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July 14, 2011

Andy Bauer, Director  
Planning and Zoning Department  
City of Gulf Shores  
205 Clubhouse Drive, Suite B  
Gulf Shores, Alabama

Re: Local Authority for Implementing Pedestrian Greenways (MASGC 11-008-07)

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Dear Andy:

We met on June 22, 2011 to continue our discussion of projects the City of Gulf Shores is interested in pursuing to enhance its working waterfront areas. As discussed during the meeting, Gulf Shores would like to increase public access along the Intracoastal Waterway (ICW) by adding a pedestrian greenway along the waterfront. This memo highlights legal tools the City may use to implement a public access greenway along the ICW. The following information is intended as advisory research only and does not constitute legal representation of the City of Gulf Shores, Alabama or its constituents. It represents our interpretations of the relevant laws and regulations.

To summarize key components of this project, Gulf Shores seeks to develop a greenway along a portion of the ICW. The City faces two initial obstacles at the onset of this project. First, private parties own many of the waterfront properties in this area of Gulf Shores. Second, the U.S. Army Corps of Engineers (Corps) holds an easement across the waterfront edge of most properties abutting the ICW, which gives the Corps authority to override construction projects within the easement.

That being said, Gulf Shores has options for creating public access greenways including the use of zoning, easements, and eminent domain. Each tool has its own advantages and disadvantages, as discussed below. The City may use a hybrid approach, combining different options for different pieces of property. However, it is important to remember that any action within the

Corps' easement will be subject to Corps' approval. The following provides an overview of how zoning, easements, and eminent domain can be used to accomplish the greenway.

### *Zoning*

Under Alabama municipal planning authority, Gulf Shores can adopt zoning regulations under a comprehensive plan designed to promote health and general welfare, to provide adequate light and air, and to facilitate adequate transportation, parks, and other public requirements.<sup>1</sup> Zoning regulations must reasonably consider the district's character and peculiar suitability for specific uses, preserve building value, and encourage the most appropriate use of land.

Using this authority, Gulf Shores has adopted a public access greenway requirement for properties along the ICW, which provides:

#### Pedestrian Greenway Requirement (Article 9-2 B 4 & 5 of the Zoning Ordinance)

*4. Pedestrian Improvements made within the Corps easement Adjacent to the Intracoastal Waterway that are consistent with the recommendations of the Comprehensive Plan and the intent of this Section may offset some or all of the customary on-site pedestrian Improvements if such Improvements are deemed by the City to be more desirable or advantageous. All such Improvements are subject to approval by the Corps.*

*5. Each development shall plan for and construct their portion of a multi-use pathway of at least twelve (12) ft in width or as otherwise recommended by applicable AASHTO standards. The pathway shall be located within the Corps' easement Adjacent to the ICW, or along the southern edge of the property where no easement exists, consistent with the recommendations of the Comprehensive Plan. ... The design and materials used in the construction of the path should be consistent, to the extent necessary, to maintain a common theme throughout the path and illustrate the path's "public" nature. Enhancements and embellishments will be allowed Adjacent to the path to represent the different developments that the path passes through.*

The pedestrian greenway ordinance applies to new developments within the Intracoastal Waterway – South District. New developments must include a multi-use pathway located along the waterfront edge of property in the development plans. Where the pedestrian path will be located within the Corps' easement, the Corps must first approve the pathway location and design before any construction in the easement occurs.

While the greenway ordinance achieves the City's goal of increased public access (assuming Corps' approval), the ordinance only applies to new development permits.<sup>2</sup> If Gulf Shores relies

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<sup>1</sup> ALA. CODE § 11-52-72.

<sup>2</sup> Gulf Shores Zoning Ordinance § 1-8. The current ordinance cannot require a property owner to make any change in plans, size, construction, or designated use of any building, structure, or part thereof for which a permit had been granted before the time of this Ordinance's passage. The only exception to this occurs when construction under an existing permit fails to either begin within sixty days or conclude within eighteen months of the revised Ordinance's enactment. When this occurs, the revised Ordinance governs all further construction under that permit.

solely on this zoning authority to achieve the greenway, the greenway development will be intermittent and dependent on property development. To achieve a continuous pathway along the ICW, Gulf Shores will need to explore other options in areas where no development is occurring.

### *Easements*

For properties where the zoning ordinance does not apply (i.e. where the owner(s) are not seeking a development permit), easements provide a second option for the City. Acquisition of a public access easement across private properties along the ICW would allow Gulf Shores to construct the pedestrian greenway on those parcels of land. Easements may be donated or purchased.

Some property owners may consider donating a public access easement to the City. Depending on the terms of the easement, it may qualify as a conservation easement. A conservation easement is a binding agreement between the landowner and the municipality that restricts the use of the property and protects any other mutually agreed upon use (including the ability to grant public access rights). Alabama recognizes a variety of purposes within its definition of conservation easement, including (1) retaining or protecting natural, scenic, or open-space values of real property, (2) assuring its availability for recreational, or open-space use, and (3) protecting natural resources. Property owners donating conservation easements may qualify for tax advantages. To qualify, landowners should carefully consult the federal tax code to ensure that the easement meets the “conservation purposes” test. (INTERNAL REVENUE CODE § 170(h)).

Gulf Shores may also purchase easements from property owners. This will require the City and the landowner to negotiate a price for the easement based on the value of the easement – not the property itself. And again, any easement obtained by the City will remain subservient to the Corps’ easement over the property (as the Corps’ easement pre-dates any property rights of the City). Whether easements are purchased or donated, this option depends on the voluntary participation of property owners.

### *Eminent Domain*

Gulf Shores’ third option involves exercising eminent domain authority over private lands to construct the pedestrian greenway. Eminent domain is the lawful taking of private lands to serve a *public use*, while providing just compensation to the landowner.<sup>3</sup> The Alabama Supreme Court has stated that the term ‘public use’ should have liberal meaning in the context of eminent domain proceedings. Generally, acquisitions that primarily benefit the public while incidentally benefiting others are considered condemnations for public use. Several states and the federal government have used eminent domain for recreational and scenic trails.

Gulf Shores may purchase any necessary private lands, rights, easements, or interests *for which lawful eminent domain purposes exist*.<sup>4</sup> Lawful eminent domain purposes include (but are not limited to) construction, maintenance, or operation of streets, roadways, government buildings, parks, or recreational facilities. A municipality cannot use eminent domain to take property for

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<sup>3</sup> 1901 Constitution of Alabama, Art. I, § 23.

<sup>4</sup> ALA. CODE § 11-47-170(a).

private development, to enhance tax revenue, or to transfer to a third party. Eminent domain proceedings are carefully governed by state law which outlines specific administrative procedures for acquisition and land valuation. (*See* Alabama Code Title 18, Chapter 2 and the Alabama Eminent Domain Code). Because of the detailed administrative process involved in exercising eminent domain authority, this process can be both time-consuming and costly.

In summary, Gulf Shores can use its existing zoning regulation to develop a greenway along the ICW pathway but this authority is limited to property owners seeking development permits. For properties not seeking development approval from the City, Gulf Shores may explore easements and/or eminent domain authority as an alternative means of continuing the greenway along the ICW. However, any greenway development will be subject to Corps' approval if located within the Corps easement. Lastly, the City may need additional permit approval from Alabama Department of Environmental Management and the State Lands Division of the Alabama Department of Conservation and Natural Resources, depending on project design.

I hope you find this information helpful. If you have any additional questions, please let me know.

Sincerely,

/s/ Niki L. Pace  
Research Counsel