s. <u>327.40;</u>

(g) Regulating engine or exhaust noise, except as provided in s. <u>327.65;</u> or

(h) That conflicts with any provisions of this chapter or any amendments thereto or rules adopted thereunder.

(3) Nothing in this section shall be construed to prohibit local governmental authorities from the enactment or enforcement of regulations which prohibit or restrict the mooring or anchoring of floating structures or live-aboard vessels within their jurisdictions or of any vessels within the marked boundaries of mooring fields permitted as provided in s. <u>327.40</u>. However, local governmental authorities are prohibited from regulating the anchoring outside of such mooring fields of vessels other than live-aboard vessels as defined in s. <u>327.02</u>.

The intent of this general law appears to be to preempt a local government's ability to regulate the operation of waterborne vessels as this power is specifically delegated to other administrative agencies including the FWC. *Florida Statute* § 327.04 (2016). The above-referenced statute and its broad prohibition on the regulation of vessels makes its unclear whether the statute preempts the ability of a local government, like the Town, to enforce sound regulations emanating from vessels located within the Intracoastal Waterway. Nevertheless, the Town believes that the Legislature's intent was to solely restrict local governments from regulating the *operation* of vessels on the Intracoastal Waterway, rather than to restrict local governments from regulating a nuisance occurring within its jurisdictional limits.

Florida Statute § 327.02(30) defines "operate" as follows:

"'Operate' means to be in charge, in command of, or in actual physical control of a vessel upon the waters of this state, to exercise control over or to have responsibility for a vessel's navigation or safety while the vessel is underway upon the waters of this state, or to control or steer a vessel being towed by another vessel upon the waters of the state." Paméla Bondi, Esquire May 3, 2016 Page 7

The Town's intent in enforcing a sound regulation on the sandy shoal areas is <u>not</u> to regulate the operation of vessels but to prevent nuisance sound that is disturbing the Town's residents. Such a regulation would have no effect on the means of actual physical control of a vessel for navigational or safety purposes while within the Town's jurisdictional boundaries of the Intracoastal Waterway. Nevertheless, one of the potential areas where such locally adopted sound regulations would be enforced is located within the Intracoastal Waterway.

The only judicial guidance with respect to a potential preemption emanates from the Lake Hamilton case. Lake Hamilton Lakeshore Owners Assn. v. Neidlinger, 182 So.3d 738 (Fla. 2d DCA 2015). In this case, the property owners association sought judicial review of the lower tribunal's decision that no private cause of action could be found for nuisance against an airboat tour company operating on the waterways adjacent to the association's constituents. Id. As part of its analysis, the Court examined whether or not there was an implied preemption that could be derived from an examination of Florida Statute §§ 327.60, 327.65 and 327.04. Id. The Court specifically found that "an intent to occupy the field of nuisance law cannot be discerned. What is identifiable is a legislative intent to prohibit local governments from discriminating against airboats. The legislative scheme does not reflect a strong public policy rationale to deprive a citizen of the right to avail themselves of a remedy for nuisance." Id. In a footnote, however, the Court goes on to explain that this analysis does not involve the exercise of regulatory power by a local government, nor is a local regulation tied to a common law claim of nuisance. Id. Thus the question of a regulatory preemption is somewhat unresolved, although the considerations contained in this Court's opinion appear to directly relate to a potential judicial determination that neither an examination of the statutory scheme or a public policy rationale would result in a finding of implied preemption with respect to nuisance regulations.

The FWC has promulgated administrative regulations under the Florida Administrative Code that permit local jurisdictions to establish boating restricted areas. F.A.C., Rule 68D-23.105. However, the Attorney General's Office has already opined that this is not an option for a local government dealing with a noise abatement issue. See AGO 2005-58 stating that the County must revisit the issue of adopting a noise pollution ordinance rather than circumvent the regulation by using laws designed for implementing safety and navigational standards. Unfortunately two aspects on this opinion leave the underlying issue unresolved for the Town of Longboat Key. First, the opinion addresses a Florida Statute that has since been repealed by the legislature. This statute provided that if a local jurisdiction expended funds to patrol, regulate or maintain maritime activities within its jurisdiction, it could regulate vessels resident within its boundaries. See Florida Statute §

Pamėla Bondi, Esquire May 3, 2016 Page 8

327.22 (2009), repealed by Laws of Florida, Chapter 2009-86. The Bill analysis for this statute's repeal does not provide any context or evidence the legislature's intent regarding its decision to repeal this section. See <u>House of Representatives Staff Analysis</u>, CS/HB 1423 (2009), <u>http://archive.flsenate.gov/data/session/2009/House/bills/analysis/pdf/h1423c.GGPC.pdf</u>.

The second aspect that complicates the Town's analysis of this issue is the examination of Florida Statute § 327.65 in AGO 2005-58. The Attorney General's Office redirects Citrus County to this statute, which specifically provides the framework for which a County may enact regulations to control noise pollution, including specifying the authority to do so within the Intracoastal Waterway. The opinion states that this statute provides both the authority and parameters for local legislation imposing noise pollution regulations without any further analysis of this statute. *Id.*

The plain language of the relevant portions of Florida Statute § 327.65 (2016) reads as follows:

327.65 Muffling devices.-

The exhaust of every internal combustion engine used on any vessel operated on the waters of this state shall be effectively muffled by equipment so constructed and used as to muffle the noise of the exhaust in a reasonable manner. The use of cutouts is prohibited, except for vessels competing in a regatta or official boat race, and for such vessels while on trial runs.
 (2)(a) Any county wishing to impose additional noise pollution and exhaust regulations on vessels may, pursuant to s. <u>327.60</u>(2), adopt by county ordinance the following regulations:

1. No person shall operate or giver permission for the operation of any vessel on the waters of any county or on a specified portion of the waters of any county, including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following levels at a distance of 50 feet from the vessel: for all vessels, a maximum sound level of 90 dB A.

2. Any person who refuses to submit to a sound level test when requested to do so by a law enforcement officer is guilty of a misdemeanor of the second degree, punishable as provided in s. <u>775.082</u> or s. <u>775.083</u>.

(b) The following words and phrases, when used in this section shall have the meanings respectively assigned to them in this subsection.

Pamèla Bondi, Esquire May 3, 2016 Page 9

1. "dB A" means the composite abbreviation for the A-weighted sound level and the unit of sound level, the decibel.

2. "Sound level" means the A-weighted sound pressure level measured with fast response using an instrument complying with the specification for sound level meters of the American National Standards Institute, Inc., or its successor bodies, except that only a weighting and fast dynamic response need be provided.

Utilizing the rules of statutory construction, an examination of the plain and unambiguous language of this section would appear to reveal that the legislative intent of the above statutory provision was to limit local governments' authority over a vessel's equipment and associated noise specific to such equipment. The sole reference to "noise pollution" regulation appears in the statutory section discussing regulating muffling devices used on boat motors, rather than the loud and raucous noise from loud gatherings and music usually associated with nuisance sound. The rules of statutory construction require that effect be given to every word in the statute when determining intent, and words and phrases should not be treated as mere surplusage when interpreting a statute. See Quarantello v. Leroy, 977 So.2d 648 (Fla. 5th DCA 2008); Larimore v. State, 2 So.3d 101 (Fla. 2008). The only purpose for mentioning the authority for further noise pollution regulations in this statute is that to the extent the noise originates from the equipment and operation of vessels, such regulation is preempted to the State and FWC. However, without more, the statute does not address a local government's authority to impose and enforce a nuisance sound ordinance that is applicable throughout the Town's jurisdiction regardless of whether the noise is on the water or on the land.

Furthermore, when reading the provisions of §327.65, Florida Statutes, together and in connection with related statutory provisions, the legislative intent appears to be to provide uniform regulations for boating equipment and operation rather than to regulate nuisance sound. The rules of statutory construction provide that statutes must be read *in pari materia*, so that related portions are examined together to achieve a consistent whole. *Id.* The only time where the Legislature addresses noise in Florida Statutes, Chapter 327, regulating vessels is with respect to discriminating against air boats and when posturing regulations related to muffling devices. By including the noise pollution language in the statutory section addressing muffling devices, the legislative intent to be inferred is that only the noise pollution associated with vessel equipment related to navigation and safety is meant to be regulated by this provision. The impetus behind this statutory scheme is not to prevent a Pamela Bondi, Esquire May 3, 2016 Page 10

local government from enforcing a nuisance sound regulation within its jurisdiction, including those portions of its jurisdiction within the Intracoastal Waterway.

CONCLUSION

Based on the foregoing, the Town believes that it has the authority to enforce a nuisance sound ordinance throughout its jurisdictional boundaries including the Intracoastal Waterway. The Town is seeking an opinion from your office on whether the above listed Florida Statutes and law precludes the Town from enforcing its sound regulations on non-motorized noise emanating from vessels anchored in and around the sandy shoal areas within the Intracoastal Waterway. The Town believes that it has the authority to enforce its ordinances anywhere within its jurisdiction, including the Intracoastal Waterway, except with respect to boating equipment, and navigational and safety regulations as pre-empted by Florida Statute and delegated in the Florida Administrative Code by the FWC. The Town hopes that the Attorney General's Office will address the authority and parameters within its jurisdiction and within the Intracoastal Waterway.

Should you have any questions about this request or need any additional information from the Town, please do not hesitate to contact me.

Respectfully submitted,

Maggie D. Mooney-Portale

Maggie D. Mooney-Portale Town Attorney, Town of Longboat Key

cc:

Town Commissioners Dave Bullock, Town Manager Harold G. "Bud" Vielhauer, FWC General Counsel

Enc.



PAM BONDI ATTORNEY GENERAL OFFICE OF THE ATTORNEY GENERAL Opinions Division

GERRY HAMMOND Senior Assistant Attorney General LL-04, The Capitol 400 S. Monroe Street Tallahassee, Florida 32399-1050 Telephone (850) 245-0158 Fax (850) 222-3839

August 2, 2016

Ms. Maggie D. Mooney-Portale Town Attorney, Town of Longboat Key Persson & Cohen, P.A. 6853 Energy Court Lake Ranch, Florida 34240

Dear Ms. Mooney-Portale:

On behalf of the Town of Longboat Key, you have requested this office's assistance in determining whether the Town of Longboat Key has the authority to adopt and enforce a local sound regulation that would include the application of such ordinance to non-motorized noise emanating from certain vessels anchored in and around sand shoal areas located within the Intracoastal Waterway. As more fully addressed in the discussion below, it would appear that the Town of Longboat Key is foreclosed from adopting any local sound ordinance or local sound regulation which would "regulat[e] any vessel upon the Florida Intracoastal Waterway" as provided in section 327.60(2)(c), Florida Statutes.

The Town of Longboat Key is a ten mile barrier island located in both Manatee and Sarasota Counties. The northern end of Longboat Key is located in Manatee County and includes within its municipal boundaries two additional islands. These islands are only accessible by boat and are located within Sarasota Bay. Between one of the Islands and Longboat Key is a sand shoal area which is within the Intracoastal Waterway.¹

¹ Section 327.02(12), Fla. Stat., defines the "Florida Intracoastal Waterway" as:

[&]quot;Florida Intracoastal Waterway" means the Atlantic Intracoastal Waterway, the Georgia state line north of Fernandina to Miami; the Port Canaveral lock and canal to the Atlantic Intracoastal Waterway; the Atlantic Intracoastal Waterway, Miami to Key West; the Okeechobee Waterway, Stuart to Fort Myers; the St. Johns River, Jacksonville to Sanford; the Gulf Intracoastal Waterway, Anclote to Fort Myers; the Gulf Intracoastal Waterway, Carrabelle to Tampa Bay; Carrabelle to Anclote open bay section, using the Gulf of Mexico; the Gulf Intracoastal Waterway, Carrabelle to

Ms. Maggie D. Mooney-Portale Page Two

According to your letter, the sand shoal area is a popular gathering place for vessels to anchor and for boaters to engage in partying activities. Frequently, the boaters listen to loud music that is amplified by speakers located on the anchored vessels. The amplified music is occasionally heard by property owners on the Sarasota Bay side of the Town. A number of residential property owners have expressed concern and frustration regarding the disturbance of their piece and solitude resulting from the loud music played by vessels anchored on the Intracoastal Waterway.

The Town Commission of Longboat Key is exploring options relating to enforcement of locally adopted sound ordinances relating to disturbing levels of sound, including those produced by speakers. The Town is considering the possibility of an acoustical sound analysis for the intent of establishing acoustical measurements of ambient sound levels for inclusion in a noise ordinance. You advise that the Town desires to control disturbing nuisance noise within its jurisdictional boundaries regardless of the source of the sound. The noise ordinance would apply throughout the Town including the sand shoal areas located within the Intracoastal Waterway. You have stated that you are confident in the Town's authority to adopt a noise ordinance and you have not requested any comment on that authority. You state that the Town would not, through this ordinance, regulate any aspect of boat equipment, navigation, or operation noise.

Of primary concern to the resolution of your question is section 327.60, Florida Statutes, entitled "[]ocal regulations; limitations." As the statute states:

The provisions of this chapter and chapter 328 shall govern the operation, equipment, *and all other matters relating thereto* whenever any vessel shall be operated upon the waters of this state or when any activity regulated hereby shall take place thereon. (e.s.)

The statute authorizes the adoption of ordinances or other local regulations relating to the operation of vessels with certain, specifically enumerated exceptions:

(2) Nothing in this chapter or chapter 328 shall be construed to prevent the adoption of any ordinance or local regulation relating to operation of

the Alabama state line west of Pensacola; and the Apalachicola, Chattahoochee, and Flint Rivers in Florida.

Ms. Maggie D. Mooney-Portale Page Three

vessels, except that a county or municipality shall not enact, continue in effect, or enforce any ordinance or local regulation:

*

(c) Regulating any vessel upon the Florida Intracoastal Waterway[.] (e.s.)

Thus, it is clear that the state has preempted² regulation of vessels on the Florida Intracoastal Waterway and that local governments have no authority to enact, continue in effect, or enforce "any3 ordinance or local regulation" that regulates any vessel on the Florida Intracoastal Waterway.4 The statute does not limit the prohibition to ordinances dealing with boat equipment, navigation, or operation noise, rather, the language of the statute addresses any ordinance or local regulation when the vessel is upon the Florida Intracoastal Waterway. In fact, other provisions of section 327.60, Florida Statutes, do limit the enactment of local ordinances regulating vessel equipment performance or safety standards; regulating the design, manufacture, installation, or use of marine sanitation devices on vessels; discriminating against personal watercraft; discriminating against airboats; regulating the anchoring of vessels outside mooring fields; regulating engine or exhaust noise; or regulations that may conflict with the provisions of Chapter 327, Florida Statutes, or the rules adopted pursuant to this chapter. The language relating to the Intracoastal Waterway is broad and does not limit local regulation to specific topics, rather, it completely removes vessels upon the Intracoastal Waterway from local regulation except as may be authorized therein and without regard to

² As provided in the Municipal Home Rule Powers Act, Ch. 166, Fla. Stat., Florida municipalities are authorized to "enact legislation concerning any subject matter upon which the state Legislature may act, except: ... (c) [a]ny subject expressly preempted to state or county government by the constitution or by general law[.]" See s. 166.021(3)(c), Fla, Stat.

³ See Ops. Att'y Gen. Fla. 74-311 (1974) and 09-31 (2009) in which this office has previously expressed its opinion that the term "any" may be read to mean "all" or "every."

⁴ And see Op. Att'y Gen. Fla. 05-58 (2005), concluding that Citrus County was prohibited from adopting an ordinance creating a boating restricted area near residential properties for the purpose of vessel noise abatement and stating that:

Chapter 327, Florida Statutes, and the administrative rules promulgated thereunder limit the authority of local governments to adopt noise abatement regulations and enforce those regulations on state waters. The county's authority to regulate is subject to the state's paramount power to regulate and control the use of its sovereign lands. A corollary to the requirement that regulations and restrictions of certain activities must be in furtherance of public health, safety, and welfare is that such regulation must not be in violation of constitutional protections afforded to the public for the use of, and access to, state sovereignt lands.

Ms. Maggie D. Mooney-Portale Page Four

whether areas of the Intracoastal Waterway may come within the geographical boundaries of a municipality.

In further support of this conclusion, the Florida Legislature has carved out a limited exception to this preemption with the provisions of section 327.65, Florida Statutes.⁵ While entitled "[m]uffling devices" and initially addressing the muffling of vessel engine exhaust, the statute goes on to address noise pollution on Florida waterways and provides that counties may, *pursuant to section 327.60(2)*, *Florida Statutes*, adopt noise pollution regulations. However, as noted above, section 327.60(2) authorizes, in subparagraph (g), the regulation of engine or exhaust noise. Thus, reading the statutes in pari materia,⁶ the authority of a county to regulate engine or exhaust noise on the Florida Intracoastal Waterway is authorized, but only as set

⁵ The statute provides:

327.65 Muffling devices.---

(1) The exhaust of every internal combustion engine used on any vessel operated on the waters of this state shall be effectively muffled by equipment so constructed and used as to muffle the noise of the exhaust in a reasonable manner. The use of cutouts is prohibited, except for vessels competing in a regatta or official boat race, and for such vessels while on trial runs.
 (2)(a) Any county wishing to impose additional noise pollution and exhaust regulations on vessels may, pursuant to s. 327,60(2), adopt by county ordinance the following regulations:

1. No person shall operate or give permission for the operation of any vessel on the waters of any county or on a specified portion of the waters of any county, including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following sound levels at a distance of 50 feet from the vessel; for all vessels, a maximum sound level of 90 dB A.

2. Any person who refuses to submit to a sound level test when requested to do so by a law enforcement officer is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(b) The following words and phrases, when used in this section, shall have the meanings respectively assigned to them in this subsection.

1. "dB A" means the composite abbreviation for the A-weighted sound level and the unit of sound level, the decibel.

2. "Sound level" means the A-weighted sound pressure level measured with fast response using an instrument complying with the specification for sound level meters of the American National Standards Institute, Inc., or its successor bodies, except that only a weighting and fast dynamic response need be provided.

⁶ When two statutes relate to common things or have a common or related purpose, they are said to be *in pari materia*, and where possible, that construction should be adopted which harmonizes and reconciles the statutory provisions so as to preserve the force and effect of each. See, e.g., Pritchard v. Jax Liquors, Inc., 499 So. 2d 926 (Fla. 1st DCA 1986), review denied, 511 So. 2d 298 (Fla. 1987), and Mann v. Goodyear Tire and Rubber Company. 300 So. 2d 666 (Fla. 1974).

Ms. Maggie D. Mooney-Portale Page Five

forth in section 327.65(2)(g), Florida Statutes.

In conclusion, it would appear that the Town of Longboat Key is foreclosed by the provisions of section 327.60(2)(c), Florida Statutes, from adopting a local sound ordinance or local sound regulation which would apply to or "regulat[e] any vessel upon the Florida Intracoastal Waterway."

Sincerely,

Franco ammond

Gerry Hammond Senior Assistant Attorney General

GH/tsh

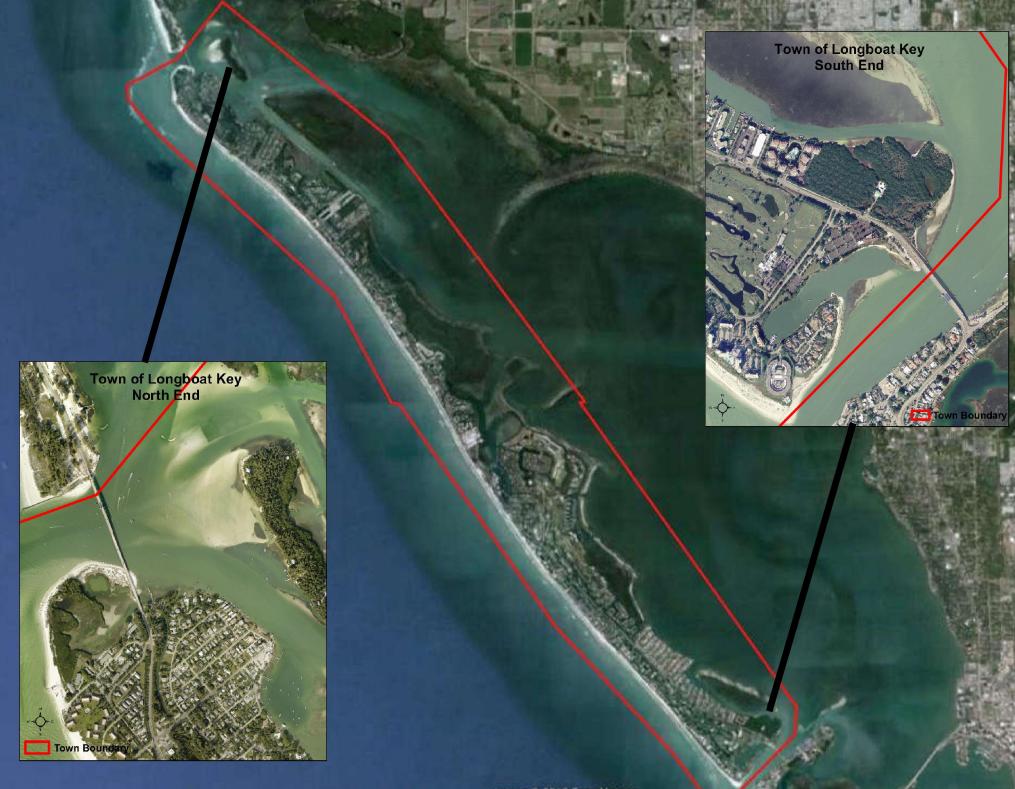


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SOUND REGULATIONS 130.02

UPDATE



PROPOSED CHANGES TO SOUND REGULATIONS 130-02

TOWN OF LONGBOAT KEY

On June 15, 2015 the Town Commission requested staff present an amendment to Town Code 130.02. (sound regulations) in order to incorporate the use of a sound measuring device.



CONSULTANT

The consulting company

Siebein Associates, Inc. Consultants in Architectural Acoustics



PROPOSAL

Scope of work and fee for acoustical consulting services to take acoustical measurements of existing ambient sound levels at various locations in the Town of Longboat Key; conduct an acoustical review of the current noise ordinance for the town; conduct acoustical analysis of the data; and prepare a written report summarizing the method, results and conclusions of the study for the Town of Longboat Key.



PROPOSAL COSTS

 Spend 2-3 hours on Longboat Key taking acoustical measurements of existing ambient sound levels and provide a written analysis.
 Cost \$6,195.

 Make presentations to Commission followed by a Q & A Cost \$6,270.



COST OF SPECIALIZED METERS

During the initial consultation the firm was presented with the towns concern regarding the measurement of sound on the waterways.

The issue was brought up regarding the accuracy of pinpointing where the sound was being produced with some degree of accuracy utilizing a standard measuring device.

In the case where a group of boats congregated the standard meter would not be able to accurately pin point the origin.



COST OF SPECIALIZED METERS

The consultant advised there is an instrument that can pinpoint sound and referred the following company:

Scantek, Inc. Sound and Vibration Instrumentation and Engineering

Description and cost:

The Nor848.4 cost about \$50,000 with computer. It requires a tripod and specialized training.

TOWN OF LONGBOAT KEY



DISCUSSION

&

QUESTIONS

PERSSON, COHEN & MOONEY, P.A. ATTORNEYS AND COUNSELORS AT LAW

MEMORANDUM

TO:	Mayor Schneier and Town Commission
CC:	Tom Harmon, Town Manager
FROM:	Maggie D. Mooney, Town Attorney and Andrew Mai, Assistant Town Attorney
DATE:	June 14, 2021
SUBJECT:	Noise Ordinance Enforcement and Recommendation

The purpose of this Memorandum is to address the enforceability of the Town of Longboat Key's existing noise ordinance and potential issues that may arise unless the ordinance is modified. Recently, the Town has been requested to enforce its noise ordinance (Section 130.02 of the Town Code) against various individuals that are playing loud music adjacent to waterfront residential homes. The enforcement of noise regulations (and particularly noise regulations to address loud music) has various Constitutional implications that need to be navigated.

I. Current Noise Ordinance

Noise is regulated pursuant to Section 130.02 of the Town of Longboat Key municipal code. Section 130.02(C)(1) provides:

> "No person shall make, cause, allow, or permit to be made any unreasonable sound within the geographical boundaries of the town or within those areas over which the town has jurisdiction, including the waters and beaches adjacent to, abutting or bordering the town."

Under the Town Code, unreasonable sound includes the following in 130.0(C)(2)(a) in addition to many other categories:

"Radios, phonographs, tape players, television sets, musical instruments, drums or similar devices. Operating, playing or permitting the operation or playing of any radio, CD or DVD

player, tape player, phonograph, television set, musical instrument, drum or similar device which produces or reproduces sound in such a manner as to annoy, disturb, injure or endanger the comfort, repose, health, peace, or safety of a reasonable person of normal sensibilities."

Annoy, disturb, injure or endanger the comfort, repose, health, peace, or safety of a reasonable person of normal sensibilities is further defined in Section 130.02(c)(3) as follows:

"The standards which shall be considered in determining whether sound annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities shall include, but shall not be limited to, the following:

(a) The volume of the sound.

(b) The intensity of the sound.

(c) Whether the nature of the sound is usual or unusual within the town.

(d) The volume and intensity of the background sound, if any.

(e) The proximity of the sound to residential sleeping facilities.

(f) The nature and zoning of the area within which the sound emanates.

(g) The time of the day or night the sound occurs.

(h) The duration of the sound.

(i) Whether the sound is produced by a commercial or noncommercial activity.

Finally, 130.02(D), provides exemptions to the regulation of sound including for church bells, government sponsored activities, and sporting events, among others.

II. Applicable law

A. Vagueness

To withstanding a constitutional challenge, an ordinance must not be vague such that it prevents a person from knowing what they must do or not do to obey the law. *See Catalano*, 104 So.3d 1069 (Fla. 2012) (interpreting state noise statute and its applicability to vehicles). However, applicable laws do not have to determine standards with mathematical certainty. *Id*. It is only when a regulation that calls for police officers to judge whether a sound

is excessive, raucous, disturbing, or offensive will a court deem such discretion improperly vague and, therefore, unconstitutional. *Id*.

B. Right to Free Speech

The First Amendment of the United States Constitution (applicable to the States through the Fourteenth Amendment) prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212(1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Id. (citing Ward v. Rock Against Racism, 491 U.S. 781 (US 1989)). Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." See, Reed v. Town of Gilbert, 576 U.S. 155 (2015). If the regulations are found to be content based, even in part, it is highly unlikely that a Court would find that regulation was narrowly tailored to serve a compelling state interest.

The right to play music is protected by the First Amendment. *State v. Catalano*, 104 So.3d 1069 (Fla. 2012). However, that right may be subject to reasonable limitations. *Id.* Limitations are reasonable if they are justified without reference to the content of the regulated speech, narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication of information. *Id.* Protecting the public from excessively loud noise is a compelling state interest. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). If overamplified loudspeakers assault the citizenry, the government may turn them down. *Kovaks v. Cooper*, 336 U.S. 77 (1948).

C. Severability

If portions of a regulation are found unconstitutional even constitutional portions may not be severed and continue if the intent of the legislative body was for the legislation to contain those exemptions. *See Catalano*, 104 So.3d 1069.

III. Application of the Law to the Ordinance

A. Vagueness

Section 130.02 contains several content-based provisions which create potential constitutional issues due to vagueness. For example, Section 130.02 provides a great deal of discretion to the law enforcement officer responding to a noise complaint to determine whether the "device which produces or reproduces sound in such a manner as to annoy, disturb, injure or endanger the comfort, repose, health, peace, or safety of a reasonable person of normal sensibilities." This is true even though Section 130.02(c)(3) provides standards to help an officer in determining whether the sound violates the law. A court could find that the ordinance is vague as it is impossible for a person to know what sounds the officer would find violate the ordinance. *Id.* A vague ordinance is unconstitutional.

The existing ordinance could be modified to incorporate more objective standards so that it is not vague. This could be done in any number of ways. In the past the Town has considered doing a study to determine an acceptable decibel level. The existing ordinance could be modified to forbid noise exceeding specified decibel levels. Decibel standards are incorporated into sounds ordinances of several neighboring local governments including (the cities of Sarasota, Venice, Holmes Beach, Bradenton Beach, and Manatee County). Equipment could be purchased that measures an established decibel level standard. In the alternative, the Town could modify the ordinance to forbid a noise that can be heard from a certain distance. The Court in Catalano upheld a similar distance provision in a state law. It is possible that such a distance could be incorporated into the Town's sound regulations to measure noise from one emanating source to another point. There may be other modifications that may make the ordinance so that is not vague and therefore constitutional.

B. Freedom of Speech Content Based Regulation

Section 130.02 includes provisions that require the person reading the ordinance to evaluate to the content of the speech in order to determine whether the speech violates the ordinance or is subject to an exemption. Content based speech regulation requires that the regulation serve a compelling state interest. Although the Courts have found that governments can regulate noise, those regulations have not been found to serve a compelling state interest that would survive strict scrutiny. Absent the higher standard the regulation would be authorized if it is required for the

public health, morals, peace, safety, or welfare and is the regulation is reasonable and substantially connected with the public interest sought to be served.

The Town's existing ordinance could be modified to remove the overly broad and vague sections of the existing noise ordinance that regulate sound based upon content. Such changes would necessitate the removal of certain exemptions and apply criteria that would apply equally to music, political speech, and advertising. *Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1992). These types of modifications would make the ordinance more defensible in the event of a challenge.

C. Severability

The Town's existing ordinance contains exemptions very similar to the State regulation adjudicated in *Catalano*. As such, it is our opinion that a court reviewing the Town's existing ordinance would likely follow the *Catalano* precedent and strike down the entirety of the legislation (rather than sever the unconstitutional provisions).

IV. Conclusion

In our opinion, a citation issued pursuant to the existing Section 130.02 would create enforcement challenges. Should the Town wish to actively pursue enforcement of sound regulations within the Town the issues relating to vagueness, overbreadth and content-based regulation(s) should be addressed and the existing Town Code modified. Two potential approaches that could be incorporated to address these issues would be to: (a) incorporate a decibel type regulation into the existing ordinance, and/or (b) establish a distance regulation (modelled in part after Fla. Stat. 316.3045 that was upheld in the Catalono decision). Most surrounding jurisdictions have incorporated decibel measurements into their regulatory codes; however, use of a decibel measurement will require the Town to establish necessary decibel standards for noise, procure the necessary equipment to measure such sound, and train the Town's police officers on the use of such equipment. Previous costs estimates obtained by the Town in December 2015 when this matter was previously discussed indicated that implementation (startup) costs of approximately \$23,000 - \$73,000. The other option of incorporating a distance standard that prohibits plainly audible non-motorized sound from a specified distance away from a source may also be explored. Both approaches should be explored in conjunction with recommendations and advice from the Town's Police Department relating to their anticipated enforcement of a revised ordinance.

We will be available to discuss this Memorandum at the June 21, 2021, workshop. Please do not hesitate to contact our office with any specific questions regarding this Memorandum.

Maggie Mooney

From:	Deborah A. Getzoff <dgetzoff@shutts.com></dgetzoff@shutts.com>
Sent:	Tuesday, June 08, 2021 2:03 PM
То:	Maggie Mooney
Subject:	CONFIDENTIAL ATTORNEY CLIENT INFORMATION

Hello Maggie,

It was a pleasure speaking with you today. You have contacted me regarding regulatory considerations related to the possible dredging of a sand shoal/sandbar located in Longboat Pass on the northwest side of Jewfish Key. You mentioned that the shoal is believed to be primarily composed of beach nourishment sand from the Gulf side of the islands that had migrated into the inlet and shoaled on the western side of the key, and that it would be considered as a possible sand source for beach fill. You indicated that there does not appear to be any seagrass associated with the shoal, and that it does not presently appear to be upland of mean high water or vegetated.

You have asked me to list the permits and approvals that may be required to dredge the shoal/sandbar to use for beach fill. The following is a brief general summary of possible state and federal permits that may be required. This only addresses the approvals that may be required for removal of materials that have not accreted to the uplands at Jewfish Key.

Federal approvals:

- 1. The U.S. Army Corps of Engineers would need to issue a permit pursuant to Section 10 of the Rivers and Harbors Act and the Clean Water Act for the dredge area and for any fill below high water. Since this appears to be an inlet flood shoal, any proposed dredge areas would probably require a modeling study to determine possible dredge locations, hydrographics, and effects on the inlet and navigation channels. For any beach placement, a sand study would need to be done to determine compatibility of the material.
- 2. The Corps may need to do a Feasibility Study, which would take a substantial period of time.
- 3. The Army Corps permit review process would include coordination with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service relating to any listed species or habitat areas. This could also be a lengthy process.
- 4. Approval may also be needed from the U.S. Coast Guard for the dredging.

State Approvals:

- The Florida Department of Environmental Protection will require an Environmental Resource Permit (ERP) for both dredging and filling below the line of mean high water pursuant to Chapter 373, Florida Statutes. This would be a Joint Coastal Permit pursuant to s. 373.427, Florida Statutes, which would combine the ERP with the permit needed for beach fill from the FDEP Coastal section and with the approvals from the Board of Trustees of the Internal Improvement Trust Fund for material removal and placement of any beach fill seaward of the Erosion Control Line or the line of mean high water pursuant to Chapter 253 Florida Statutes.
- 2. Part of the s. 373.427 Joint Coastal Permit for any beach fill activities seaward of the Erosion Control Line or the line of mean high water would be issued pursuant to s. 161.041, Florida Statutes. A coastal construction control line permit pursuant to s. 161.053, Florida Statutes may be required for beach fill above the Erosion Control Line or line of mean high water.
- 3. The shoal location appears to be within the Sarasota Bay Outstanding Florida Water pursuant to Rule 62-302.700 (9)(i), Florida Administrative Code. This designation requires the applicant to provide reasonable assurances that the proposed activity is clearly in the public interest pursuant to s. 373.414, Florida Statutes.
- 4. There may be a drafted Inlet Management Plan for Longboat Pass that includes consideration of this location that may have been filed with FDEP. I have not seen that any plan has been filed or adopted, but it may have draft provisions related to dredging in this location that would require consideration by Manatee County for any

permitting process. If the Plan has not been adopted, it would not necessarily determine FDEP permit action, but it may raise issues to be considered by the Department in the review process.

- 5. State permitting would include coordination with the Florida Fish and Wildlife Conservation Commission relating to listed species at the state level.
- 6. There may also be approvals required by the West Coast Inland Navigation District.

Maggie, this is a very quick and non-final review of some of the state and federal approvals that may be required if this project were to be considered. Further detailed review would be needed, including coordination with the listed agencies to provide more in-depth information. Please feel free to contact me with any questions.

Best regards, Deborah

Ta hill protect and from the internet directly in pro-×

Deborah A. Getzoff Partner

Shutts & Bowen LLP

 4301 W. Boy Scout Boulevard, Suite 300
 Tampa, FL 33607

 Direct: (813) 227-8136
 Fax: (813) 227-8236

 E-Mail
 Biography
 V-Card
 Website

Maggie Mooney

From:	lsaac Brownman <lbrownman@longboatkey.org></lbrownman@longboatkey.org>
Sent:	Friday, June 11, 2021 10:45 AM
То:	Tom Harmer; Maggie Mooney
Cc:	Charles Mopps; Alexandra Lowe-Mains
Subject:	Longboat Pass Flood Shoal: Jewfish Key

Good morning Tom and Maggie,

I spoke with Dr. Al Browder regarding the possible dredging of Longboat Pass flood shoal sand along the west side of Jewfish Key. In addition to the comments Ms. Deborah Getzoff provided, I would also like to summarize my conversation with Dr. Browder for additional context below:

Longboat Pass has an ebb shoal and a flood shoal, similar to most every tidal inlet. The sandy area west of Jewfish Key, and Jewfish Key itself, is part of the Longboat Pass flood shoal. Tidal inlets naturally form these shoal features as tidal currents carry sand in and out of the Pass. Tidal inlets generally form a level of dynamic equilibrium in terms of the sand volume and orientation of the shoal system. A certain amount of sand flows into the Pass shoals each year, and a certain amount is dredged out every few years. These actions collectively are referred to as the Pass sediment budget.

There is already an FDEP permitted amount of sand that can come out of (be removed from) the sediment budget of the Longboat Pass system. This includes the Longboat Pass permitted dredge channel shared with Manatee County, and two very slow-filling small sand traps north of Jewfish Key.

If the Town were to propose removing more sand from the Pass sediment budget, one primary question (among many) the Town would be required to answer to the satisfaction of FDEP is as follows: what does the removal of the flood shoal sand do to the two adjacent shorelines and to the inlet system itself? Does it change the dynamic enough to cause harm / can a harm be claimed? This is the most involved and costly question the Town would have to answer to access that sand and is found in Section #21 of the FDEP Joint Coastal Permit application.

To answer that question is a very lengthy and costly exercise that includes all the permitting elements noted below by Ms. Getzoff. This includes significant geotechnical investigation (perhaps as much as \$50,000) and costly numerical morphodynamic inlet modeling with sediment budget analysis for the Longboat Pass system (perhaps \$300,000 to \$500,000, depending on the level of new field data collection and calibration required). In addition to these costs, the permitting process will require a cultural resource assessment, environmental assessments, possible seagrass mitigation requirements, and the development of a proposed Inlet Management Plan for FDEP (derived from the studies described herein).

After all the analysis are completed, depending on the results, there is no guarantee that FDEP will issue a permit, or the permit issued may only allow for a portion of the shoal feature to be dredged (a likely outcome if any dredging is allowed there). If only a small excavation is permitted, does that sufficiently address the Town's objectives?

In addition, in Dr. Browder's opinion, the sand will be the best quality during the first dredge; after that, his expectation is that it would fill with progressively finer material and possibly fines and muck,

based on his experience at other flood shoal locations. So, it may not be the best renewable sand source, but perhaps good for the first couple dredges. In other words, there may not be as much juice as we think for "sand source" squeeze over time. Many of these details cannot be determined without at least an initial geotechnical analysis. There <u>could be</u> well over 200,000 cy of beach quality sand available upon first dredge, depending on the extent of an excavation, but likely less than that on all other future dredges. The recovery period is currently unknown as well. If modeling shows that the flood shoal does recover fairly quickly, then part of the exercise also requires identifying where in the system does the infilling sand come from and is it damaging another parts of the system. If the recovery rate is slow, then it is a single-use or intermittent sand source.

If the goal is simply access to more sand, a better strategy may be to pursue permitting a wider dredge channel for Longboat Pass. Again, although the pass channel may regenerate better, the question would still have to be answered as to whether or not too much sand is being pulled from the system.

If the combined intent is one of a single-use or intermittent sand-source COMBINED WITH removal of an attractive nuisance, the Town would need to consider that cost – benefit of the exercise. For FDEP, the attractive nuisance component is likely irrelevant to their permitting effort, and may actually factor negatively into the Public Interest component of the permit review.

Dr. Browder confirmation of Deborah Getzoff comments in red:

Federal approvals:

- 1. The U.S. Army Corps of Engineers would need to issue a permit pursuant to Section 10 of the Rivers and Harbors Act and the Clean Water Act for the dredge area and for any fill below high water. Since this appears to be an inlet flood shoal, any proposed dredge areas would probably require a modeling study to determine possible dredge locations, hydrographics, and effects on the inlet and navigation channels. For any beach placement, a sand study would need to be done to determine compatibility of the material. Yes.
- 2. The Corps may need to do a Feasibility Study, which would take a substantial period of time. This is true if the U.S. Army Corps is concerned that the proposed dredging may increase the burden of dredging for navigation in the future. If the Army Corps deems that is possible, the Town would need to assist the USACE in a Section 408 Study, which alone takes 1 2 years.
- 3. The Army Corps permit review process would include coordination with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service relating to any listed species or habitat areas. This could also be a lengthy process. Yes, and the NMFS process would relate to potential seagrass mitigation requirements.
- 4. Approval may also be needed from the U.S. Coast Guard for the dredging. Primarily to be made aware, as well as WCIND notification.

State Approvals:

- 1. The Florida Department of Environmental Protection will require an Environmental Resource Permit (ERP) for both dredging and filling below the line of mean high water pursuant to Chapter 373, Florida Statutes. This would be a Joint Coastal Permit pursuant to s. 373.427, Florida Statutes, which would combine the ERP with the permit needed for beach fill from the FDEP Coastal section and with the approvals from the Board of Trustees of the Internal Improvement Trust Fund for material removal and placement of any beach fill seaward of the Erosion Control Line or the line of mean high water pursuant to Chapter 253 Florida Statutes. Yes. In the Joint Coastal Permit ("JCP") Section #21, Town must demonstrate effect of project to the coastal system, both adjacent shorelines and the inlet itself. This requires Morpho-dynamic modeling.
- 2. Part of the s. 373.427 Joint Coastal Permit for any beach fill activities seaward of the Erosion Control Line or the line of mean high water would be issued pursuant to s. 161.041, Florida Statutes. A coastal construction control line permit pursuant to s. 161.053, Florida Statutes may be required for beach fill above the Erosion Control Line or line of mean high water. Yes, a JCP is definitely required, and that process would cover the CCCL requirements, so I don't think you would need the additional CCCL permit.

- 3. The shoal location appears to be within the Sarasota Bay Outstanding Florida Water pursuant to Rule 62-302.700 (9)(i), Florida Administrative Code. This designation requires the applicant to provide reasonable assurances that the proposed activity is clearly in the public interest pursuant to s. 373.414, Florida Statutes. Yes. FDEP review for Sarasota Bay Aquatic Preserve comments and the shoal location in the AP/OFW increases the Public Interest test requirements.
- 4. There may be a drafted Inlet Management Plan for Longboat Pass that includes consideration of this location that may have been filed with FDEP. I have not seen that any plan has been filed or adopted, but it may have draft provisions related to dredging in this location that would require consideration by Manatee County for any permitting process. If the Plan has not been adopted, it would not necessarily determine FDEP permit action, but it may raise issues to be considered by the Department in the review process. This is significant. Currently, no formally adopted inlet management plan exists for Longboat Pass. As part of answering Section 21, the Town would need to perform an Inlet Management Study to confirm how much to pull out of system beyond what is currently permitted. Ideally, this study would need to be done before filing for JCP permit. The study steps outlined above, including the detailed numerical hydrodynamic/morphodynamics modeling, constitute the inlet management study that ultimately leads to the drafting of an Inlet Management Plan for consideration for adoption by FDEP.
- 5. State permitting would include coordination with the Florida Fish and Wildlife Conservation Commission relating to listed species at the state level. Yes.
- 6. There may also be approvals required by the West Coast Inland Navigation District. Be made aware; most likely in favor of sand removal for better navigation.

Maggie, this is a very quick and non-final review of some of the state and federal approvals that may be required if this project were to be considered. Further detailed review would be needed, including coordination with the listed agencies to provide more in-depth information. Please feel free to contact me with any questions.

Best regards, Deborah

Deborah A. Getzoff

Partner

Shutts & Bowen LLP

4301 W. Boy Scout Boulevard, Suite 300 Tampa, FL 33607 Direct: (813) 227-8136 Fax: (813) 227-8236

Thank you,

Isaac Brownman

Director | Town of Longboat Key Public Works 600 General Harris Street Longboat Key, Florida 34228 Ph. 941-316-1988 Ext. 2210 Cell 941-822-6876 ibrownman@longboatkey.org

"Longboat Key is a beautiful place to live, work, and visit where the natural assets of a barrier island combine with cultural and recreational amenities, visionary planning, and proactive leadership to enhance your way of life."

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The Town Clerk will read all comments/questions received. You do have the option to dial in to speak. If called upon and we cannot hear you, we will read the comment/question you submitted below. Would you like the option to speak at the meeting?

Yes

Your Name - Please use the same name in the Zoom session to be recognized to speak

James Haft

Your Email

jameshaft@comcast.net

Phone - If dialing in by phone to the Zoom session, use the phone number here so we can identify you as the caller.

Is the the item quasi-judicial?

No

Attend

Virtual

Date of Meeting for Comment

06/21/2021 12:00 AM

Agenda Item Number

discussion of boat noise issue at north end

Your comment/question - Limited to 1000 characters

will comment by zoom

Check Box List

Thank you, LongboatKey, FL

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June 18, 2021

6833 Hughes Street Longboat Key, Florida 34228

Attention to the Mayor and Commissioners of the Town of Longboat Key

Dear Ladies and Gentlemen;

I am pleased that you are looking into the high volume of noise from boats on the sandbar adjacent to Jewfish Key and the beaches of Greer Island.

I have been involved in community affairs with the Town over the past 6 years. I am a 37 year property owner in Longbeach Village, on the north end of Longboat Key.

I support the memo that James Shaft has put forward for your consideration.

There has been an uptick in the usage of the beaches and the sandbar. At one point it was only weekends but now the noise from boat stereos and parties at these locations continues loudly on a daily and nightly basis. The "quiet enjoyment of our neighbourhood" is facing another onslaught; this time from the water.

My neighbours are frustrated with having to constantly call the police for parking and noise on the water. Why does this "policing" fall to the tax paying residents? It is clear from Mr. Shaft's memo that there is area for the Town to control the water noise pollution with salaried staff who can write fines big enough to dissuade the ongoing obnoxious behaviour of boaters.

Please support this "control the boat noise" initiative by updating and strengthening the Town codes so that all of us can have the peace and quiet others enjoy on the rest of Longboat Key.

Best regards.

Madeleine Stewart

Michelle Lowe

From:	Michael Saunders <michaelsaunders@michaelsaunders.com></michaelsaunders@michaelsaunders.com>
Sent:	Wednesday, June 16, 2021 5:14 PM
То:	Sherry Dominick; Penny Gold; Kenneth Schneier; Debra Williams; Maureen Merrigan; BJ Bishop; Mike Haycock
Cc:	Tom Harmer; Town Clerk
Subject:	June 21st Workshop

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Dear Commissioners,

Longboat Key is one of the most desirable barrier islands on the west coast of Florida. Prior Commissions, along with you, have taken important steps over the years to protect the environment, create a sense of community and enhance the quiet enjoyment of living on our magical island. Thus we enjoy strong property values which results in favorable tax revenues – all to help provide local services that benefit us all. Therefore, it is unfortunate that we now have a situation at the north end of Longboat Key which to my knowledge does not exist in magnitude off the waters off any other barrier island.

On Monday, in your Town Commission Workshop, you will be addressing the enforcement of an existing noise ordinance. Since the 4-acres we call home – Lands' End – at the north end has been in our family since the late 1800s, we have embraced the natural beauty, nesting birds, clean water, protection of our grass flats and sea life for many years. The noise from the loud music and the type of music played at decibel levels that are ear piercing has become intolerable to all of us who live on the north end of Longboat Key and Jewfish Key. I have been in touch often with staff from issues caused by the dredging, the boating activity around Greer Island and trespassers at my dock and property. It truly is a circus environment on holidays and weekends. Often we have the "Fun Barge" anchored right off our seawall with water slides, trampolines and no means to get to the boat except to trespass on my property or swim. It has become an attraction for trespassers and it is a full time job telling them they are trespassing on private property. In recent weeks, there has been a boat towing jet skis under the bridge and people using them in Greer Bay to do "loop de loops" in what should be a nature preserve. Manatee County has the whole back side of Coquina Beach to devote to additional boat and recreational activities.

As you know, with boats come people and with people come trash, waste, dogs, grilling on the beach – all polluting what should be the most pristine pass and nature preserve. I don't need to remind you that there are no restrooms on Greer Island or the sandbar. I urge you to look at the big picture and not just the noise which you can control through your noise ordinance – but what can you as a Commission, through thought leadership and the powers that rest with you, do to return the Longboat Pass which is the northern entrance to our magical island to an area where more passive enjoyment can be found which would maintain the pristine environment for nature, sea life, bird life, grass beds and make this pass an asset that Longboat Key can be proud of instead of an embarrassing circus? I urge you to make the first step in enforcing the noise ordinance but also have a discussion surrounding the entire atmosphere and boating activity to ensure the future vitality of the Longboat pass. This has become something that Longboat Key is not. I would appreciate any efforts to make this gateway an asset rather than a liability to the image of Longboat Key. I invite any of you who wish to see first-hand to come on weekends and holidays – seeing is believing.

Michael Michael Saunders

Founder and CEO

<u>941-953-7900</u> MS@michaelsaunders.com 100 S. Washington Blvd. | Sarasota, FL 34236 Nowhere but here.



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Town Clerk

To: Subject: Rusty Chinnis RE: State of The Bay

From: Rusty Chinnis <rustychinnis@comcast.net> Sent: Monday, June 21, 2021 8:12 AM To: BJ Bishop <BBishop@longboatkey.org>; Sherry Dominick <SDominick@longboatkey.org>; Tom Harmer <THarmer@longboatkey.org>; Mike Haycock <MHaycock@longboatkey.org>; Susan Phillips <sphillips@longboatkey.org>; Kenneth Schneier <kschneier@longboatkey.org>; Maureen Merrigan <maureenmerrigan@mac.com>; Penny Gold <PGold@longboatkey.org> Cc: Town Clerk <TClerk@longboatkey.org> Subject: State of The Bay

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Dear Commission,

Please consider this a comment under the Public to Be Heard since unfortunately I can't attend todays' meeting due to a prior commitment. I wanted to share my concern for the health of our gulf and bay waters. As a long time resident and avid angler I have spent may hours on local waters since I moved to Longboat Key in 1980. I have been an advocate for clean waters and a healthy marine ecosystem for many years, cofounding and participating in groups including the Florida Conservation Association (now CCA), The Sister Keys Conservancy, Sarasota Bay Watch and most recently Suncoast Waterkeeper.

I have never been more concerned about the health of Sarasota Bay than I am today. Harmful algae blooms are threatening to turn the waters of the bay from a seagrass to an algae based system which would have disastrous effects on the environment and the local economy. We only have to look as far as the <u>Indian River Lagoon</u> to see the possibility of a looming disaster.

The good news is that we have an Estuary Program and a Director that understands the problem and the solutions necessary to reverse the recent decline as you'll hear today. I'm including a video I shot early this month documenting the extent of the problem just to our north in Anna Maria Sound. I encourage you to make a commitment to be on the front lines and lead our local communities in being part of the solution.

https://www.youtube.com/watch?v=hDOhMBv0Nuo

Rusty Chinnis 941-650-0318 www.rustychinnis.com

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TCRW 6-21-21 #6

Tom Mayers Lands End, Longboat Key, FL 6.18.21

Noise meeting Monday 21, 2021.

I have been in contact with other homeowners at the North End of LBK concerning the circus like atmosphere that LBK and Manatee County Commissioners have allowed to continue here at North LBK Pass. We all seem to agree that there are problems that you Commissioners need to address. There are laws which if enforced could alleviate some of these problems. It is not too difficult to identify times when you need to patrol the area with police activity in order to deal with problems on busy weekends- for example Labor Day, July 4th weekend, Memorial Day and pretty much any pretty sunny day on the weekend over the summer. In the winter there is not much problem. We have a typical scenario of people loving Longboat Key to death. I propose that we emphasize the nature and serene environment here. For example- you spend a million dollars to make a channel for entrance to the Greer Island Bay and then allow large motorboats to anchor in the channel, which prevents boaters from entering the bay. By not regulating activity you encourage that activity. My suggestion is that you make the land or beach between the bridge and the mouth of the channel a kayak, paddle boat and swimmer area and then only allow anchoring offshore and no beaching of boats out to the jetty that you are spending more millions on creating. You are allowing and thereby encouraging people to beach their boats and swim in areas that we all agree are dangerous. In fact, you have signs that say dangerous current, no swimming and you have that activity currently allowed. In making the channel you have created a dangerous environment where people are mixed in with large motors and propellers and people are drinking while operating the overpowered boats. It is a recipe for and accident and disaster. Are you all going to be liable for creating a mechanism that will produce human injuries? Police are like the "Keystone Cops" playing hide and seek with boaters. You say no alcohol, no dogs and as the police boat goes by people hide the dogs and alcohol and when the boat leaves the dogs and alcohol are back on the beach. You Commissioners and Police seem

to be cultivating this antisocial behavior by not putting up clear and proper signage and by not enforcing the law. I suggest that you have a specialist, which you should have as your staff, review the signage. You may want to remove signs that do not apply or are not enforced and add clear signage to help make the rules clear to visitors. For example- we had a dozen manatees in the new channel and in Greer Island Bay mating this week. This is an important manatee area that is used by manatees year- round and is important to their mating and continuing to exist. You have not one sign saying manatee area here at the North End of LBK. Are you doing this on purpose or are you just inept? The only manatee area signs here were put up by me many years ago. I met a jet skier who was planing in the Greer Island Bay and told him that it was a no wake are and he was not allowed to go fast in that bay. He said that he was not from around here and he did not know that it was not allowed. There is a piling there with no signage at the entrance to the bay- How about a no wake and manatee area sign there? If you do not enforce your laws you encourage that activity. No sound enforcementsound problems. Not giving tickets to speeders in no wake zonesspeeding problems. The Fun Barge is a bad joke. You, yes you, have allowed him to operate an illegal business for about 3 or more years. What is wrong with you? You must not care what your constituents think. Why no dogs on the public beach? We have had years to understand that no dogs is a good policy. For sanitation, for not having to police dog fights and dog bites and for the wildlife. These are all laws that exist and are not being enforced now. Let us play a gamelook and see how many violations and tickets have been issued on these issues that I have brought up here. It should not be difficult, just ask the police and Coast Guard to give you those numbers. What sense does it make to have a policeman drive a \$200,000.00 boat and pay that officer \$50,000.00 a year to not enforce the law. Give some tickets and see how quickly people reform. Word will get out that you are serious about your laws. It will be like a speed bump, it will produce a calming effect. You have tried not doing your job, how about trying to do your job and see what the results will be. You may not even have to receive

letters and emails from you constituents and things will become more calm.

At New College, my professor John Morrill always told me to offer a solution when dealing with an environmental subject. Here are some maps and an offer of a solution. This page is from a book that I published about 5 years ago. It is available on Amazon and I have distributed copies throughout this area. The book is <u>Sarasota Bay</u> <u>Mangroves: Past Alterations and Future</u>

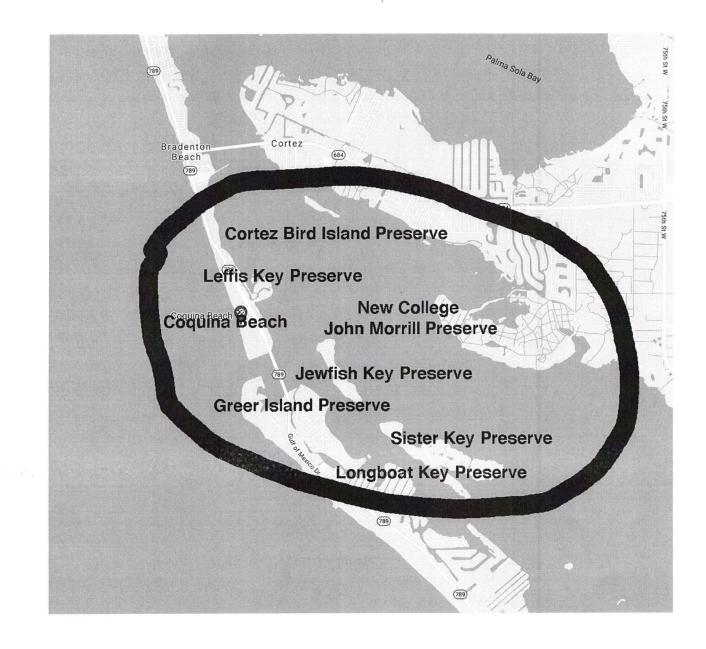
Possibilities- https://www.amazon.com/Sarasota-Bay-Mangroves-1991-Possibilities-

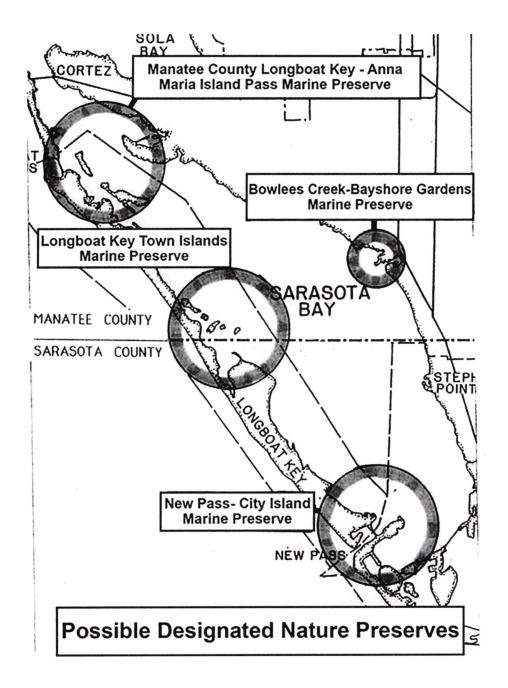
<u>ebook/dp/B07BGRN5ZD/ref=sr_1_1?dchild=1&keywords=Tom+Maye</u> rs-+Sarasota+Bay+Mangroves&qid=1624034133&sr=8-1

The key to the peaceful use of the pass area is to establish Nature and Wildlife areas and to regulate their use. We have the nature areas, now we just need to advertise them as passive recreation areas and limit the active aggressive use by boaters. As you can see, the Manatee County, Longboat Key- Anna Maria Island Pass Marine Preserve would define and encourage maintaining the wildlife and nature here in the future. All you would have to do is make regulations for boats just like the "No Wake Area" and have police enforce the laws. The Police and Town and Manatee County policy almost seems to be a laissez faire policy. People respond to this by flying obscene flags, speeding in "No Wake Zones", aggressively playing music loudly, letting dogs run free in public parks where birds and turtles nest, and trespassing on private property all while wrapping themselves in the American flag and declaring their rights of freedom. We will wake up one day soon with no manatees, no porpoises and a lot of wounded and disappearing birds and wildlife. A good question for the Town and the Manatee Commission should be- "What is your plan for the future of Longboat Key Pass?". Is this your plan- to wipe out what makes this area special and what draws people here? The Marine Preserve plan would encourage passive recreation in this pass area and will insure more enjoyment by more people into the future. We need to have areas set

aside for the turtles and wildlife to exist unmolested. It is not too late now but it soon will be.

This is a map of the area that you all are responsible to manage. This is a contextual framework that may help you to protect our nature areas here into the future. People have asked me to say something and here it is. I have lived here for longer than most of you and I have become attached to the nature and have tried to help preserve it into the future. Manatees, porpoises, herons, ibis, songbirds, wood peckers, fish, turtles, tortoises, snakes all make this area interesting, unfortunately people, not so much.







Trish Shinkle

From:
Sent:
To:
Subject:

Lucia Uihlein <lutie3@icloud.com> Monday, June 21, 2021 12:25 PM Trish Shinkle Excessive noise from boaters at Jewfish Key sandbar

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To the Commission:

I would like to add my following comment about the noise problem that will be discussed today, 6/21/21, at the Commission's Workshop.

I have lived at Lands End for 25 years. While there was occasionally a problem with loud noise coming from boaters at the sandbar, it was relatively rare.

So what has changed, given the sandbar has always been a destination for boaters? This past year the restrictions brought about by the Covid pandemic made boating one of the few safe recreational pastimes available to the public. Consequently, the number of boats anchoring off the sandbar and along Greer Island increased significantly. What has also changed dramatically over the past several years are the sound systems now routinely sold on many boats. Suffice it to say, they are powerful systems able to create a high decibel level, and, as everyone knows, sound carries on water.

Imagine, if you will, a pickup truck parked several doors down from your home. It's a newer model with a great stereo system and has speakers not only in the cab but also the cargo area. The driver decides to listen to his favorite rap music and turns the up the volume to the max. The woofers and tweeters are pumping out sound and the windows in your home start to vibrate. So, you call the police and ask for help. The police come and deliver a warning. The offender leaves. If he returns and cranks up the sound system again, he will pay a hefty fine. Ultimately, he decides to lower the volume or go elsewhere.

This is what we are experiencing at Lands End on a regular basis. The difference is the music is coming from a boat on water, not a truck on land. The noise ordinance covers one scenario but not the other?

We appreciate very much the help of the marine patrols of LBK and the County Sheriff! They do their best. But, unfortunately, not much will change until there are some teeth put into the warnings. Unless there are fines to be paid, boaters will shrug off the verbal warnings.

I understand there is some question as to who, legally, has jurisdiction over this area of the sandbar. I would request a thorough examination of State and Town law to see how this problem can be resolved.

Thank you for your attention to this matter. We truly need your help.

Respectfully,

Lucia Uihlein

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6/21/21 TCRW #6

June 18, 2021

6833 Hughes Street Longboat Key, Florida 34228

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Dear Ladies and Gentlemen;

I am pleased that you are looking into the high volume of noise from boats on the sandbar adjacent to Jewfish Key and the beaches of Greer Island.

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My neighbours are frustrated with having to constantly call the police for parking and noise on the water. Why does this "policing" fall to the tax paying residents? It is clear from Mr. Shaft's memo that there is area for the Town to control the water noise pollution with salaried staff who can write fines big enough to dissuade the ongoing obnoxious behaviour of boaters.

Please support this "control the boat noise" initiative by updating and strengthening the Town codes so that all of us can have the peace and quiet others enjoy on the rest of Longboat Key.

Best regards.

Madeleine Stewart

TCRW 6/21/2/ #6

Trish Shinkle

From: Sent: To: Cc: Subject: Julie Hansen <juliehansen40@gmail.com> Monday, June 21, 2021 7:27 AM Trish Shinkle John Hansen Re: Jewfish Island Noise Video

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I am requesting that my written comments by written in to the record at the appropriate time. Thank you,

Julie and John

> On Jun 21, 2021, at 6:24 AM, Julie Hansen <juliehansen40@gmail.com> wrote:

>

 > We are requesting that the video that was submitted to the commissioners by Jim Haft be shown at the workshop today at 1:00 pm re: the Jewfish Island boaters noise. The video portrays all the noise from the boaters - it is very loud and it clearly should stop. This happens on any given day.
 > Thank you,

> ---

- > Julie and John Hansen
- > 701 Lands End Drive

>

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End of Agenda Item