

**A PRIMER ON THE MATLACHA HISTORIC DISTRICT
AND THE LEE COUNTY HISTORICAL PRESERVATION BOARD**

“OUR JOURNEY THROUGH THE REGULATORY PROCESS”

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Introduction

Kathleen and I have lived in Matlacha since 2014. This article represents my knowledge of the law related to construction and renovation in the Matlacha Historic District. Our path to understanding started in 2020 when I made application to demolish our existing 574 sq. ft., 46-year old house and to build a new home at 4700 Pine Island Road in Matlacha. The application first had to be filed with the Lee County Historic Preservation Board [HPB]. The application was denied twice by the HPB, and twice I obtained reversal from the Chief Hearing Examiner for Lee County. Even then the lay members of the HPB wanted to deny the application a third time until the Lee County Attorney intervened and told them to grant the application.

In the course of this journey, I probably read and digested every application to the HPB from Matlacha property owners, along with every Staff Report and final decision. If I were not an attorney, it would likely have cost me \$50,000 in legal fees if I were able to find a law firm familiar with the process. I am not a Florida barred attorney, and this article is not intended to be legal advice under Florida law. One need not be an attorney barred in Florida to represent an owner before the HPB or to represent yourself in an application to the HPB.

Matlacha is an unincorporated area in Lee County, Florida. Matlacha is a place name, which the U.S. Post Office continues to honor even after we lost our own zip code. Matlacha falls under the governing authority of the Lee County Commissioners. Matlacha does not have its own governance; although, the

Matlacha Civic Association, Inc., is a nonprofit IRS 501(c)(3) corporation formed under Florida law to advance the interests of Matlacha and its residents.

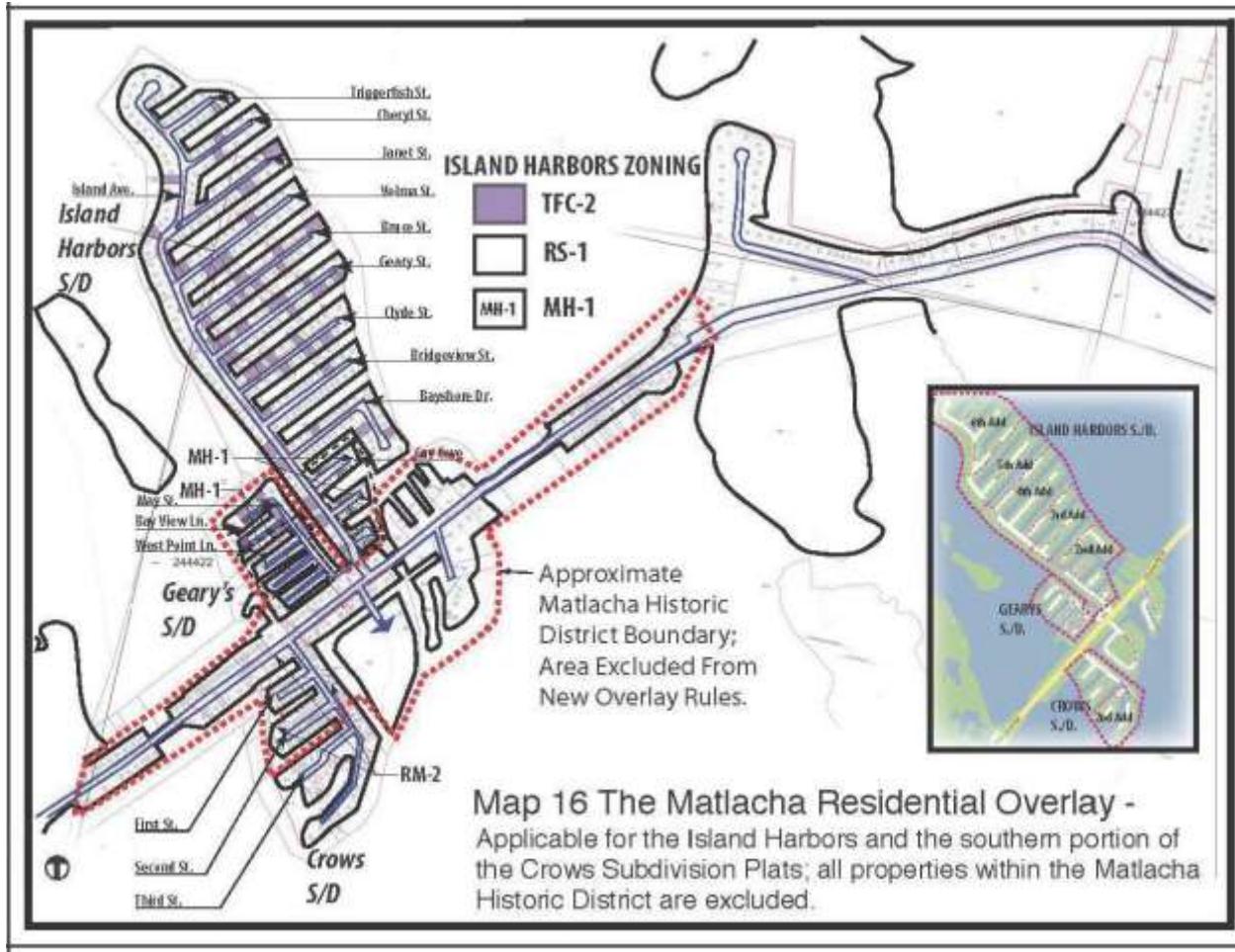
The Matlacha Historic District

For application of Lee County laws and regulations governing renovation and construction of properties in Matlacha, you should know that over time, Lee County has divided Matlacha into two areas: the Matlacha Historic District and the Matlacha Residential Overlay.

This process started in 1988, when the Lee County Commissioners enacted Ordinance 88-62 which created the Lee County Historic Preservation Board. [EXHIBIT A]. Ordinance 88-62 is now contained in Title 22 of the Lee County Municipal Code, which you can find online and where you can learn about the powers of the HPB and how it conducts its business. Lee County also created Rules of Procedure for the HPB in Administrative Code AC-2-10. [EXHIBIT B].

Under the authority of Ordinance 88-62, in November of 1990, the HPB enacted Resolution HD-90-10-01 [the “Resolution”] creating the Matlacha Historic District. [EXHIBIT C]. Unfortunately, the Resolution does not include a map. The boundaries of the Historic District must be discerned from the list of STRAPS and LEGAL DESCRIPTIONS of the properties contained in Attachment A to the Resolution. The LEGAL DESCRIPTION does include addresses of the properties.

The Historic District generally includes the main street [Pine Island Road] and some adjacent streets deemed historic in 1990. When Lee County much later created the Matlacha Residential Overlay on August 22, 2012, the Commissioners created a new map which shows the Historic District. Here is a recreation of the map from the Lee County Code:



To help focus on the properties in the Historic District, the following is an aerial of the same area of Matlacha taken from the Lee County Appraiser's GeoView. The Historic District, according to the list of properties in Appendix A of the Resolution, starts at 4130 Pine Island Road on the east [Century 21 Office] to and including 4915 Pine Island Road on the west. [Yucatan Bar & Grill].



Applications for renovation, construction, or demolition of properties in the Historic District first must be approved by the HPB, which issues either a Certificate of Appropriateness [COA] or Special Certificate of Appropriateness [SCA]. Before the HPB makes a decision on an application, the Lee County Staff presents the HPB with a Staff Report and Recommendation for approval or denial. After approval by the HPB, the owner then takes the plans to Lee County permitting. After denial, the owner must either appeal or revise the application. There are time limits that apply.

Our process through the HPB took over a year including the two appeals to the Chief Hearing Examiner; whereas, I have seen applications bouncing back and forth between the owner and the HPB for longer than a year. After HPB approval, the property owner may still need to apply to Lee County Community Development for variances from zoning ordinances or other provisions of the Lee Development Code [LDC]. The Community Development office is an umbrella for Zoning, Planning, and HPB, among many other services.

The owner may have to go to Community Development because HPB has no jurisdiction over zoning or building code issues. The staff of the HPB are knowledgeable regarding zoning and the building code and will sometimes advise the owner of needed variances after approval of the application by HPB. This is not always the case, and one cannot necessarily rely on this advice before actually submitting an application for variance.

Resolution HD-90-10-01 divides the properties in the Historic District into two categories for permitting purposes: “contributing” and “noncontributing” properties, depending on their characteristics as unique to Matlacha as of 1990. The two groups are listed separately in Attachment A of the Resolution. The Resolution may be the only place you can find out whether your property is contributing or noncontributing. If you review your property information on the Lee County Appraiser’s website, the information notes whether the property is “historic”; however, it does not tell you whether it is contributing or noncontributing. Many property owners in Matlacha have told me they never knew whether their properties were contributing or noncontributing when purchased. An owner must also note that HPB considers the two designations to apply to the actual property and not merely to the structure. This can be important if Hurricane Ian washed away your contributing home; however, HPB also has authority to redesignate property from one category to another.

The Matlacha Residential Overlay

The Lee County Commissioners created the Matlacha Residential Overlay on August 22, 2012, as depicted in the map above. Ordinance 12-14 [EXHIBIT D] stated: “Matlacha is noted for its unique island village character that necessitates a distinct regulatory treatment.” Therefore, the Ordinance provided the following:

[N]ew Article VI of LDC Chapter 33 will create relevant zoning height, bulk, setback and other standards designed specifically for Matlacha residential neighborhoods. These new standards take into account the small platted lots of the community, correct the problem of almost mandatory variances for residential home construction and amend building height, lot coverage, set back and other zoning standards to support harmonious neighborhood character and waterbody views.

Consequently, new renovation and construction of Matlacha properties in the Residential Overlay [excluding the Historic District] must comply with the provisions of Lee Development Code Chapter 33. A property owner in the Residential Overlay applies directly to Lee County for approval of renovation or construction projects. As Ordinance 12-14 acknowledges, many properties in the

Matlacha Residential Overlay may still have the status of a “nonconforming use” under the zoning and construction standards contained in LDC Chapter 33. HPB has no jurisdiction over these properties.

The Design Guidelines

The “Design Guidelines” for the Historic District are contained in Appendix B of the 1990 Resolution of the HPB. [EXHIBIT C]. New renovation or demolition of noncontributing properties must meet a “preponderance” of the 25 design criteria currently listed in the Resolution. Prior to June 10, 2021, the HPB (consisting of unpaid volunteers), rejected numerous applications for COAs and SCAs based on often whimsical and inconsistent criteria. I have not found a single HPB decision which applied the “preponderance” standard to an applicant prior to 2021.

On June 10, 2021, a decision by the Chief Hearing Examiner in our case held that the HPB cannot reject an application unless the evidence relied on by HPB proves that the application fails to meet 13 or more of the design criteria. In our case, the Staff Report had recommended approval because the application met all 25 of the design criteria. Prior to June 10, 2021, the HPB frequently denied applications even though they were approved by the professional staff. Our case was the first time any property owner appealed an adverse decision of the HPB to the Lee County Chief Hearing Examiner.

Interior Department Standards for Rehabilitation

For contributing properties in the historic district, the 1990 Resolution requires the applicant to comply with the U.S. Secretary of the Interior’s Standards for Rehabilitation. These standards can be found in Title 36 of the Code of Federal Regulations § 67.7. [EXHIBIT E]. Once again, a review of decisions by the HPB over the years prior to Hurricane Ian evidences whimsical and arbitrary decisions to approve or disapprove applications for contributing properties. In my research, I am not aware of any owner appealing an adverse decision of the HPB regarding a contributing property. Owners of contributing properties today should also review the 2021 Secretary of the Interior’s Standards Guidelines on Flood Adaptation for Rehabilitating Historic Buildings. Title 36 CFR § 67.6(c) states that the Secretary of Interior shall determine if a project “is

consistent” with the Standards for Rehabilitation set forth in Title 36 CFR § 67.7. While it is not entirely clear, it appears that HPB has applied the same standard to contributing properties.

Hurricane Ian

After Hurricane Ian, the Lee County Staff acted aggressively to address the impact of the storm on the Matlacha Historic District. The current position of the Staff is expressed in the Minutes of the HPB Meeting of December 2, 2022. At that meeting, the staff presented a chart entitled “Items Subject to Administrative Review and Approval by Staff.” [EXHIBIT F]. The purpose of this document is to permit property owners to make renovations and repairs of their properties in the Historic District which the staff recognizes as routine and permissible without going through the elaborate process of Board approval. This strategy of streamlining approval is commendable and should be adopted where possible for all applications.

My take is that the HPB realizes it may focus only on what is harmonious, historic Matlacha architectural style. Contributing or noncontributing property owners should have no difficulty meeting appropriate design guidelines. No longer will property owners be unable to raise their properties or to build to within the applicable Lee County zoning and building code. The result will protect Matlacha from the next Ian.

Summary of the Journey

Our recommendation to Matlacha residents and property owners is to understand the legal status of the Historic Preservation Board and its authority over your use of your property. You should read the sources mentioned in this article and available online. There are many nuances not addressed in this short article. In particular, please consider the following:

First, in late 2023 the Florida Legislature enacted amendments to Florida Statutes Chapter 163 to clarify the limited authority of an historic preservation board. The legislation followed Hurricane Ian to clarify that no local HPB in Florida can prevent a property owner from restoring or using her property within the bounds of the county land development code passed by the local county commissioners. The following language comes directly from the statute:

Land development regulations relating to building design elements may not be applied to a single-family or two-family dwelling

“Building design elements” means the external building color; the type or style of exterior cladding material; the style or material of roof structures or porches; the exterior nonstructural architectural ornamentation; the location or architectural styling of windows or doors; the location or orientation of the garage; the number and type of rooms; and the interior layout of rooms. The term does not include the height, bulk, orientation, or location of a dwelling on a zoning lot; or the use of buffering or screening to minimize potential adverse physical or visual impacts or to protect the privacy of neighbors.

(Florida Statutes § 163.3202(5)(a) and (b)(1)E); EXHIBIT G).

Second, the HPB Design Guidelines contained in the 1990 Resolution at Appendix B must be amended to comply with the Florida Legislature’s amendment of Florida Statutes § 163.3202(5)(a) and (b)(1)E. The 1990 Design Guidelines unlawfully impose restrictions on renovation and construction based on zoning and building code criteria. The Design Guidelines must use the criteria quoted above.

The Lee County Commissioners already made this clear. The Historic Preservation Board may not deny applications which conform with the County Land Development Code. Chapter 22 of the Lee County Land Development Code itself restricts the authority of the Historic Preservation Board. Section 22-2(b) states: “Nothing contained in this chapter shall be deemed to *supersede or conflict with applicable building and zoning codes* except as specifically provided in this chapter.” (Emphasis supplied). Any decision of the Board to deny construction of a residential structure in a manner which conflicts with the zoning or building code is unlawful.

Third, Chapter 22-103(e) of the Lee County Land Development Code provides: “All decisions of the historic preservation board shall be in writing and shall include findings of fact. When an application is denied, the notice of the

historic preservation board shall provide *an adequate written explanation of its decision to deny the application.*" (Emphasis supplied). In our case, the HPB failed to provide any findings denying our application. Based on my review of prior cases, this was a routine failure of the HPB. Denial of an application can only be supported by factual findings that the application does not meet the preponderance of design guidelines. We trust that is no longer a problem, as the HPB legal advisors are aware of this law.

Fourth, the Historic District was created by an HPB Resolution in 1990. The Design Guidelines are part of the Resolution. A "resolution" of an historic preservation board is not a valid law unless it conforms with the county commissioners' enabling legislation and with Florida Statutes Chapter 163.

Fifth, due to Hurricane Ian Matlacha has lost most of its historic properties. This is due, in part, to the sad history of the HPB refusing to permit owners to raise their properties or even to bring them up to code. The decisions of the HPB prior to Hurricane Ian are replete with statements that Matlacha's "diminutive properties" must be preserved. Thus, the small historic properties had no ability to avoid being washed away or destroyed in place.

The new Design Guidelines based on Florida Statute § 163.3202(5)(a) and (b)(1)E must find a way to properly reflect our true historic buildings without penalizing owners. The Matlacha Historic District should continue to exist under appropriate and expeditious permitting procedures for renovation and construction.

A Final Thought

Lee County's oversight of the Historic Review Board has forgotten two of the Board's most important duties established by the Lee County Commissioners in 1990:

- (11) To propose and recommend to the Board of County Commissioners financial and technical incentive programs to further the objectives of historic preservation.

(14) To apply for, in the name of the county only, grant assistance from state, federal or private sources for the purpose of furthering the objectives of historic preservation.

LDC Sec. 22-74.

All properties designated as historic resources or as a contributing property to a designated historic district shall be eligible for any financial assistance set aside for historic preservation projects by the county, the state or the federal government, provided they meet any additional requirements of those financial assistance programs. The historic preservation board and its staff shall investigate funding sources and make recommendations to the Board of County Commissioners to establish a program providing for transfer of development rights, easements and other local financial assistance programs whenever possible.

LDC Sec. 22-171.

After the establishment of the HPB and the Matlacha Historic District in 1990, Lee County funded property owners' improvements to Matlacha owners in the Historic District. A property owner could receive 50% of the cost of improvements from Lee County. The County would enjoy a lien on the property for the funding which would be forgiven at the rate of 20% per year so long as the owner retained the property. The purpose of the funding was to restore the dilapidated condition of the historic properties.

Today more than ever, Matlacha needs this type of funding assistance. We are told that Lee County is receiving billions of dollars from federal sources and other sources to recover from Hurricane Ian. I am not aware of a single dollar being provided to Matlacha owners of historic properties. Lee County through the HPB needs to address this issue immediately.