



MINUTES

FORT MYERS BEACH TOWN COUNCIL TOWN HALL – COUNCIL CHAMBERS 2523 ESTERO BOULEVARD FORT MYERS BEACH, FLORIDA 33931

AGENDA

January 4, 2010

9:00 AM

I. CALL TO ORDER

Mayor Kiker called the meeting to order at 9:05 a.m. Present with Mayor Kiker was Vice Mayor Acken, Council members Babcock, List and Raymond along with Interim Town Manager Jack Green, Town Attorney Anne Dalton and Town Clerk Michelle Mayher.

II. INVOCATION

Invocation led by Councilmember List.

III. PLEDGE OF ALLEGIANCE

All stood to recite the pledge of allegiance led by Councilmember List.

IV. LOCAL ACHIEVEMENTS AND RECOGNITIONS

Councilmember List began by thanking the Semmer family and all those who assisted in raising funds for the New Year's Eve celebration in Times Square.

Vice Mayor Acken thanked the Town Staff for all their hard work to make the celebration happen.

Mayor Kiker noted the Historic Preservation Board in their efforts to recognize some of the island's older structures with first presentation on the 19th of January at 3 p.m. Mayor Kiker also stated he had received phone calls from those wanting

to raise money for Bay Oaks. He then asked Attorney Dalton about the need for a specific account for those funds.

Attorney Dalton indicated a dedicated account was customary and should be set up. It was also noted by Mayor Kiker that an account was found with several thousand dollars in it that had been raised by an association to be used for the pool. Mayor Kiker asked for consensus allowing Attorney Dalton time to investigate the funds and move them to a new account. Attorney Dalton noted her work on this, since it was for a non-profit organization, would be pro bono.

V. ADVISORY COMMITTEES ITEMS AND REPORTS

None presented

VI. PROCLAMATIONS: League of Women Voters

Town Clerk, Michelle Mayher read the Proclamation as Council and representatives gathered for a photo.

Laura Miller representing the League of Women Voters thanked Council and noted their celebration of 60 years of service.

VII. PUBLIC COMMENT

Public Comment Opened

▪ Joanne Shamp spoke on beach renourishment and her concerns regarding the county changing the project and doing a terminal groin along with a shortened project. Ms. Shamp noted that on the Town website there was a Department of Environmental Protection Consolidated notice of intent to issue joint coastal permits. Ms. Shamp continued to review the report and provide possible paths to take to obtain true solutions for the inlet and the shoreline.

Public Comment Closed

VIII. CONSENT AGENDA

- A. Approval of Minutes: November 19, 2009 Worksession
- B. Approval of Minutes: December 7, 2009
- C. Acceptance of Financial Statements, October, November 2009
- D. Special Event Permit Application, Bikers for Babies

Open Public Comment

No Public Comment

Public Comment Closed

MOTION: Councilmember List moved to approve the Consent Agenda with one correction. Correction pertaining to November 19th Worksession minutes, to add the last name of Peebles where the transcriber had noted last name unknown.

Councilmember Babcock seconded the motion.

VOTE: Motion passed 5 to 0

IX. PUBLIC HEARINGS:

A. SEZ2009-0001 “Wicked Wings” COP

Mayor Kiker opened the hearing for SEZ2009-0001 “Wicked Wings” COP at 9:23 a.m.

Mayor Kiker asked for any ex parte communication on the part of the Council members.

- Councilmember Babcock had viewed the site.
- Vice Mayor Acken had no ex parte
- Councilmember List spoke with a friend of the owners
- Councilmember Raymond had no ex parte
- Mayor Kiker had no ex parte

Town Attorney Dalton swore in all those intending to speak.

Owner Walter Simmons and partner Eric O’Gilvie spoke concerning a property on Public Access #34 that they had remodeled into a full service beach front restaurant. They appealed to Council to obtain the right to sell beer and wine at the location. Four photos were distributed to Council showing improvements to the property including a new fire hydrant.

Frank Shockey, Community Development Director spoke for staff reviewing all information pertinent to the property, one issue being the original outdoor deck which extends into the EC zoning district and whether the location was appropriate for outdoor dining with consumption on premises. A request for an earlier opening time was also noted due to the desire for breakfast service. Mr. Shockey stated staff’s recommendation was approval of the request.

Councilmember Babcock asked the applicant if there were any concerns with the decisions by LPA or staff other than the possible service of breakfast. The applicant indicated there were no concerns.

Vice Mayor Acken asked staff if no service on the beach was in regards to the Land Development Code with Mr. Shockey stating there was no service unless approved by Council or previously licensed by the State prior to Council’s jurisdiction that covers sales and service for consumption on premises. Vice Mayor Acken continued to question Mr. Shockey regarding the codes and laws pertaining to service on the beach.

Joann Shamp, chair of the LPA, noted the LPA reviewed the application stating their concerns that the appropriate signs were in place regarding not taking alcoholic beverages down to the beach off of the deck, with the applicant reporting that the signs were in place. Another concern was

the affect on residential neighbors, with the neighbor attending the LPA meeting stating the applicant had been a good neighbor and did not have a concern with the request. The third concern was the hours of operation, that they would not have to come back through the hearing process should they decide they wanted to serve breakfast, so they approved the hours of 7 a.m. to 11 a.m. with no alcohol consumption should they want to serve breakfast. Ms. Shamp also noted the LPA's motion did pass 6 to 0 to approve the applicant's request.

Public Comment

- **Chris Schaab** voiced his frustration with the LPA's meeting concerning the public comment time on this hearing. Mr. Schaab brought bags of sand filled with cigarette butts and trash to present to Council, then stated his concerns with fuel storage on the property since the applicant was applying for consumption on premises. Mr. Schaab also took exception to the hours of operation if breakfast was served as well as any music played during late night hours.

- **Gerald Crowley**, property owner within 500 feet of Wicked Wings. Mr. Crowley felt Wicked Wings had added to the ambiance of the area rather than detract from it. Mr. Crowley stated he and his wife had no objection to Wicked Wings.

- **Nancy Van Oyen**, resident, spoke in favor of Mr. O'Gilvie, the restaurant and the professional way it was being run, noting her approval of the applicant's request.

Public Comment Closed

Eric O'Gilvie nor Mr. Simmons had any rebuttal other than to note they were trying to move forward on a positive path.

Interim Town Manager stated he felt many of Mr. Schaab's concerns were more a code enforcement issue and had no bearing on the applicant's request for special exception.

Mayor Kiker closed the testimony portion of the hearing.

Before Council began their discussion Mayor Kiker asked staff if the hearing was appropriately advertised with Frank Shockey stating that it was along with the information being posted on the Town's website as well.

Councilmember Babcock had questions on the properties zoning, with Mr. Shockey stating landward of the 1978 coastal setback line the property was zoned downtown seaward of the line was EC. Councilmember Babcock asked if it was appropriate for Commercial Application at the site with Mr.

Shockey indicating downtown zoning district allowed for a variety of commercial uses provided they are located within appropriately constructed buildings and are in compliance with the outdoor display requirements. Councilmember Babcock also questioned any conditions that establish changes in the hours of operation or whether it was structured just for the alcohol issue. Mr. Shockey stated the applicant had noted the hours not begin earlier than 10 a.m. and not end later than 11 p.m. daily but Council could change the hours or make that condition specifically relevant to the service and sale of alcoholic beverages as to the operation of the restaurant itself.

Vice Mayor Acken reminded Councilmember Babcock that all Council was considering was alcohol service and it would be unfair to rewrite the hours of operation. Vice Mayor Acken wanted to rephrase condition number 1 to incorporate Dr. Shockey's suggestion that they need to have a referral to the existing area that will be permitted, striking all wording after approved for consumption on premises and replace it with, will be controlled by the rules and regulations of the Town of Fort Myers Beach. Vice Mayor Acken also asked for consideration of alcohol before 10 a.m. as there were numerous restaurants that served drinks such as mimosas with breakfast.

MOTION: Vice Mayor Acken moved for approval of **Resolution Number 10-01** with selections as follows: page 1 of 4 **APPROVES** the applicant's request for a special exception to permit consumption on premises of beer and wine; page 2 of 4 (1) Changed or changing conditions **EXIST** that make the requested approval, as conditioned, appropriate; page 3 of 4 (3) The requested special exception, as conditioned, **MEETS OR EXCEEDS** all performance and location standards set forth for the proposed use; page 3 of 4 (4) The requested special exception, as conditioned, **WILL** protect, conserve, or preserve environmentally critical areas and natural resources; page 4 (5) The requested special exception, as conditioned, **WILL** be compatible with existing or planned uses and **WILL NOT** cause damage, hazard, nuisance or other detriment to persons or property; page 3 of 4 (6) The requested special exception as conditioned, **WILL** be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34. Adding page 3 of 4 (2) The requested special exception, as conditioned, **IS** consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan.

Mayor Kiker asked for the specific hours of operation with Vice Mayor Acken stating 10 a.m. to 11 p.m.

Councilmember Raymond seconded the motion.

SECONDARY MOTION: Councilmember Babcock asked if there were any changes made by Vice Mayor Acken, with his answer being no but he would be making a secondary motion to amend the primary. Mayor Kiker asked

what those changes would be with Vice Mayor Acken stating he would like to change condition 1 consumption on premises will be governed by the rules and regulations of the Town of Fort Myers Beach. Vice Mayor Acken also wanted to make a motion to amend the hours of operation.

Community Development Director Frank Shockey stated it was customary for the floor plan to be indicated for the State for a beverage license and unless the procedure was changed legislatively the applicant would still need to come through the process in order to change the floor plan outside of exhibit B, the present floor plan.

FAILED: There was no second for Vice Mayor Acken's second motion.

SECONDARY MOTION: Vice Mayor stated his next secondary motion would be to amend condition 3 to allow service of alcohol to begin at 8 a.m. rather than 10 a.m.

FAILED: Motion failed for lack of a second.

Councilmember Babcock questioned condition 1 stating the labeling for the exhibits seemed to be different than the LPA's exhibit. Exhibit A was the correct labeling.

VOTE: Motion passed 5 to 0

Mayor Kiker closed the hearing at 10:20 a.m.

B. SEZ2009-0002 Taylor Recreation Commercial Recreation Facility

Mayor Kiker opened the hearing of SEZ2009-0002 Taylor Recreation Commercial Recreation Facility at 10:20 a.m. Mayor Kiker asked for any ex parte communications on the part of the Council.

- Councilmember Babcock – none
- Vice Mayor Acken – yes by email, phone and in person
- Councilmember List – email
- Councilmember Raymond – none
- Mayor Kiker – email

Attorney Dalton swore in all those intending to make comment or testify.

Attorney K'Shana Haynie for the applicant Joe Taylor was present to request a special exception to allow the commercial recreation facility containing an amusement device (inflatable waterslide) on the subject property at 1100 and 1130 Estero Boulevard.

Mr. Taylor spoke stating that he had cleaned the lot and continues to do so on a daily basis, that he provides portable restrooms, he deflates and

and covers the slide at night and provides a dumpster on the site as well.

Community Development Director Shockey spoke on behalf of staff regarding the request. Mr. Shockey stated recommendations are primarily in consideration of the appearance as well as other site issues such as parking and appropriate use in conjunction with existing plan use in the vicinity also safety and environmental issues, considering wind and the discharge of water from the slide. Mr. Shockey stated the staff report addressed the recommended findings and conclusions.

Joann Shamp, Chair of the LPA reviewed findings from their meeting of Tuesday, December 15th, 2009. The LPA's main concern was when the condition would end, which would be at the construction of a new structure on the property. Other issues addressed by the LPA safety, setbacks for zoning, letter of authorization from property owner intact, liability issues resting with the owner with the resolution passing 6 to 0.

Councilmember Babcock asked if there were limits of operations in hours open in the area in question, feeling that closing at 5 p.m. in the summer would be well before sunset.

Applicant, Joseph Taylor noted at the time when they first applied for the permit sunset was at 6 p.m. and the condition was just left in. He noted he would love to be open later in the summer.

Public Comment Opened

No Public Comment

Public Comment Closed

Applicant had no rebuttal nor did staff.

Mayor Kiker closed the testimony portion of the hearing and called on Council for their remarks, questions or comments.

Councilmember Babcock had nothing further. Vice Mayor Acken noted he would hope Council would be willing to change hours of operation, also noting the degree the applicant had gone to clean up the property in question. Councilmember List noted her grandchildren loved the slide and she enjoyed the openness of the property.

Councilmember Raymond had no problem with the request and felt it was one of the only things the Town offered the kids.

Mayor Kiker noted he would like to talk to the owner and have palm trees planted on the lot.

Attorney Dalton noted the exhibits on the resolution were slightly skewed

so it would be Exhibit A and the site plan attached to the LPA resolution would be the Exhibit A in question.

MOTION: Vice Mayor Acken moved for approval of **Resolution 10-02** Page 1 of 4, The Town Council **APPROVES** the applicant's request for a special exception to allow the commercial recreation facility; page 2 of 4, 1. Changed or changing conditions **exist** that make the requested approval, as conditioned, appropriate; page 3 of 4, 2. The requested special exception, **is** consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan; 3. The requested special exception, as conditioned, **meets or exceeds**, all performance and location standards set forth for the proposed use; 4, The requested special exception, as conditioned, **will** protect, conserve, or preserve environmentally critical areas and natural resources; 5. The requested special exception, as conditioned, **will** be compatible with existing or planned uses and **will not** cause damage, hazard, nuisance or other detriment to persons or property; page 4 or 4, 6. The requested special exception, as conditioned, **will** be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.

Councilmember List seconded the motion.

AMENDED MOTION: Vice Mayor Acken requested to amend condition 1 as to hours of operation from 10 a.m. to sunset every day with a second by Councilmember List.

Councilmember Babcock stated he was uncomfortable adding things the applicant had not asked for, suggesting it did not go to sunset but 5 p.m. or one hour prior to sunset with Vice Mayor Acken amending his motion reflecting those times with Councilmember List amending her second.

Mayor Kiker called for a vote on the secondary motion.

VOTE: Motion passed 5 to 0

Vice Mayor Acken then moved to strike condition 6 which limited the applicant to one inflatable waterslide.

Attorney Dalton stated staff would have to check the LDC to see if two smaller slides would be permitted and asked for time to check for the information.

Mayor Kiker asked Council for consensus on the idea.

Councilmember Raymond did not understand why Council was rewriting each of these issues with Council members List and Babcock as well

as Mayor Kiker agreeing not to make Vice Mayor's requested change.

Mayor Kiker called for a vote on the original motion.

VOTE: Motion passed 5 to 0

Mayor Kiker closed the hearing at 10:40 a.m.

C. ADM2009-0001, 201 Old San Carlos Appeal

Recess: 10:40 a.m.

Reconvene: 11:00 a.m.

Mayor Kiker opened the hearing ADM2009-0001, 201 Old San Carlos Appeal at 11:00 a.m. Mayor Kiker asked Council for any ex parte communications.

- Councilmember Raymond – Met with applicant Tim Anglim and Attorney Steve Hartsell as well as property owner John Richard.
- Councilmember List – Met on December 30th with the appellant and met 3 times in casual conversation with Mr. Richard.
- Vice Mayor Acken had spoken with Mr. Richard by phone and in person as well as members of the public.
- Councilmember Babcock – Discussions with Mr. Richard, the Appellant's attorneys, Mr. Friedin and Mr. Hartsell, members of the public on both sides of the issue, viewed the site, submitted emails in advance of the hearing and a packet of information that other Council members had been given as well.
- Mayor Kiker – no ex parte. Mayor Kiker noted he had two brief conversations with both sides of the issue and decided it was in his best interest to wait until the hearing for information.

Council submitted all correspondence they had received on the matter.

Attorney Dalton swore in all those intending to speak during the hearing.

Mayor Kiker prefaced the hearing by stating Council was going to cover unknown grounds and asked for patience while Council followed the legal responsibilities necessary during the course of the hearing.

Attorney Dalton explained the Appellant was not the property owner, the property owner had requested permission to be considered a party, which meant for purposes during the hearing whatever rights the Appellant was given the property owner requested the same rights from the Town. Attorney Dalton stated she had spoken with the Appellant's attorney regarding the request and then asked for him to approach and give his opinion on the matter.

Attorney Steve Hartsell on behalf of the Appellant spoke to Council, noting his client had no objection to Mr. Richard and his council being given equal and adequate opportunity to respond to the issue being addressed.

Mayor Kiker asked Mr. Richard's attorney to respond. Beverly Grady, attorney for Mr. Richard, the property owner, agreed that they had requested to be treated as a party.

It was then asked of Council if they agreed to Mr. Richard being treated as a party to the proceedings, which would decide whether or not the case could be heard. Council had no objection.

Attorney Dalton reiterated that the case was different than other zoning cases or appeals heard in the past and in the packet was a copy of a memo provided to both Mr. Hartsell and Ms. Grady dated December 28, 2009 which discussed two threshold issues for Council to review in the appeal. It was Attorney Dalton's recommendations that the Appellant's attorney present whatever he is going to present on jurisdiction and standing and then Miss Grady do the same and then Dr. Shockey do the same and after public comment stop to make a determination on the two issues which are two separate issues. Then if Council gets to the next step then address the process for getting to the merits of the situation.

Mayor Kiker asked for clarification of the two issues with Attorney Dalton stating the first issue was whether the LDC allows a party who is not a property owner to file an appeal, with the LDC sections outlined in the staff report with a yes or no decision, yes, indicating the Appellant is allowed to bring the appeal under the LDC or he is not. The second issue being does this particular party qualify as an aggrieved party under the LDC.

Mr. Hartsell, attorney for the Appellant, representing two businesses Mango Bay and Winds and their owner, Tim Anglim, who was present in Council Chambers, distributed aerial photos of the property in question. Mr. Hartsell stated the issue was the community vision for Old San Carlos Boulevard and how the vision would be implemented or fulfilled and the issue being appealed was two interpretations of staff. Interpretations of the Town's LDC not interpretations of the development order or building permit even though those two things would be impacted. Mr. Hartsell continued by reviewing his client's property boundaries. Mr. Hartsell indicated his client raised his concerns with the reviewing staff when he learned the motel property was to be expanded on an already non conforming property which would eliminate the inadequate on site parking. Mr. Hartsell stated Mr. Anglim had raised his concerns with the reviewing staff and was told the decision to proceed had been made at the

director's level and he then met with the director and the Town Manager, who then decided not to change the interpretations. He stated the options was to either go to court or to file the administrative appeal and give Council the opportunity to look at the interpretations as to how the LDC should be applied.

Mr. Hartsell noted that staff felt Mr. Anglim was not an aggrieved party and should not have the standing to bring the concerns before Council which would mean Council would be deprived from the opportunity to consider the merits of interpretations of the Town LDC. Mr. Hartsell indicated they were prepared to take the issue to court but Mr. Anglim felt the discussion should take place with Town Council in a local forum rather than in court. It was indicated that the Council had the jurisdiction to interpret the Town's LDC provisions, noting Section 34-90 that specifically says the Town Council may hear and decide applications for interpretations for the LDC. Regarding the Standing, Mr. Hartsell went on to explain why his client was an aggrieved party who was adversely affected by the incorrect interpretation of the LDC. Parking was noted as being a problem in the Old San Carlos area having a direct impact on business owners and that the lack of availability of parking to those businesses adversely affect those businesses. By adding a motel, restaurant, retail structure it increases the parking pressure in the Old San Carlos area. When new businesses are allowed to develop in this neighborhood in violation of the LDC standards it has a unique and adverse impact on his client and all other businesses in the neighborhood. Mr. Hartsell stated his client's interest is in how the interpretations of the LDC are applied to all the businesses in the Old San Carlos Boulevard neighborhood.

Mr. Hartsell stated in their application supplement PH-F they did not mark the box, appeal a development permit, which is what they would be doing if appealing the development order or commercial building permit. What was marked was the box to appeal the interpretation of Section 34-220, Section 34-2018 and Section 34-2020. Staff interpretations being appealed related to the parking requirements of businesses on Old San Carlos and the Downtown District with the same parking requirements applying to his client and other businesses in the area and would give them a legally recognizable interest in how and whether the regulations were applied. Mr. Hartsell also stated that one of the appeal criteria 34-86A raises a jurisdictional issue, noting that criteria says: Whether the appeal is of a nature properly brought for decision, or whether there is an established procedure for handling the request other than through the appeal process, Mr. Hartsell indicated it asked a jurisdictional question, stating it was intended to prevent a developer from asking for an approval that should otherwise be handled through a zoning process and then simply filing an appeal administratively when that gets denied instead of going through the

standard zoning process.

Mr. Hartsell concluded by stating that his client and his businesses have clearly demonstrated that they are aggrieved parties, that they have standing to challenge the staff interpretations of the LDC and that they affect these businesses uniquely.

Beverly Grady, attorney for John Richard, property owner provided Council with handouts, depicting information which had been emailed over the weekend. Ms Grady stated that they did concur with staff's position that neither of the entities represented by Mr. Hartsell qualifies for standing and that the staff report is articulate, thorough, provides an excellent analysis and is well written.

Ms. Grady requested that the appeal should be dismissed, based upon the LDC's limitations on who can appeal. The Council was provided with a tax map showing the location of 151 Old San Carlos Inc. which was the location of Mango Bay and 150 San Carlos Boulevard the location of Winds. Ms Grady noted Mr. Hartsell listed in his appeal SWF Management Inc. as one of the two entities he represented and filed an appeal. Ms Grady indicated this entity should be dismissed as this entity did not own property in Times Square on Old San Carlos, it did not own or claim to own the property at the address of 150 Old San Carlos Boulevard and its strap number is 244623W300207.0000 bounded by Old San Carlos, Center Street and Estero Boulevard. In the appeal filed by Mr. Hartsell there was no authorization by the property owners of 150 Old San Carlos which is always a requirement of the Town and the LDC. Noted also in the disclosure of interest form required of any appeal for any public hearing only one is filed for 150 Old San Carlos which is the Mango Bay property. The LDC and Town requires a property owner to receive authorization if it is a tenant in order to pursue determination of property rights. Ms Grady stated they had shown from exhibit #1, the tax map the location of the two entities appealing. Richard exhibit #2 was a composite of the property appraiser and the Florida division of records again showing that the actual owners of 150 Old San Carlos are OMG Inc. and San Carlos Boulevard Corporation and that there was no authorization from those entities that authorized the filing of any appeal for which Mr. Hartsell was claiming that they had standing.

Ms. Grady stated their second item of disagreement was the LDC precludes a third party appeal of a chapter 10 development order and and third party appeal of a building permit governed by chapter 6 of the Town's LDC. In reviewing the appeal filed by Mr. Hartsell it was clear to Mr. Richard who expended his time, energy and money to obtain approval from the Town that the request by Mr. Hartsell to declare Mr. Richard's limited development order 2007-38 as invalid

and void as failure to comply with the parking requirements and the commercial building permit 08-0085 in count 2 and count 3 also requested the development order be declared void and invalid and his building permit be declared void and invalid, count 4 Mr. Hartsell requested Mr. Richard's development order and building permit be declared void and invalid. Miss Grady stated they understood that to be absolutely an appeal of the issuance of the development order and building permit for Mr. Richard.

Ms. Grady stated that the law in Florida states that local government can regulate and is in total control of who can appeal. Ms. Grady submitted that the Town Council could not hear an appeal of Mr. Richard's development order or his building permit as that was contrary to the adopted existing LDC, citing the sections that would incorporate them by reference. She went on to state that just being a certain distance from the property that received permits did not create a legally recognizable interest. Ms. Grady concurred with the staff report and it's analysis that finds that Mr. Hartsell's clients, neither of them have standing to file a challenge that has been provided, because Mr. Hartsell's narrative lumps all the downtown property owners along Old San Carlos, Crescent, Times Square as having a concern about parking and that they want to have a discussion on the vision of the downtown area, but that is not a legally defined interest in the issuance of a building permit or development order for Mr. Richard since they are an unrelated third party. Mr. Hartsell's clients had not shown where they suffer any special damage or any damage different from the community or shown any damage at all. Another reason to dismiss this appeal is there is no basis for administrative challenge based on an inconsistency with the Comprehensive Plan. Though Town Council was in control of who could appeal and when they could appeal Ms. Grady was asking Council to look at the rules in place currently where standing provisions provide the right to challenge someone else's permits are not met, there can be no appeal. Ms. Grady requested Council to dismiss the appeal by the Appellants, however if Council did hear the appeal that the Appellants needed to waive any other form or challenge of circuit court or else if Council holds this and they lose the appeal then they may be on their way to court.

Ms. Grady indicated if Council overturned the staff and heard the appeal they believed the Appellants had no standing for an administrative challenge and would request that Council accept the staff's analysis and accept their analysis and dismiss the appeal for not having standing and not having established a legally recognizable interest.

Interim Town Manager Jack Green indicated Community Development Director Frank Shockey had written the staff's report and would deliver

staff's testimony.

Dr. Shockey indicated the initial question was whether Council had jurisdiction to hear the appeal. Dr. Shockey stated the staff's report quoted the section of the LDC that addressed the question of jurisdiction which was Section 34-86 in Chapter 34 which said, 'Town Council will hear and decide appeals where it is alleged there is an error in any order requirement decision interpretation determination or action of any administrative official charged with the administration and enforcement of the provisions of this code or any other ordinance or portion of this code which provides for similar review. Dr. Shockey noted various other sections in the code that addressed appeals however each referred to the right of the applicant or land owner being allowed to apply or that they may appeal under certain circumstances, they did not contain language to suggest the Town Council could not hear an appeal by someone else, which was summarized in the staff report on page 3. Dr. Shockey went on to review staff's recommendation that Council had jurisdiction to consider whether the appellant had standing. It was noted Council had jurisdiction over appeals but did these Appellants have standing to bring forth the appeal. Dr. Shockey stated the usual way of having an interest in a manner under the LDC is to own the property to be the applicant for an order or action that would allow you to develop your own property and be aggrieved to deny that application for one reason or another, but these Appellants did not claim to have such an ownership interest or right to use any of the three properties that are implicated, property at 201 Old San Carlos, 220 Old San Carlos or the property at 237 Old San Carlos.

Dr. Shockey stated the Appellants did argue that they were aggrieved or may potentially be aggrieved in the future by the Town's decision. If they were aggrieved then it may be a recognizable interest if their interest is adversely affected by the action. Dr. Shockey noted that the Appellant was adversely affected by the action was a hypothesis based on their characterization of the vicinity, the area around Old San Carlos as a retail shopping area that has inadequate parking. Dr. Shockey felt the nature of those problems to be wide spread and felt the Appellants had not demonstrated that they would be aggrieved by Mr. Richard's use of his property to provide parking for his other property and that it was clear that the Appellants had not shown that they will suffer an adverse affect to an interest that is protected or furthered by the Comprehensive Plan.

Attorney Dalton provided her opinion on the process, stating the first question was for the Council to determine if those two sections are the only remedy or whether there was an additional remedy under 34-86, noting LDC section 10-112 allows the applicant to appeal the decision

LDC section 34-201 allows the land owner to initiate an appeal of administrative action in regards to his own property. Neither one said it was the only way of appealing so the first issue was whether Council wanted to interpret those two sections of implying that they are the only way to appeal or if the language were to be taken literally it did not bar other types of appeals then the suggestion would be to look at 34-86 which was the general provision regarding appeals and within Council's discretion and determination of fact for the Council to make.

Public Comment Opened

- **Chris Schaab**, voiced his opinion on the parking problems on the island.

- **Anita Cereceda**, stated she was not there to rally against John Richard or against anything that was going on but to rally against the process. Ms. Cereceda noted in 1995 the Town of Fort Myers Beach incorporated to ensure the residents of the community that they would be heard in every situation that implicated their lives where land use was concerned. Ms. Cereceda strongly voiced her opinion on the rights of all residents of the island to be given opportunity to speak regarding any development occurring on the island.

- **John Richard**, stated he was inspired to speak by Anita Cereceda, stating Council had heard of the Old San Carlos plan and that in the last 3 years he had spent over \$100,000.00 trying to obtain the permit and noting that the Appellants attorneys have been down at the County making sure they were heard.

Public Comment Closed

Mayor Kiker asked Council if they had questions for clarification before rebuttal was heard.

Vice Mayor Acken asked staff if this was a limited development order that was an amendment to the CPD granted in 2003, with Dr. Shockey stating the LDO 2007-00038 was to allow development on the 201 property in the form of construction of a new building that would contain approximately 3,500 square feet, that is not a CPD zoning district, it's zoned Downtown. Vice Mayor Acken asked Mr. Hartsell as to the meaning or intent as to the section or sub-section of the code, with Mr. Hartsell answering in the affirmative. Vice Mayor Acken then asked Dr. Shockey if the interpretation involving policy or legislative intent issues, with Dr. Shockey stating the appeal references Section 34-86 which provides for the Town Council to consider appeals where it is alleged that there is an error in action or interpretation by staff. Vice

Mayor Acken stated he was looking at Section 34-265 titled request for interpretation of the code and Mr. Hartsell did say they were looking for interpretation of the code and Section 34-265-2 said interpretations which in the opinion of the director involved policy or legislative intent issues shall be placed on the agenda of the Town Council for its consideration, so the question would be should it be placed on the agenda. Dr. Shockey indicated the application was for appeal of action or interpretation made by staff not for an interpretation. Vice Mayor Acken continued to question as to whether Council could hear the matter.

Mr. Hartsell continued to state that his clients were adversely affected by the interpretations of the Town's code and how they were applied. Mr. Hartsell indicated the sections of the code they appealed the interpretations of were Section 34-220, duration of master concept plans and Section 34-2018, joint use parking agreement.

Vice Mayor Acken again asked Dr. Shockey if the interpretations involved policy or legislative intent issues with Dr. Shockey stating yes they did involve questions of policy.

Councilmember Babcock asked Mr. Hartsell if there were any other process that could have been used to have made the decision made by our staff more visible to the public or some process that would have allowed public input before the decision was made rather than after. Mr. Hartsell stated he could only think of the administrative appeal that would provide the forum for the Town Council to make the considerations. Mr. Hartsell stated what was before Council was how the interpretations of the code should be applied by the Town's staff. Councilmember Babcock indicated he was just trying to focus on the issues of jurisdiction and standing, then asked Mr. Hartsell if he felt there was no way for his client to be proactive before the appeal process rather than reactive with Mr. Hartsell responding in the affirmative. Councilmember Babcock then asked Dr. Shockey in the administrative process if there was any attempt to reach out to neighbors in the area or allow for public input prior to the decision. Dr. Shockey indicated if the property owner is proposing to comply with the code rather than to request a form of zoning action and is not applying for some form of state permit that would require a notice to the property owners in some vicinity such as an environmental resource permit or submerged land lease then no, the development order process would not involve a public hearing or comment period and the building permit would not involve either of those. Councilmember Babcock then asked Dr. Shockey if Council was given the opportunity to pull the issue prior to issuance of the permits. Dr. Shockey indicated that yes, Council was given the opportunity in the area of May of 2008 and it was only put on an agenda if it was pulled by one of the Council members.

Interim Town Manager Jack Green stated that process is only for the commercial design standards not for the project itself.

Mayor Kiker asked Dr. Shockey regarding Section 34-220 concerning the duration of the rights conferred by the adoptive master conceptual plan, if there were any elements that would make the conceptual plan not active. Dr. Shockey replied with his impression that only the issues of jurisdiction and standing were being addressed. Mayor Kiker again asked Dr. Shockey the same question with Dr. Shockey asking if Mayor Kiker was referring to the master plan of the Rusty's CPD. Mayor Kiker asked for assistance from Mr. Green, with Mr. Green noting he assumed Mayor Kiker was referring to the master concept plan of the Rusty's CPD with Mayor Kiker answering in the affirmative. Mr. Green then indicated that that master concept plan has expired. Mayor Kiker then addressed Mr. Hartzel asking him about his reference to a formula which he felt demonstrated that there was a disadvantage to Mr. Anglim in terms of the project going through that there would be a financial impact to his client.

Mr. Hartsell stated it was difficult to quantify a specific dollar amount that would be related to the adverse impact and that it was not an element to being an aggrieved party. Mayor Kiker asked Mr. Hartsell if that was part of the criteria of what he was presenting with Mr. Hartsell stating, no it was not.

Vice Mayor Acken asked if Ms Grady or Mr. Richard wanted to rebutt.

Councilmember List made a point of order, noting she thought they would be discussing whether Council was going to hear the appeal and then figure out if the appellant has just cause for appealing.

Recess: 12:30 PM

Reconvene: 2:45 PM

Mayor Kiker called the meeting back to order and reminded all in attendance Council was talking about whether the appeal could be heard, noting that was point Councilmember List had made just before the break.

Mayor Kiker asked Council if they had any additional questions for clarification. Council members all stated they had no additional questions for clarification.

Mayor Kiker called Mr. Hartsell forward for rebuttal. Mr. Hartsell requested Miss Grady come forward first, however Mayor Kiker asked Mr. Hartsell to proceed.

Mr. Hartsell wanted Council to understand the appeal is not for the two

development permits, it would have an impact on them, but the appeal is for Town Council to make policy decisions to the Town's LDC pertaining to the two sections previously cited. Mr. Hartsell stated the appeal was the only forum to get the issue before Council. With regard to the standing issue, Mr. Hartsell stated the reason the permit was shown was to demonstrate that there was standing. Mr. Hartsell indicated to Council that they felt the permits and development orders were void and invalid due to the fact that they were improperly issued, however that was not what was being appealed. Mr. Hartsell also stated the determination of Council would affect all of Fort Myers Beach. Mr. Hartsell indicated the interpretations of the LDC are what affects his client and they urge Council to find that yes, there was standing to hear the appeal.

Councilmember Raymond asked Mr. Hartsell if he felt his client had standing, then did everyone along Old San Carlos have standing as well as those businesses in Times Square. Mr. Hartsell felt yes, they did all have standing. Mr. Hartsell stated they were not blaming Mr. Richard for all the parking issues in the area, but that each business that gets approved has an impact.

Vice Mayor Acken asked Mr. Hartsell if they had plans to file appeals with all the other development going on in the area and if it was the first step in shutting down development throughout the island. Mr. Hartsell indicated no, it was not, with Vice Mayor Acken asking if they planned to appeal the development behind Winds known as LaPlaya, with Mr. Hartzel again stating no. Mr. Hartzel again stated they felt the two permits pertaining to Mr. Richard's property were issued in violation of the Town's LDC and the only way to get it before Council was to file the appeal. Vice Mayor Acken voiced his concern regarding the precedent that was being set, by the appeals attempting to shut down any new development throughout the island.

Councilmember Babcock stated in determining whether there was jurisdiction and standing there has to be an assumption made that there may have been some error that occurred administratively. Councilmember Babcock asked Mr. Hartsell if what they were appealing was an administrative action and not a zoning action with Mr. Hartsell noting that was exactly the point. Mr. Hartsell indicated that his concern was that no hearing was permitted when an applicant did not comply with the code.

Attorney Beverly Grady stated the Appellant had not shown that they are an aggrieved person or party because they have not shown a legally recognizable interest which show that they are adversely affected, and that it was a hypothesis about parking. In response to Council members on the

process, they had followed the process of the Town of Fort Myers Beach, and every community has the ability to legislate its process which the Town has done. Miss Grady, in regards to Mayor Kiker's question, noted that 201 Old San Carlos which is the beneficiary of the limited development order 2007-0038 and the building permit is zoned downtown and the one that received the limited development order for expansion of commercial and found to be consistent with the plan with the staff and that the parking is at 320 Old San Carlos across the street.

Ms Grady went on to state there was no real policy question, it comes down to the only adverse impact as cited by the appellant is the economic one of having some competition of bringing to Old San Carlos some square footage that's consistent with the Town's plan of downtown. There is no question on 34-22 master concept plan, no policy question. Mr. Hartsell does not like where we are that we have the permit, there has been no question on joint parking as far as how to figure out the codes as the codes are very clear. Miss Grady stated they had complied and staff found that they had complied. Where does one go when the Town's representative that's authored says that you comply with the code? Miss Grady noted that if you read the challenges the whole point of the challenges are to declare that development order void and invalid and to declare the building permit void and invalid and yet they had not presented any special circumstances or special interest, anything legally recognizable that would qualify, with Ms Grady respectfully asking Council to deny the appeal.

Councilmember Raymond asked Ms Grady if the basis of the appeal was that the Town's Community Development staff erred in approving the project. Ms Grady indicated that yes it was what Mr. Hartsell was alleging.

Interim Town Manager Green indicated staff was available to answer any questions pertaining to the appeal.

Councilmember Raymond asked staff if they were sure they did not make a mistake. Mr. Green responded by stating no, staff did not err by issuing the limited development order or the building permit. Noting one of the issues was concerns on the Rusty's CPD and in fact the master concept plan has expired but anything developed under that master concept plan to date is valid, additionally all the zoning approvals for that CPD run with the land and continue to do so regardless of the expiration of the master concept plan and commercial parking was in fact one of the zoning approvals with the joint parking agreement is an issue due to the loss of the parking spaces and is allowed under the LDC and is within the required distance and in fact it is in the CPD location and is an approved commercial parking use so therefore staff has not erred in this case and are

confident that Council will find as well that staff did it properly in accordance with the LDC. Councilmember Raymond noted he had not implied that they had erred but felt that was the point of the appellant.

Councilmember List stated she liked the idea that any resident or taxpayer of the Town, if they have a grievance that they find a proper place to bring that grievance, however felt the process that was in place for permits and development orders were quite extensive and had been used since the start of the Town. Councilmember List stated her concern with setting a precedent that would allow for people coming forward every time someone received a permit and someone else didn't like it, she went on to state that everything done in this Town affects everyone else in the Town.

Vice Mayor Acken asked staff what the end result would be in finding for the appellant and if that would invalidate the permits issued by the Town.

Interim Town Manager Green stated there was a distinction determining whether Council had jurisdiction didn't mean Council would hear it, it meant yes you could but if Council chose not to hear it they did not have to, adding Council still had to determine if they had the jurisdiction to even make that determination.

Mayor Kiker asked Attorney Dalton for a legal opinion as to whether they had standing. Ms. Dalton replied that if she were sitting as a fact finder, which she noted she was not, she would not find that they had standing.

Mayor Kiker asked the Council for any further comments, questions or concerns and if not then he would entertain a motion.

Attorney Dalton requested the first motion be on the question of jurisdiction and depending on what that answer was the second motion be on the question of standing but not jointly. Attorney Dalton indicated the motion should cite that the Town Council interprets LDC Section 34-201 and LDC Section 10-112 as not the exclusive sections for an appeal of this type that in fact Council has jurisdiction under 34-86.

MOTION: Under Section 1. Councilmember Babcock moved Section 34-86 **does** allow an entity which does not have an ownership interest in property to appeal an administrative approval regarding such property.

In addressing the reasons it was Councilmember Babcock's opinion that Section 10-112 **is not** the exclusive LDC section for appeal.

Vice Mayor Acken stated a point of order asking if it was part of the motion with Councilmember Babcock indicating it was.

Councilmember Babcock continued to state LDC Section 34-201 **IS NOT** the exclusive LDC code section for appeal, however 3. which stated LDC Section 34-86 **DOES NOT** provide an additional remedy for a party who appeals an administrative action on property in which it does not have an ownership interest.

Councilmember Babcock questioned Attorney Dalton as to the wording of section 3. explaining his concerns. A decision was made for Councilmember Babcock to remove the word additional and amending the motion to **DOES** provide a remedy.

Vice Mayor Acken asked for the motion to be restated.

Motion was as follows per Councilmember Babcock.
Section 34-86 **DOES** allow an entity which does not have an ownership interest in property to appeal an administrative approval;
LDC Section 10-112 **IS NOT** the exclusive section;
LDC Section 34-201 **IS NOT** the exclusive LDC section;
LDC Section 34-86 **DOES** provide a remedy

Councilmember List stated she was still not sure what the motion was.

Attorney Dalton reviewed the motion followed by Councilmember List's question if it would be setting a precedent.

Councilmember Raymond seconded the motion for purposes of discussion.

Vice Mayor Acken asked for clarification from Attorney Dalton on the motion Attorney Dalton indicated that if the motion passed what Council will have determined is that because LDC Section 10-112 did not contain the word only and that because Section 34-201 did not contain the word only, because those two sections did not contain the word only Council would be finding that there is another part of the LDC that could apply and it was the legislative determination that Council had to make in the appeal.

Clarifying again for Vice Mayor Acken Attorney Dalton stated that Council's only decision would be toward Section 10-112 and Section 34-201, which was all Council was interpreting.

Discussion continued between Vice Mayor Acken and Councilmember Babcock on the items contained in the motion and their interpretations. Attorney Dalton made a suggestion to the motion maker, Councilmember Babcock under section 3: LDC Section 34-86 **DOES** provide a remedy for a party who appeals an administrative action concerning LDC Section

10-112 and/or LDC Section 34-201, which would limit it to the two sections more clearly than it currently did.

Councilmember Babcock agreed to the wording change and Councilmember Raymond agreed to amend his second.

VOTE: Motion passed 3 to 2 with Vice Mayor Acken and Councilmember List dissenting.

Mayor Kiker stated they would move on to the determination of standing. Attorney Dalton stated that Section 2 of the resolution concerned standing entailing one section.

MOTION: Vice Mayor Acken moved that the Town Council find that Appellant **was not** an aggrieved party and **had not** proven it had a legally recognized interest and that the appellant **failed** to prove that its geographical proximity to the subject property and the appellant **has failed to prove** that Developer's customers will use Appellant's parking lots in a manner which is or which may be adversely affecting Appellant's legally recognizable interests as a result of the Town's issuance of LDO 2007-00038 and COM 08-0085 and/or that Appellant is or may otherwise be, adversely affected by such approvals. The Council concludes that the appellant does not have standing to bring this appeal.

Councilmember List seconded the motion.

Councilmember Babcock would not support the motion but stated he felt uncomfortable doing that as he liked interpreting the LDC as literal as possible and the noted motion caused a problem because he had a hard time being able to justify that the appellant had a legally recognized interest and was a problem with the wording in the LDC. Councilmember Babcock indicated he would like to be able to get to the point of arguing the case as he felt the significance was important to the Town but he felt the wording in the LDC did not do a very good job of supporting that position and was eager to hear the position of the other Council members. Councilmember Babcock stated he felt the people within the 500 foot radius of a property the property in question should have standing as well as people outside of that radius.

Councilmember List noted that Mr. Hartsell presented a very compelling body of information, however did not see the appellant as an aggrieved party and did not feel the appellant was personally impacted any more than anyone else.

Mayor Kiker felt Council's job foremost was to establish and protect the legal position of the Town, feeling Council had no choice in that and because of that he stated he would be supporting it.

Attorney Dalton asked to clarify that both parties had highly competent Council but she wanted to point out that the appeal documents stated there were two different pieces of the appeal, one being: appeal interpretation of LDC Sections 34-220, 34-2018 and 34-2020 however, there was a second line that was checked which was appeal other administrative action stating LDO 2007-00038 COM-08-0085 with Mr. Hartsell saying what his client was appealing was the interpretation of those LDC sections and in fact both sections are part of the appeal, so in looking through section 2, that addressed the development order and the building permit. Attorney Dalton suggested that the motion maker add a sub section D which stated that he also had no legally recognizable interest with regard to the first part of the appeal. The appeal of interpretation of 34-220, 34-2018 and 34-2020.

AMENDED MOTION: Vice Mayor amended his primary motion with Councilmember List amending her second.

Councilmember Babcock felt there had been precedent and that it had already been in place and that it was not an issue on parking, noting Council had not had a chance for discussion and that while looking for section 2. he stated they failed to prove that the parking issue had a financial impact. Councilmember Babcock did feel however that they had proved that they had some legal standing because of their geographical location. Councilmember Babcock stated he wanted everyone to have the ability to have their say in regards to the appeal.

Council continued to discuss their concerns with Mayor Kiker asking if there was another process that they might be missing. Attorney Dalton stated the only other process was court.

Vice Mayor Acken stated the aggrieved status related to someone else to use the parking and go into the competitors business, that being his interpretation. Councilmember Babcock felt Council needed to hear the case to be able to determine if the appellant was an aggrieved party and whether they had standing.

Councilmember Raymond asked, that in fact the decision was only if they did or did not have the right to appeal.

Recess: 1:55 PM Reconvene: 2:10 PM

Mayor Kiker indicated there was a request to hear the appellant for 30 to 45 seconds.

Attorney Hartsell stated that they would be willing to allow the hearing to continue so his client could show a financial impact as well as possibly address with staff additional detail or have a discussion with Mr. Richard they were willing to do that.

Attorney Dalton stated based upon what had happened during the course of the hearing she felt that the finding of fact A.B.C.D. under section 2. sub-paragraph 1. would need to be reviewed and revised and if Council did grant the continuance that the motion on the table to approve Section 2. be withdrawn by the motion maker and the second to be able to clean up the language.

Vice Mayor Acken stated he was not interested in withdrawing his motion however, Councilmember List did rescind her second. There was no second to the motion.

Vice Mayor Acken voiced his frustration with the turn of events regarding the motion and the rescission of the second asking for Attorney Dalton to supply Council with her option for restructuring the wording.

Councilmember Babcock asked for clarification regarding section 2. as to whether each section had to be answered affirmatively. Attorney Dalton indicated they were suggested findings of fact that would substantiate Council's determination of an aggrieved party.

Attorney Dalton stated that the appellant was offering an opportunity to sit down with Miss Grady and her client and staff to resolve the entire situation and would urge Council to give a continuance for that purpose as that is Council's history and precedence.

Council members Raymond and List agreed with the continuance with Vice Mayor Acken stating it was procedurally inappropriate for the Appellant to stand and ask for a continuance in the middle of Council's deliberations while a motion was on the floor also stating it was putting Council at considerable risk.

MOTION: Vice Mayor Acken moved that the appellant is not an aggrieved party.

Motion fails for lack of second.

Vice Mayor Acken continued to voice his disapproval for a continuance of the hearing.

Councilmember List asked if the process stopped the permit from being enforced. Attorney Dalton replied with a yes and no. Were Council to determine that staff had erroneously issued the permit there would be consequences were the property owner to continue with the permit upon notice of the appeal, with it being a decision the owner would make.

Mayor Kiker asked Miss Grady if they were in favor of the continuance or not.

Miss Grady approached stating she knew nothing of the proposal and that suddenly in the middle of a motion the appellant proposed a continuance as well as hearing the same from the Town Attorney which she did not understand. Miss Grady indicated that Mr. Richard had been pursuing the permit for years and now that there is the appeal filed it does have financial consequences on him, he has a permit issued by the Town, complied in every manner with the Town then the appeal is scheduled which they disagree with and now there is talk of continuance with it being a complete surprise to have it presented at the microphone and not even let them know that it's something being considered with no chance of talking to Mr. Richard.

Mr. Richard stated it felt like a delaying tactic again, more attorneys, more delay, more costs. Mr. Richard asked the Council to vote on standing.

MOTION: Councilmember Babcock on Section 2 moved the Town Council find the appellant **is** an aggrieved party; under a. section b. the appellant **has proved** that its geographical proximity to the subject property, and/or its other allegations set forth in the appeal, establish it has a legally recognizable interest in the approvals reviewed herein; c. Appellant has **failed to prove** that Developer's customers will use Appellant's parking lots d. Appellant **does** have standing appealing the interpretations of LDC Sections 34-220, 34-2018 and 34-2020.

Attorney Dalton recommended Councilmember Babcock delete C to make it consistent with the rest of the motion.

Councilmember Babcock amended the motion to delete c. and approve what is now the replaced part c.

No second, motion failed.

Councilmember Babcock wanted Council to listen to the appeal, make a decision and be done, noting he was not in favor of continuing the hearing.

Mayor Kiker stated he was not happy with the way things had been handled going back to why the permit was issued.

MOTION: Vice Mayor Acken moved that the Town Council finds John Richards' irrevocable trust is an aggrieved party and that Council would pursue the findings of fact necessary to substantiate that determination.

Attorney Dalton stated she did not feel that was a legal motion.

Vice Mayor Acken argued the fact of who could be an aggrieved party.

FAILED: No second, motion failed.

MOTION: Councilmember Raymond made a motion that the Appellant did not have standing. Vice Mayor Acken seconded the motion.

Councilmember Babcock indicated he could not support the motion for all the reasons he had given previously.

Councilmember List stated that Council read all the materials to determine if they agreed or disagreed with staff's interpretations of the Town's code. The Appellant did not agree with it and wanted to know if Council agreed with their interpretation of issuing a permit. Councilmember List continued to state she did not feel the Appellant was aggrieved anymore than anyone else, feeling Council should have found there were no grounds for a hearing, no special grievances and to encourage them to get together and figure out what they are doing together instead of using the taxpayers' money and time to sort out the philosophical differences. Councilmember List did not feel that Mr. Richard, the Council nor the Town violated anything other than a lot of time constraints.

Councilmember Babcock felt the issues that arose were critical as to why we were a Town, with the basic issue of open government, the ability to make land use decisions where the Council has the responsibility as a quasi judicial board to be able to make those kind of decisions. Councilmember List stated it was not a land use hearing, it was an opinion as to whether staff gave a permit properly or not, asking Councilmember Babcock if he believed Council should pull the whole Town into every permitting action if someone doesn't like it.

Councilmember Babcock indicated there was an entire Section in the LDC that defined an appeal process and the question was how does Council define the process.

Attorney Dalton asked Councilmember Raymond the motion maker to consider the modification to the motion as: The Town Council finds the Appellant is not an aggrieved party pursuant to LDC Section 34-2 and

therefore does not have standing to bring the appeal.

Councilmember Raymond amended his motion with Vice Mayor Acken amending his second.

Mayor Kiker called to question if Council wanted to stop the conversation and have a vote.

VOTE: passed 4 to 1 with Councilmember Babcock dissenting.

Mayor Kiker called to question the motion.

VOTE: 4 to 1 with Mayor Kiker dissenting

There was confusion among Council members in regards to the motions and the votes.

Town Clerk, Michelle Mayher reviewed the votes for clarification. The motion that the Appellant did not have standing, passed 4 to 1 with Councilmember Babcock dissenting. Councilmember Babcock indicated in regards to the call to question he would vote yes and to the call to standing he would vote no.

Mayor Kiker reviewed the chain of events as the first motion was to call to question, which was to vote on whether to discontinue conversation and the vote. Councilmember Babcock intended to vote yes which would make the vote 5 to 0.

Regarding the regular vote to the motion Town Clerk indicated she had the vote showing 4 to 1 with Councilmember Babcock dissenting. Mayor Kiker stated that was incorrect. Mayor Kiker called to question again on the motion.

Attorney Dalton read the motion back to Council. Town Council finds that the Appellant is not an aggrieved party pursuant to LDC Section 34-2 and therefore concludes that the Appellant does not have standing to bring the appeal.

Mayor Kiker called the motion to question.

VOTE: Motion passed 3 to 2 with Councilmember Babcock and Mayor Kiker dissenting.

Attorney Dalton provided a review showing the Town Council had had two votes, with the first to find that LDC Section 34-84 does allow the appeal with the second vote showing that the Appellant has not proven

that he is an aggrieved party and as a result of which the Appellant does not have standing to bring the appeal. Having made the second determination Council do not have the ability to reach the substance of the matter and would be closing the hearing.

Mayor Kiker closed the hearing at 2:45 p.m.

Councilmember Babcock suggested a change in the order of the Agenda, stating he felt there were many people waiting for the subject of Town Manager and Mayor Kiker indicating the same for Beach Nourishment.

Vice Mayor Acken voiced his concerns with the change of order and noted he would support the change if given a fair hearing of his suggested changes of the noise ordinance.

Mayor Kiker then asked Councilmember Babcock for his suggestion for the order change with an agreed change to be moving the discussion of the Amended Noise Ordinance to place C.

X. ADMINISTRATIVE AGENDA

A. Beach Nourishment Update

Interim Town Manager stated he did not have an update for Council. He indicated he had spoken with Steve Boutelle before Christmas to see if he had any plans or amendments and it was indicated the County had not taken any serious action as yet and that nothing had been forwarded or recommended to the BOCC and had requested an update be delayed until the meeting of the 19th.

Public Comment Opened

▪ **Frank Shilling** started his comments by stating his respect for the time Council put into their deliberations. In regards to beach nourishment, if the project was changed Mr. Shilling felt the Town did need to get involved in the permitting process and the Town needed to get some expert engineering knowledge for whatever is done this time forward.

Public Comment Closed

Vice Mayor Acken wanted to see the Council consider amending the position on the interlocal to make dunes and vegetation voluntary, believing if that occurred it would increase the number of easements and make the project viable and make the County follow suit.

Councilmember Babcock stated that he supported beach nourishment, he noted he did not support the plan and did not vote for the plan and the reason why nothing had happened in 15 years was it was not the right plan. Councilmember Babcock suggested taking a step back, hire an engineering

firm to find out what the Town was really dealing with and move forward.

Councilmember Raymond indicated he was and always had been for beach nourishment, making it clear that regardless of media stories he did not vote with the BOCC, he was in favor of staying a part of the project with the County and did not feel Vice Mayor Acken's view on dunes and vegetation was correct.

Councilmember List felt duning and vegetation was probably the soundest part of the project as far as keeping the sand on the beach. Councilmember List also wanted to reiterate Council had not voted on any modified plan.

Mayor Kiker felt the County had positioned itself financially and was going with option C. Mayor Kiker noted the technology of beach renourishment did not really apply to the situation here on Fort Myers Beach, however, it was time for the Town to take an aggressive approach to what needed to be done next. Mayor Kiker stated it might be time to put some interested parties together and form some ad hoc committees to discuss many topics of interest and necessity to the Town.

Vice Mayor Acken continued to rally for the project asking to change the stance slightly and approach the County to see if they would allow voluntary instead of mandatory vegetation.

Mayor Kiker asked if the Town had any control over the Federal money with Mr. Green indicating the County was the administrator.

Mayor Kiker asked if there was a consensus from the Council to approach the County with a full fledged beach renourishment process with the elimination of dunes and vegetation.

Councilmember Babcock noted the County was going to discuss it on January 13th and didn't feel it made sense to ask the question, stating the question he would ask was if there was a way to nourish the beach in a way without signed easements using the current permits.

Mayor Kiker asked for consensus, was there a will to approach the County with the full fledged project and leave out the dunes and vegetation.

Council members Raymond, List and Babcock, replied no, Mayor Kiker stated no, so there was not a consensus.

B. Town Manager Search Update

Attorney Dalton stated at the December 21st meeting Council directed Mr. Green and herself to conduct a search for an Interim Town Manager and bring forward a process that would lead Council to find someone

that could lead for 6 to 8 months and would be prepared to start on or about February 1st since Mr. Green would be leaving February 12th. Attorney Dalton indicated she had contacted the Florida League of Cities to get their list of managers in transition and had contacted every person on the list providing Council with a spreadsheet with the result of that and in addition several candidates came forward voluntarily with a total count of 13 with an additional candidate coming forward that day making a total of 14. Attorney Dalton gave an overview of the information she had provided to the candidates as well as the information she had received from them, noting some were present in Council Chambers.

Public Comment Opened
No Public Comment
Public Comment Closed

Councilmember Babcock asked if all candidates were on the list and requested confirmation of all names on the list and wanted Council to talk about the profile they should be looking for to narrow down the candidates.

Discussion ensued regarding timing, whether those present should have the ability to address the Council, and how to go forward once it was narrowed down.

Attorney Dalton then stated there were 13 candidates.

Councilmember Babcock suggested a set criteria for Council to follow while narrowing down their search and Councilmember List noted the need for a time line or calendar to follow as well as all Council to make a list of the questions they were interested in having answered. Councilmember Babcock would prefer for the candidate to come in without knowing the questions or arriving prepped. The question was also raised on references, background checks with Attorney Dalton indicating the Town had a company that conducted those.

Council continued to discuss the process of narrowing down the list of candidates, background checks, profiles and interviews.

Recess: 3:45 PM Reconvene: 4:00 PM

Council started their decision making by selecting February 1st as the start date for the new Interim Town Manager to begin work, with January the 25th being the date to make the offer.

Council then discussed a cut off date for receiving resumes, selection process and interviewing.

Mr. Green suggested Council interview the candidates on their own and at the end of the week establish a date to consolidate their short list and then agree on a public date.

Councilmember Babcock again asked for a cut off date for resumes with Council agreeing the cut off was right then.

January 13th, at 9 a.m. was selected to set up a meeting to determine process and agree on the short list. January the 21st was scheduled for the face to face interviews with the candidates at 9 a.m. until noon, from noon to 6:30 p.m. the candidates will have an opportunity to tour the island, at 6:30 p.m. the public meeting with the candidates will be held. Council decided that following the group interview they would make their selection.

Councilmember Babcock requested a commitment from Council for a date to evaluate the Interim Town Manager to decide if it was necessary to start the search for a permanent Town Manager. Council decided on the first meeting in August.

Mayor Kiker stated he had already interviewed the candidates himself and could eliminate two immediately due to the timing factor. Candidate Duncan Ballantyne would only be available for a couple of months and Tony Otte indicated he was not interested in a six month commitment.

Councilmember Babcock raised the question of compensation and how to respond to the candidates during their one on one interview process. Attorney Dalton noted the candidates had been provided with the range of compensation from past Town Managers, noting it was \$120,000.00 to \$160,000.00. Questions of paying for travel and accommodations were then discussed as well as the need for them to live within Town boundaries, which was decided in the case of an Interim Town Manager it would not be necessary.

Attorney Dalton requested a representative from Council to work with her and Mr. Green to go through the process of hiring with Councilmember Babcock volunteering.

C. Discussion of Amended Noise Ordinance

Interim Town Manager Green stated the recommended changes were put through by the Vice Mayor Acken and that the staff had not had an opportunity to evaluate the suggestions. Mr. Green recognized that there was a need to make changes to the noise ordinance however, there needs to be additional research done to have a better understanding of some of the suggestions made by Vice Mayor Acken.

Public Comment

No Public Comment
Public Comment Closed

Vice Mayor Acken stated he was trying to get something on the table before the end of his term. Vice Mayor did see the need for Council to make some decisions soon. One of the areas noted was noise issues in short term rental areas as well as increasing allowable decibels during regular business hours and then lowering them during late night hours.

Mr. Green indicated if they wanted a hearing date staff would need time to evaluate the difference in decibel levels, possibly the 2nd meeting in February.

Councilmember List stated she had two items she wanted included into the noise ordinance discussion, one being the decibel levels measured from the the line of the complainant or the property from which the noise is emanating as well as the noise ordinance being used as a tool for harassment.

Councilmember Babcock felt there were too many issues to be discussed before putting the noise ordinance through as a hearing.

Vice Mayor Acken did not feel the issue needed to go to a workshop, noting the ordinance would not have time to happen before his term ran out.

MOTION: Vice Mayor Acken made a motion to discuss the Amendment to the Noise Ordinance to the January 19th meeting. Councilmember List seconded the motion.

Mr. Green indicated discussing it on January 19th was not a problem but staff would still require time to work on the issues to present the information in an understandable format for Council.

Attorney Dalton asked Council if they were now directing her and staff to allot time to the issue. Councilmember List indicated she had information to supply to staff from her time with the ad hoc committee, Councilmember Raymond indicated he would make no decisions on the issue until he was able to hear for himself any decibel changes in question and Councilmember Babcock felt Council was making a joke of the process giving his opinions on the need for appropriate information as well as allowing for public input.

VOICE: Motion passed 4 to 1 with Councilmember Babcock dissenting

Discussion began between Mr. Green and Council regarding the ability to acquire adequate information before the hearing.

D. 10-03, Resolution Fee Schedule, Vacation

Interim Town Manager Green indicated Attorney Dalton would provide

information on the subject but cautioned Council on tying their fees with the County. Attorney Dalton read the resolution title:
RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA RESOLUTION NUMBER 10-03 FEE SCHEDULE: VACATIONS A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA, SETTING A FEESCHEDULE FOR VACTION OF TOWN INTEREST IN REAL PROPERTY PURSUANT TO CHAPTER 10, ARTICLE II, DIVISION 5 SECTION 10-219(B)(10), LAND DEVELOPMENT CODE; AND PROVIDING AN EFFECTIVE DATE

MOTION: Councilmember Babcock moved for approval of Town Resolution 10-03 ; Councilmember Raymond seconded the motion.

VOTE: Motion passed 5 to 0

XI. TOWN MANAGER'S ITEMS

A. Election 2010 Update

Mr. Green stated Council had been provided with an election update in their packet.

Mr. Green acknowledged the New Years Eve celebration recognizing the assistance of Bruce Cermack of the Surf Club, the Time's Square Alliance and all other businesses and individuals who helped make the evening a success.

A reminder for January 6th at the West District Sheriff's Station to present a key to the Town for Major Powell along with a proclamation.

XII. TOWN ATTORNEY'S ITEMS

Attorney Dalton reminded Council the reduced fee schedule reverts back to the higher amount in March.

XIII. COUNCILMEMBER ITEMS AND REPORTS

Councilmember Raymond asked Council if they wanted him to continue setting up meetings regarding the dedicated trolley lane, with all Council voicing their support.

Councilmember List noted the Horizon Council annual meeting is Friday, January 29th at Broadway Palm, also noted was a benefit for Bay Oaks Thursday, January 14th, from 6 to 10 p.m. at the Harbor House.

Councilmember Babcock brought up the subject of the Town bidding on the vacant property downtown. Mayor Kiker stated he did look into it and was told by the Town Attorney that the state requirement was for appraisals to be in place before going forward. Mayor Kiker also indicated the County was

looking into the possibilities of acquiring the property.
Mayor Kiker wanted to recognize that the cottage was now gone and questioned leaving the chimney and the safety factor with Mr. Green indicating work needed to be done on the chimney and surrounding area along with the completion of Seven Seas.

Mayor Kiker also noted the League of Women Voters on Sunday the 10th.

XIV. AGENDA MANAGEMENT

To be discussed at the worksession on Tuesday.

XV. RECAP OF ACTION ITEMS

- Dedicated account for Bay Oaks donations
- Town Attorney Okayed to work on the Pool Non-Profit
- Possible planting of palm trees in Times Square area near the inflatable slide
- Interim Town Manager assessment for the August 2nd, 2010 meeting

Public Comment Opened

- **Chris Schaab** voiced his opinion on hearings and reiterated the trash problem on the beach.

Public Comment Closed

XVII. ADJOURNMENT

MOTION: Councilmember List moved to adjourn with a second by Councilmember Raymond.

Meeting adjourned at 6:12 PM

Adopted __2.01.2010__ Motion by _Babcock / List_____

Vote: __4-0, Vice Mayor Acken absent __

Michelle D. Mayher _____
Michelle D. Mayher, Town Clerk

- End of document.