



MINUTES

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

AGENDA

January 19, 2010

6:30 PM

I. CALL TO ORDER

Mayor Kiker called the meeting to order at 6:30 p.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 was led by Reverend Jeanne Davis from First United Methodist Church.

**III. PLEDGE OF ALLEGIANCE
YOUTH COUNCIL**

Present to lead the Pledge of Allegiance were the two Carson Scholarship finalists from Beach Elementary, Mady Cai Macko and Thatcher Flowers. The children gave a review of events from the past year at Beach Elementary.

IV. LOCAL ACHIEVEMENTS AND RECOGNITIONS

Councilmember Raymond reported on the dedication of the old school house in the historical building. Mayor Kiker also recognized names of those working on historical preservation for the island, Fran Santini, Roxie Smith, Jean Mathews and A.J. Bassett, being four that have been involved the longest.

Vice Mayor Acken recognized Kendra Miller, the transcriptionist for Council Meetings as well as all the island churches which are the heart of the island and their affiliations with relief organizations.

Councilmember Babcock congratulated Cathie Lewis on her promotion to Public Works Director and thanked the maintenance workers for cleaning the beach and dealing with the recent fish kill due to the cold weather.

V. ADVISORY COMMITTEES ITEMS AND REPORTS

None

VI. PUBLIC COMMENT

No Public Comment

Public Comment Closed

VII. CONSENT AGENDA

A. Approval of Minutes: November 18, 2009 Worksession

B. Approval of Minutes: December 3, 2009 Worksession

C. Approval of Minutes: December 21, 2009

MOTION: Councilmember List moved for approval with a second by Councilmember Raymond.

VOTE: Motion passed 5 to 0

VIII. PUBLIC HEARINGS:

A. Continuation of Case FMBDC12006-0001 and FMBDC12006-0002,
White Sands, Captiva Villas, and Bayside CPD Amendments

Mayor Kiker opened the public hearing and presented an overview of how the hearing would proceed. Attorney Dalton noted for the record the description of the resolutions in question: the larger resolution 09-33 and the two shorter resolutions 10-05 regarding the Gulf side parcels and 10-06 regarding the Bay side parcels.

Town Attorney Dalton swore in all those present who intended to testify.

Mayor Kiker asked Council for ex parte:

- Councilmember Babcock – Carleton Ryffle
- Vice Mayor Acken – Nothing new since last hearing
- Councilmember List – A conversation with Carleton Ryffle.
- Councilmember Raymond – A short conversation with Carleton Ryffle
- Mayor Kiker – Nothing other than casual conversation just before the meeting.

Public Comment Opened

- **John Naylor** indicated he had been involved with Pink Shell since 1991 along with the County and the Town regarding development of the Pink Shell. Although no longer an employee of Pink Shell, Mr Naylor owns property at Captiva Villas and is president of Captiva Villas Condominium Association. Mr. Naylor encouraged Council to approve the requests made by Pink Shell.

- **Peggy Scarpetti** resident of the island and employee of Pink Shell since 1986 and currently works as owner services manager. Miss Scarpetti indicated she felt the changes requested would benefit the community as well as the Town.

- **Matt Uhle** representing the Vacation Villas Condo Association and Peter and Susan Lisich. Mr. Uhle noted they were extremely concerned with the dock issue expressed in both resolutions with their position being the applicant is entitled to what was testified by Mr. Lisich as what was their right in 1995; adding the notice sent out by the Corp of Engineers said they only have 30 slips.

Mr. Uhle asked that the landscaping near Mr. Lisich's property be put back on the plan, a request that the boat launch be filled in as was contemplated in the 2000 plan and all plans since then, and that they did not accept the compactor location suggested by the applicant and that there was no need for additional parking spaces, asking for denial of those requests.

- **Terry Schad** resident of Fort Myers Beach since 1979 and an owner at White Sands a part of Pink Shell, voiced his approval of Pink Shells requests and asked Council for approval of those changes.

- **Chuck Pogue** resident spoke in favor of Pink Shells requests.

- **Roxie Smith** resident and adjacent property owner of Pink Shell stated she saw no reason to not approve the requests. Miss Smith did not see the need to close off the boat ramp and was in favor of the additional parking that the resort would have control over rather than cars parking haphazardly over her property.

- **Charles Mason Ramsey Jr.** resident at 100 Estero voiced his disapproval of Pink Shells requests, noting past problems with noise issues emanating from Pink Shell.

- **Peter Lisich** owner of 131 Estero indicated to Council his property was completely surrounded by Pink Shell. Mr. Lisich felt the current owner of Pink Shell did not care about the neighbors and felt he had divided the neighborhood and divided owners of individual buildings against each other. A notice from the Department of the Army regarding the permit application of the Pink Shell Resort was displayed by Mr. Lisich, indicating he was the only person noticed on the document for purposed work which had the applicant proposing to reconstruct an existing docking facility from 30 boat slips to 44

slips. Mr. Lisich also addressed the parking request voicing his disapproval of same.

- **Sharon Faircloth**, operator of Holiday Water Sports, Fort Myers Beach, and the watersports vendor at Pink Shell noted her approval of Pink Shell as well as voicing the need for the boat ramp in connection with their business.

- **Cindy Miller** resident at 131 Estero Boulevard spoke regarding the noise from the adjacent parking lot to her residence and asked Council to remember it was still a residential area noting she did not want to smell garbage from the compactor nor have her view affected.

Public Comment Closed

Vice Mayor Acken asked the applicant which resolutions they preferred; Resolution 10-05, 10-06 or 09-33 which was presented at the previous hearing.

Beverly Grady, representing Pink Shell, indicated they appreciated the additional resolutions and preferred the 10-05 representing the Gulf side and 10-06 representing the Bay side. Miss Grady indicated if Council chose to proceed with the original resolution of 09-33 then Pink Shell would need to withdraw their application due to the risk involved of losing all prior entitlements under the resolution.

Councilmember Babcock asked Ms Grady if Council decided to use resolution 09-33 and the applicant then withdrew their application what direction did they intend to take at that point. Ms Grady indicated the status of the application was a very specific list with staff recommendation of approval and LPA approval although there needed to be discussion regarding the docks and the compactor. Ms Grady indicated they had concerns regarding pre disaster and post disaster build back and had provided Council a memo outlining in detail all conditions of concern.

Councilmember Babcock then asked for Miss Grady to respond to section 34-214b #3 which said, if the LDC had changed since the previous approval the proposed amendment must be based on current regulations. Miss Grady responded that a fair interpretation would be if someone were coming in for redevelopment, to tear down what was on the site and put up something new, then the older resolutions would not be needed and a new resolution would be appropriate for new development. Miss Grady stated the requests from Pink Shell in the context of land use were minor, as adding a use of employee housing, relocating a walkway, adding additional parking, not adding units, not adding commercial square footage, not adding a new building, they had been done so the new resolution was the guiding document for the new redevelopment. Councilmember Babcock then asked if previous conditions to the

property should stand as well with Miss Grady indicating yes they apply to the site. Councilmember Babcock stated there were a lot of conditions applied as changes were made and it seemed they were now being challenged in the application and if the applicant was unwilling to agree with the way the LDC was being interpreted in terms of changes in the code then how did they feel about previous Town Council conditions that had been put on the property such as parking. Miss Grady felt there was a set of approvals and any property could make a request to alter or modify parking and it would then be up to Town Council to approve, but the location of a walkway or parking were minor and not redevelopment of the parking.

Mayor Kiker wanted to clear up the issue of 30 to 44 slips in the applicant's request. Bill Waichulis, Managing Director of Pink Shell addressed Council stating they had 41 slips with DEP recognizing 41 slips and the previously mentioned Army Corp permit was to redesign the main dock which was 30 slips. The design has now changed and Pink Shell was now redesigning all 41 slips, with the Army Corp and DEP both recognizing 41 slips. Mr. Waichulis indicated they had an intent to issue permit from the Army Corp for 41 slips pending the approval from DEP with a proposal to increase the size of the slips not the amount of the slips. Robert Boykin of Pink Shell indicated he felt it was a 10 to 15 % range of linear footage increase.

Mayor Kiker asked why there was a need to increase the parking. Bob Mulhare addressed Council stating there was no prohibition for them to ask for additional parking, and that operationally the need had been proven for additional parking with the intent to make it permanent and improve it to the LDC requirements.

Councilmember Raymond asked why staff decided on two new resolutions instead of the original one. Interim Town Manager Green indicated from previous meetings there was a great deal of stress regarding the consolidated resolution and that the actual requests were being lost in the process with staff feeling it might be better for Council to have an option.

Councilmember Babcock appreciated that staff took the effort to sense Council might go a different direction but wanted to go on the record that he did not request staff to take that action and would feel much more comfortable if it had been available before going to the LPA, noting it seemed like a last minute change after a continuance with no specific request from Town Council.

Interim Town Manager Green responded by indicating staff was always trying to facilitate Council's deliberations and that was purely the reason, noting staff still supported the consolidated resolution but without an option it may have been more difficult, so again it was to facilitate.

Mr. Green indicated there were two applications and one dealt with the

Bay side CPD and one dealt with the Gulf side CPD that exist and that over time the project and development had evolved and there had been requests for changes and modifications with a series of amendments to the CPD's along with PUD's under the County rules. The thought process was because there had been so much history and so many changes the LDC recommends bringing it forward into current jargon or rules and regulations so staff felt as did the LPA that it was a good time to bring it all up together and make it one big development rather than three and tie it all together. The applicant indicated concern and there seemed to be so much discussion over the resolution that the actual requests were taking a back seat so staff thought it may be useful to address each of the applications with a separate resolution which continues the process and procedure that had happened in the past indicating it isn't right or it isn't wrong, it's just different.

Attorney Dalton stated the decision to develop the two additional resolutions was a joint decision of Mr. Green and herself immediately after the last hearing and it was not initiated by any Council member or applicant or any member of the public. Attorney Dalton stated the reason they initiated the decision was that the resolution Council was presented at the last hearing, caused a concern as it was their job to present drafts that Council could make policy decisions from and in presenting drafts staff attempted to anticipate the various paths Council may choose to go down. Since it was a very complex resolution if Council chose to interpret the section of the LDC in conjunction with the way Ms Grady on behalf of the applicant had asked, which was not to update all the old resolutions then it would be difficult for Council in a hearing context to pick through the 12 page resolution to pick out the pieces that were and were not to be updated. Attorney Dalton's perspective was the two resolutions presented to Council for the hearing were not new resolutions they were merely an alternative, addressing only the application and not updating the resolutions which would be a different interpretation of 34-214, it would be more in line with what Miss Grady had requested. Attorney Dalton stated she did not feel it required the LPA to revisit the resolution.

Recess: 8:03 PM

Reconvene: 8:17 p.m.

Mayor Kiker called the meeting back to order asking Joanne Shamp, Chair of the LPA to address the Council.

Joanne Shamp, chairman LPA, stated with reference to LDC section 34-214b, 3 and 4 what transpired with the LPA was their review of six Lee County Board of Commissioner resolutions, eight administrative amendments, five Fort Myers Beach Town Council resolutions with all of them stretching over a twenty six year history, taking four meetings from March through June to thoroughly review because it was so complicated. It was LPA's decision, 5 to 0 that it was their interpretation of that section of the LDC that there should be the consolidation that had been recommended in the resolution brought forward by the LPA.

Ms. Shamp felt that LDC 34-214b4 did apply and that they went with staff recommendation to go forward with the way it was compiled.

Councilmember Babcock asked after reviewing all the different land use cases, if they intertwined between the Bay front and the Gulf, indicating a reason to put them into a single document. Ms Shamp indicated that there had been decisions made for variances perhaps on one side, if you concede this then you get this, so Ms Shamp did not know how you could separate them out, noting one was given for another.

Councilmember Babcock wanted to hear rebuttal from the applicant and staff first, then after closing testimony the first thing to do would be to discuss 33-214b.

Mayor Kiker asked Council if they were in favor of allowing the candidate to withdraw after rebuttal. Councilmember Babcock suggested Council go through the testimony portion and discuss the consolidation of 34-214b and then take a consensus at that point and if the applicant chose to withdraw before Council had any discussion on other issues then he could live with that.

Vice Mayor Acken stated he heard a consensus on allowing the applicant to withdraw after Council's deliberations at which point the fact finding of 34-214b would have been made, indicating he was in favor of two resolutions.

Mayor Kiker then asked Council if after rebuttal if they were going to allow the applicant to address the Council if they wished to withdraw. All Council members except for Councilmember Babcock agreed to allow the applicant the opportunity to withdraw.

Ms Grady stated for the record that there were four Council members that had agreed upon the close of the rebuttal portion of the Public Hearing that Council would then decide which resolutions they would be working from and when the decision was made the applicant would be able to approach Council and speak on the record and have the ability to withdraw the application.

Ms Grady thanked staff for providing the two resolutions, 10-05 and 10-06 noting that the memorandum prepared by staff asking the Council to continue the hearing to the present date, memorandum December 11th, 2009 as part of the record from the Interim Town Manager it was stated in the memo that staff had determined to present Town Council with additional resolutions to allow Council a range of options for final decision, and that the continuance allowed staff time to prepare the additional resolutions noting that was the basis for the continuance.

Miss Grady appreciated staff preparing a separate resolution for the Gulf side

10-05 which added the permitted uses, group quarters which was employee housing and secondly to show a possible relocation of the walkway easement presently between White Sands and Captiva Villas relocating it to the opposite side of Captiva Villas. Ms Grady indicated they were in agreement with staff's preparation of that resolution and only had one thing to simplify which was withdrawing deviation #3 as it was no longer needed.

Ms Grady addressed resolution 10-06 prepared by staff for the Bay side stating each item was reviewed by staff and the LPA, indicating that in the Bay side request was to keep the existing boat ramp, add additional parking on the dock master parcel and the parcel next to Bowditch with entrance gates both with staff and LPA approval. The other two items that were requested was the compactor location and at Council's request the applicant supplied alternate locations. The staff also added a condition on docks with the applicant in agreement of 212 words of the 215 word condition. In the letter filed by the applicant there was a request for the ability to delete the and/or size in reference to boats since the dock realignment could allow larger boats and felt that was something that would not trigger the public hearing request.

Ms Grady stated those were the specific items requested with each one standing on its own and were separate decisions to be made with none of them adding square footage or buildings to the site noting each were improvements to the community.

Bob Mulhare addressed the issue of the boat ramp, indicating it was waterfront property and generally access to the water was seen as being very positive. The boat ramp provided public access to the water and it was not inconsistent with the Comprehensive Plan or LDC to leave it in place.

Mr. Mulhare stated the Comprehensive Plan Policy 4B-12 land use types defined, it defined the 4 major types of land uses, lower case iii. identified marina uses, which states 'The prime uses of waterfront sites to support recreational boating, such as wet or dry boat storage, sales and rentals of boats and supplies and boat repair.' Objective 10G Public Access proposes to increase the number and quality of public access points to the Gulf, beaches and Estero Bay. Mr. Mulhare indicated there was no reason to relocate the walkway and continue to allow the boat ramp to remain in place. Regarding the dock redesign in condition 7 as proposed by staff, Mr. Mulhare felt the part which was inappropriate and objected to was the requirement for the size of boats triggering a public hearing, the number of 41 slips was agreed on.

Mr. Mulhare brought up Larry Wineburg from Veolia Environmental Systems which is the trash hauler for Fort Myers Beach. Mr. Wineburg spoke on the advantages of a trash compactor, minimizing reduced traffic of garbage trucks, reducing costs, odor control, rodent and pest control, the minimizing of number of containers from approximately a dozen to one compactor on one site, the noise factor would be considerably less as well.

Ms. Grady referenced the staff prepared resolution 10-05 for the Gulf side, indicating they were in complete agreement with that resolution, withdrawing deviation #3 as staff indicated it was not needed and they agreed. Ms Grady addressed condition #7 where staff added a condition to deal with the docks, it was a condition that was not in existence before and it did add clarity and indicated when a change would require a public hearing amendment. Ms Grady stated again that there were 215 words of clarification and the applicant agreed with 212 of them. The applicant as in agreement with condition #7 10-06. The question that was raised was the applicant did not believe that if a dock realignment was being done that the fact that a larger boat may fit into the slips should trigger a public hearing. The request made by the applicant was line #14 of condition #7 *and/or size* of boat slips, be marked out and not trigger a public hearing.

Ms Grady reiterated that the docks were an integral part of the resort having been there for decades. Pink Shell is located on both the Gulf and Bay side and time had just come for a dock realignment, making it an asset for the resort as well as the Town. Ms Grady referenced deviation #2, allowing the Vacation Villas parking to remain where it was with this deviation having staff approval. It was indicated staff had recommended denial of a second opening which would deal with the parcel next to Bowditch. The applicant requested the approval of the Bay side resolution as well as Council's recommendation of the compactor location. .

A request by the applicant was made for Council to utilize resolution 10-05 for the Gulf side and 10-06 for the Bay side. Miss Grady reiterated the concern with the original staff resolution 09-33 in a memorandum dated October 13, 2009 which contained six pages of concerns regarding wording of conditions and taking twenty plus years of history and consolidating it into one resolution.

Councilmember Babcock asked for explanations of the specific conditions with Ms Grady stating condition #10 regulated consumption on the premises of alcoholic beverages, basically a condition that only applied to Captiva Villas but as worded now would be applicable to the entire CPD. Condition #11 added a number of restrictions to the marine uses, condition #13 talked about structures that were located seaward of the Coastal Construction Setback Line and were shown on the master concept plan and are now shown nonconforming. Related to that under condition #14 the viable watercraft operations states that should there be a new or relocated office for either of those they would have to comply with the new code and a special exception which would be a public hearing. Miss Grady stated they were not asking for any changes on those operations and that condition would take them away. Ms Grady indicated in section 34-932b conditions must be reasonably related to the purposed development and any reasonable expected impact on public services facilities, public safety, health and general welfare. Ms Grady indicated if Council looked at the small list of what they were requesting many of the conditions in 09-33 don't relate in anyway

to the specific requests and modifications proposed and would be binding on the Council that you wouldn't impose conditions that were not related to the specific requests, so there was concern that conditions #5, #9, #10, #11, #13 and #14 were not reasonably related to the limited request they were making.

Ms Grady stated that condition #5 took the landscaping plan that was approved by a development order and puts it into a zoning resolution, so if they wanted to do revision on landscaping from a development order that would be administrative. The concern was that condition #5 pulls it from a development order and clearly put it into a zoning resolution which would cause them to file an application to amend the CPD and go before the LPA and be seen before the Town Council.

In response to a question regarding post disaster build back, Ms Grady indicated she was looking at condition 2. Site Development Regulations there was a section on redevelopment, stating 'Proposed accessory structures must meet the setbacks applicable accessory structures in the RM (Residential Multifamily) zoning district. Redevelopment under the "post-disaster" build back provision of LDC Section 34-3238(2) must (1) comply with the setbacks and property development regulations applicable to the RM zoning district at the time of development order approval. Ms Grady stated Pink Shell was never subject to the RM property development regulations. Under subsection (3) comply with the minimum open space and buffer requirements specified in this resolution and on the approved MCP, except where allowed by LDC Section 34-3238(2)f. The concern was the uncertainty of applied RM2 zoning regulations that had never applied previously, seeming to add restrictions to the post disaster build back. Ms Grady agreed the post disaster build back was in the code but this would add additional restrictions to the post disaster build back.

Discussion ensued regarding the boat ramp, with council asking whether use would be restricted to resort guests, and whether any other options beside the boat ramp. Mr. Waichulis responded its use would be limited to the resort guests, Holiday Watersports, and that the rip rap along the shore line limited other options.

Councilmember Raymond asked if the 70 foot figure was correct for the reconfiguration of the docks. Bill Waichulis stated that was correct that some of the slips would be 70 foot. Councilmember Raymond then asked if they would be utilizing the longer docks by accommodating double boats per dock which would increase the number of boats being docked. Mr. Waichulis indicated that potentially could happen but there was only one utility for each slip.

Dr. Shockey began by reminding Council they were mostly talking about specific limiting conditions with some objections to some of the specific changes that were requested, some of the changes had also been withdrawn. Mr. Shockey

indicated the applicant would have staff believe that if they were not proposing to build anything new then the Town could not put any conditions on them. The code does say that special conditions attached needed to be reasonably related to the impacts created by the proposed development on expected impact on public services and facilities, public safety, health and general welfare. Mr. Shockey felt the impact heard could reasonably be expected to continue into the future and are therefore reasonably expected impacts and that therefore there are conditions Council might want to place to mitigate those impacts which would be appropriate. It was also noted by Dr. Shockey that the section that discussed Council's authority to attach conditions also said that the conditions could be attached by Council where they're necessary to address unique aspects of the subject property in the interest of protecting the public health, safety and welfare, which was a little more wide ranging than addressing impact merely created by the proposed development of the future as opposed to the impacts reasonably expected to continue into the future.

Mr. Shockey then went on to address some of the comments from the public. Mr. Shockey agreed it would be a good idea for Council to address the dock issue since the last time it was mentioned in a resolution affecting the property was before the Town incorporated, which meant the present Council had not weighed in on whether the marine type uses that were taking place adjacent to the mixed residential future land use category were in fact consistent with the Comprehensive Plan in the location. As a result, the condition that Council finds in the separate resolution dealing with the Bay side or in the consolidated resolution proposed to restrict those uses in a way that would be consistent with the restriction placed on those uses if they were lawfully non-conforming with regard to the zoning district that they were located in. That position would suggest that they be limited in size since that is a form of expansion to the non-conforming use, allowing increase to the size or capacity of use. Dr. Shockey stated the reason staff was not talking about the possibility of Council making a finding, that the uses were in fact consistent with the Comprehensive Plan was because they were not requested as a part of the application. The applicant could request those uses be placed on the master concept plan and on the schedule of uses but they did not; they resisted efforts for them to supply a schedule of uses, with Dr. Shockey stating he had to create one. In condition #2 of the consolidated resolution in order to have an idea of what uses were permitted on the property, Dr. Shockey had to search through the prior resolutions and compare them with what existed on the property at present. Those actions led staff into the question of the potential loss of uses on the property, potential loss of future rights on the property based on repeal of prior conditions and deviations and replacing them with one consolidated consistent set of conditions and deviations. Mr. Shockey stated that the resort was built and that the consolidated resolution 09-33 attempted to characterize what existed on the property and to capture those things on the property currently non-conforming in regard to the LDC or that Council had not rezoned the property to allow the development to be in compliance with the LDC and comprehensive plan in affect today. Mr. Shockey indicated the

future land use category is mixed residential, the prior resolutions by Town Council affecting the property were characterized as amendments of prior zoning, rezoning decisions by earlier Town Councils that predated the comprehensive plan or by even earlier decisions by Lee County predating the incorporation of the Town. The density and intensity of the resort was beyond what would be allowed for vacant land on that location and would be non-conforming in a variety of ways. Dr. Shockey indicated there were certain rights provided for in the comprehensive plan today and for several years now as to what would happen in a post disaster situation and as to what would happen if they would decide to rebuild in a pre disaster situation. Dr. Shockey stated they were not proposing to modify those things, however in order to put those things in place in a post disaster situation where it would not be in front of Council for a rezoning, but applying for a development order to rebuild one or more buildings there are certain base line questions that need to be answered. The LDC section that implements the post disaster policy of the comprehensive plan provided for new buildings to comply with all other zoning and development regulations except where compliance with such regulations would preclude reconstruction otherwise intended by the post disaster policy of the comprehensive plan which gives a short list of priorities for which of those things need to be complied with and which ones can be administratively waved by the director to create a priority for one over the other.

Dr. Shockey stated it was clear to him that the setback requirements were a priority over the height limitations, stating that if a rebuilt building must be set back further from a property line due to current requirements of the code then the volume of the building so reduced could be built elsewhere on the site including one or more extra stories on a building. Dr. Shockey then noted if he were facing a development order application to rebuild a building and he did not know what the required setbacks were how would he know if they were allowed to build another story or comply with the current setbacks. He felt it captured the sense in which there needed to be a base line in order to move forward in the future. He felt looking back at the old resolutions in order to answer a specific question of that nature would be more than inefficient and more than confusing, feeling that the alternative resolutions, 10-05 and 10-06 do anything to repair that problem. Dr. Shockey felt the section of the LDC bringing the resolution affecting a planned development up to date with the current terminology used in the LDC and current regulations was designed to make it clear for those in the future who have to look at those things of what was and was not allowed on the property affected by the resolution, stating in no indirect language that you are not suppose to have to look at prior resolutions in order to figure it out.

Dr. Shockey then addressed the issue of a standard for when it was needed or not needed, and noted he would agree with it if they were talking about requiring the development to come into compliance, but in the case now the Town was not requiring them to come into compliance but at some time in the future or at least

providing what compliance at some time in the future could be. Dr. Shockey stated again that it was necessary to look at all the prior resolutions to determine what compliance was.

Dr. Shockey indicated that Council deciding on the two separate resolutions would simply add to the cacophony and not make things any easier to deal with in the future. The applicant had stated a number of concerns regarding the conditions and consolidated resolutions that might have unknown consequences; for example condition #10 on the COP hours of operation and types of uses. Dr. Shockey agreed that language in that condition was taken from a resolution that affected Captiva Villas properties specifically, and that there were a number of other resolutions that affected the Captiva Villas property along with other properties and other resolutions that affected other properties but not the Captiva Villas property but there was not a direct lineal dissent from the first resolution that approved any of this development to the last one that includes all of those for any of the properties involved, so you couldn't really leave out any of the resolutions from the others.

Dr. Shockey stated that the conditions that staff proposed for the consolidated resolution were designed to try to capture what was non-conforming about the property and put that in place, not to require anything in existence to go away at some time other than it would be required to go away for any other property in a similar situation. Dr. Shockey indicated he was trying to avoid having Council's future decisions be foreclosed by the fact that the amendment was granted whether it would be enforcing conditions that were intended to be put in place in the past to continue onward from the present or whether it be future policy decisions Council could make about what form or intensity they wanted to build on the island.

Councilmember Babcock asked Dr. Shockey if he felt the previous conditions and deviations of previous resolutions had been accurately captured in 09-33, with Dr. Shockey indicating as far as he could tell all the prior deviations and conditions were referenced in 09-33, but would not dispute with Ms Grady that some of the conditions might have a slightly different affect on some portions of the property than what other conditions might be gleaned if you searched through all the prior resolutions and attempted to discover which was the more recent affecting a more similar use. If it were possible to determine that resolution was superseded by some subsequent resolution.

Councilmember Babcock indicated it would be great if Council had a long list of previous conditions and deviations, but what had been accomplished was references to those resolutions to where the information was available, with that information being useful but it may not accomplish what would be helpful for what particular conditions might be dealt with in the days' hearing.

Dr. Shockey stated the conditions referenced in 09-33 and the latter conditions in that resolution were drawn from the resolutions that you have in the original Council packet and attachment E to the staff report, the hundred page document that contained electronic reproductions of those resolutions.

Council queried staff as to landscaping being detailed in MCPs, the allowance of dumpsters and the required screening, the interpretation of “guest”, the concerns regarding parking and the resolutions adopted prior to the Town’s incorporation and the transfer of development rights and a bayside view corridor.

Councilmember Babcock began a discussion regarding the docks asking what right they had to decide on the number of docks or if that was a decision that was already made in the past with the submerged land lease and whether it linked directly with a land use issue that needed to be captured and addressed. Dr. Shockey indicated there was a submerged land lease dated 2002 that said there are/were 41 slips authorized by the state; authorized by the state to be used within the submerged areas which included the large dock and several other smaller docks. Dr. Shockey stated it was within Council’s abilities to say some extent of docks there were appropriate or not, however a specific dock plan was not proposed through the process even though staff heard about it from a concerned neighbor with staff receiving a request from the applicant for staff to declare that it had already been found in compliance with the comprehensive plan which as he had stated the last resolution that dealt with the docks was before the Town was incorporated and that it was not a finding that the docks were in compliance with the mixed residential future land use or the adjacent zoning. Dr. Shockey felt the plan development process was perhaps the best place for Council to determine whether multi slip docks that were an accessory to a resort or some other form of more intense or less intense marine use was appropriate in a submerged area adjacent to mixed residential future land use or whatever zoning it has on top of it.

Dr. Shockey suggested Council acknowledge the docks that are there according to the current submerged land lease, the one that says there are 41 slips and not allow the applicant to expand it unless they request a specific expansion from Council so there was a chance to review the plan and have the opportunity to say yes it was consistent with the comprehensive plan or no only these are and only approve those.

Councilmember Babcock then asked if there was an issue of whether it was 30 or 41 if they have a chance to go back and review it. Dr. Shockey stated he looked at previous submerged land leases with the latest one showing 41 slips.

Resolution 09-33 was addressed by Councilmember Babcock noting condition 2a. for marine, stated it could be leased to non-occupants of the principle use. Councilmember Babcock asked Dr. Shockey if that was carried over from a prior approval or just an assumption. Dr. Shockey indicated one of the difficulties of the dock uses was the only mention of the dock uses that was passed by a Town

Council was a reference that transferred commercial uses from the Bay side to the Gulf side with the only remaining commercial uses on the Bay side was related to the boat slips and dockage. The schedule of uses in 09-33 the recommendation would address that by putting those specific uses in there that had been in a prior resolution and then limiting them by reference to the condition that they are non-conforming because Council had not had the opportunity to decide that they are conforming.

Discussion ensued regarding the beach access as referenced in condition #3, the use of the employee housing, and the schedule of uses as outlined in the three draft resolutions.

Recess 10:35 p.m Reconvene 10:50 p.m.

Mayor Kiker questioned whether conditions should be considered an agreement or promise, and asked how they were handled. Dr. Shockey indicated that the idea of putting a condition on an approval in the context of what new conditions might be placed presently; the idea being the conditions addressed unique aspects of the property, activities or development of what was being approved, what was taking place, what environmental conditions existed on the site, things that needed to be mitigated or addressed. Discussion continued as to current conditions on the property, placing additional conditions on a property and the onus of enforcement and the exercise of Council authority.

Councilmember Babcock questioned whether there were any specific requirement for green space when the density was transferred from the Bay side to the Gulf side. Dr. Shockey indicated there had been different rules about maintaining open space under the County and the Town and there may have been a requirement to calculate a particular portion of open space at one time but he could not find any specific condition as the maintenance of the tennis courts specifically as an open space component, but there were no conditions in the resolutions that referenced them specifically.

Mayor Kiker asked if the docks were floating docks or regular wood docks with the applicant stating they had not made that decision as yet.

Mayor Kiker closed the testimony portion of the meeting.

MOTION: Vice Mayor Acken moved to remove the 09-33 from consideration and go back to 10-05 and 10-06 that were originally requested by the applicant. Councilmember Raymond seconded the motion.

Councilmember Babcock indicated he would not support the motion, noting that was not the staff recommendation, it was not the LPA recommendation, stating there was value in having a history recorded in one place for all the resolutions

involved and indicating he had not been convinced that there had been any loss of rights or anything that would heed the applicant from achieving the goals of their establishment most of which were complete at the time.

CALL THE QUESTION: Councilmember Babcock called to question.

VOTE: (On the motion to call the question) Motion carried 5 to 0

Mayor Kiker asked Town Clerk Michelle Mayor to read back the motion with Miss Mayher stating the motion was to remove 09-33 from consideration.

Attorney Dalton indicated the additional part of the motion was to consider resolution 10-05 and 10-06.

VOTE: Motion passed 4 to 1 with Councilmember Babcock dissenting.

Mayor Kiker then indicated Council would be working on 10-05 and 10-06 and Council could either have discussion or a motion.

MOTION: Vice Mayor Acken made a motion starting on page 2 of 5 of resolution 10-05, The Town Council **APPROVES** Applicant's amended request; subject to **APPROVAL of (7) conditions;** Town Council **APPROVES deviation #2;** (1) the requested amendment **DOES** comply with; (2) as conditioned **IS** appropriate; (3) safeguards **ARE** provided; (4) All special conditions **ARE** reasonably related; (5) The proposed use or mix of uses **MEETS** all specific requirements. Councilmember Raymond seconded the motion.

SECONDARY MOTION: Councilmember Babcock made a secondary motion to add conditions 9, 10, 19 and 25 from 09-33. Mayor Kiker seconded the motion.

Councilmember Babcock indicated the intent of 9, 19 and 25 was to restate the stipulations that appear to be in 01-26, limited use of the facilities by the general public, reiterating his intent was to reemphasize that the use of the facility was not for general public use as had been stipulated in previous conditions; it was intended for use of guests on the residence.

Councilmember Babcock noted the interpretation of the comprehensive plan that was very clear that there were density and intensity issues; there was a huge density on the property because of a transfer of density from the Bay side to the Gulf and there would not be the high towers or that many units without the transfer and the only way they were able to get that density was not to open up the restaurants and all the retail to anyone that walked through the door, with the stipulations being it was for people and residents of that facility, which was clear in 01-26. Councilmember Babcock indicated it was important on this half of the

resolution because it drives the next half on parking, making it exactly why it needed to be there as a condition.

CALL THE QUESTION: Councilmember List called the question.

Mayor Kiker asked Town Clerk Michelle Mayher to repeat the motion. Ms. Mayher read the motion as follows: The motion was to include sections 9, 10, 19 and 25 from resolution 09-33.

VOTE: (on the motion to call the question) Motion failed 4 to 1 with Councilmember Babcock voting in the affirmative.

Motion on the floor was approval of 10-05.

VOTE: Motion passed 5 to 0

MOTION: Vice Mayor Acken made a motion for approval of resolution 10-06 with the intent of selecting everything in the affirmative including the suggested word change on line 14 of condition #7. Starting with The Town Council **APPROVES**; subject to **APPROVAL OF (9) conditions**; The Town Council **APPROVES deviation #2**; The Town Council **APPROVES deviation #3**; under condition #7, second line from the bottom **and/or size** would be stricken; regarding the proposed trash compactor, Town Council **APPROVES deviation #2** next to the dock master building; Findings and Conclusions, #1 as conditioned **DOES** comply with; #2 **IS** appropriate; #3 public interest **ARE** provided; #4 conditions **ARE** reasonably related; #5 proposed uses **MEETS**; 6B(1) Deviation #2 **DOES** enhance; 6B(2) welfare **WILL** be preserved; 6B(3) Deviation #2 **DOES** operate to the benefit and **may not operate** to the detriment; 6B(4) Deviation #2, **IS** consistent. The motion was clarified to include the exhibit #3 for the location of the trash compactor. Councilmember Raymond seconded the motion.

SECONDARY MOTION: Councilmember Raymond made a secondary motion to eliminate #8, concerning the 8 valet parking spaces on the northwest and the 12 valet parking spaces on the southwest allowing for green space. Mayor Kiker seconded the motion.

Councilmember Babcock questioned starting over with motions as he wanted to take out the additional parking as well and indicated he had serious concerns with the trash compactor as he felt there couldn't be a worse place for the trash compactor than in the middle of the green space. Councilmember shared his concerns with the loss of green space that would occur with the previous motions.

TERTIARY MOTION: Councilmember Babcock made a tertiary motion to deny the whereas statement #1 and #7 as well as #8.

AMENDED MOTION: Councilmember Raymond amended his motion to amend #1 to reflect #8 with Mayor Kiker amending his second.

Attorney Dalton stated for clarification that Council was instructing her to take #1 and modify it to say with an accessory parking lot for employee parking only and make it part of the condition of #1. The motion and second was amended for those changes.

Councilmember Babcock indicated the trash compactor was now located in option #3. Mayor Kiker indicated it was the applicant's choice and he was ok with it. Councilmember Babcock stated it was not their choice as it was the Town's view corridor and indicated he did not feel the trash compactor should be anyplace on the Bay side. Mayor Kiker asked the applicant to come forward and clear up the location issue regarding the trash compactor. Mr. Boykin indicated the trash compactor was next to the boat launch ramp as the fourth location primarily because of where the curb cut was, taking into consideration access for the garbage truck to have access to the compactor. Mr. Boykin stated they were willing to put it where Council recommended. Mayor Kiker asked if the compactor could be located next to the dock master building with Mr. Boykin indicating he felt it would wipe out even more parking and be difficult for the truck to gain access. Mr. Boykin then reviewed the issues with locating the compactor on the Gulf side.

Vice Mayor Acken felt Council should not be micromanaging a 25 foot discrepancy in the placement of a trash compactor, noting the Pink Shell was a four star resort and would know how to conceal it and the one curb cut and straight back access was going to be the least impediment to everyone in the neighborhood as far as the noises of the truck.

CALL THE QUESTION: Vice Mayor Acken made a call to question on the secondary motion.

Councilmember List asked to have the secondary motion repeated.

Town Clerk Michelle Mayher reviewed the secondary motion by Councilmember Raymond and seconded by Mayor Kiker which was to eliminate #8 valet parking and amended to limit it to employee parking. Attorney Dalton assisted with reviewing the motion by stating Councilmember Raymond's motion was #8 which was part of the application on the first page of the resolution would be incorporated into condition #1 which meant the 8 valet parking spaces at the northwesterly end and the 12 valet parking spaces at the southwesterly end would be deleted from the master concept plan and #1 which was the applicant's first request about the tennis courts would be incorporated into condition #1 to allow the replacement of the tennis courts with an accessory parking lot but the accessory parking lot would be for employee parking only.

Mayor Kiker made it clear the vote was on the secondary motion.

VOTE: The call to question was 4 to 1 with Councilmember Babcock dissenting

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

Mayor Kiker indicated there was a primary motion on the floor made by Vice Mayor Acken.

Councilmember Raymond voiced his concerns over the location of the compactor. Discussion continued regarding language with regard to the trash compactor.

Councilmember Babcock asked if the trash compactor was being moved out of lots 38 and 39, if that would mean more parking in that area.

CALL THE QUESTION: Vice Mayor Acken called to question.

VOTE: Call to question passed 5 to 0

VOTE: Motion passed 4 to 1 with Councilmember Babcock dissenting.

Public Hearing was closed at 12:20 AM.

Reconvene: 12:33 AM

MOTION: Councilmember List moved to continue the meeting.

Mayor Kiker indicated there were people who had sat for several hours that wanted to make comment and felt Council should allow them that option as well as setting another date and time for a continuance.

Motion failed for lack of a second.

IX. ADMINISTRATIVE AGENDA

A. Discussion of Outdoor Display and Banner Signs

Interim Town Manager Green indicated this item is on the agenda at the request of the Council.

Vice Mayor Acken stated Ordinance 04-08 which was passed in 2004 amended the LDC regarding outdoor display. Vice Mayor Acken was of the opinion that it would be of value to revisit the ordinance and encouraged Council to have a workshop on the ordinance and its implications and modifications, lifting some of the restrictions on banner signs and A-frames as well.

Public Comment Opened
No Public Comment
Public Comment Closed

B. Introduction of Ordinance 10-01, Amendment to Noise Ordinance

Vice Mayor Acken stated he was in favor of less noise and the limits proposed was just a starting point and as far as the upper limit realized they were probably beyond the maximum allowable but did not want to limit himself before Council had a chance to consider it. Vice Mayor Acken stated staff would be bringing forth some examples of the difference in decibels.

Public Comment Opened

▪ **William Shenko** asked why it was being discussed, stating Council was the only line of defense for homeowners and guests to have peace and quiet in their homes. Mr. Shenko stated he had provided information to be in Council's mailboxes regarding in depth noise ordinances from other cities in Florida. Mr. Shenko went on to state he had attended a joint meeting regarding noise ordinances where the room had been outfitted with speakers allowing for those in attendance to experience the difference in decibels and suggested this Council do the same.

▪ **Doris Grant** resident on Crescent Street. Ms Grant spoke to the noise level in the vicinity of her home, indicating she had all the file numbers of when she had called the sheriff's department, who on one occasion did arrest the night manager of the Light House Motel after the third call. Ms Grant further stated she could not hear her own TV, that this was totally unacceptable, and asked Council to decrease the decibels.

▪ **Janette Swinson** resident of Primo, described to Council her frustrations with the volume of the music, the way it penetrates her home and the fact that it continues into the early morning hours, and asked Council to address the issue of the noise and the hours it was permitted to continue.

▪ **Dave Anis** resident of Primo Drive, indicated he was like everyone else getting blasted out by the music and saw no reason why they should raise the decibels.

▪ **Joe Grant** 320 Crescent Street, indicated that the drafting and enforcement of the noise ordinances was influenced by perceived community and cultural standards and maybe that needed to be considered and raise the standards by lowering the decibel requirements in relation to noise.

▪ **Lee Melsek** stated that businesses had a right to play their music but did not have a right to play their music in other's homes. Mr. Melsek indicated those that spoke were victims and they were victimized in their homes late at night into the early morning by loud outdoor music establishments, stating that their homes were there a long time before the outdoor entertainment bars were created

and before Councils of the Town gave them permission to put their bands outside. Mr. Melsek stated that the proposal was ludicrous and insane and should not even be considered. He felt it was a slap in the face of anyone on the island that lived near an establishment with outdoor music. Mr. Melsek also indicated the LPA wanted to talk about the issue and was not given the ability to.

▪ **Bonnie Anis** resident of Primo Drive, voiced her disapproval of Council considering the increase in decibels.

Public Comment Closed

Interim Town Manager Green stated that some of the recommendations were substantial and recognized that there was an entire science devoted to sound and wanted to insure that staff could get expert information, noting the document provided by Bill Shenko would be a good start and felt it was important to have sufficient time to prepare an adequate staff report in order to have the proper information for Council's deliberations.

Vice Mayor Acken discussed his reasoning for action and was in favor of doing something to get the process started.

Councilmember List was not interested in raising decibel levels but more interested in making sure the measuring process was correct and that there were built in protections for both the complainants and the alleged offenders. Councilmember List indicated her interests were the enforcement issues and the process of enforcement, noting she felt it was very inadequate and did not serve anyone.

Vice Mayor Acken wanted to indicate that he had no interest of hurting anyone and would like to strike the increase of decibels keeping it at 66 and keep in the 2 a.m. to 6 a.m. decibels at 35 and change commercial to 85 decibels for discussion at the hearing as well as to strike the waivers in section d. to limit some staff work.

Attorney Dalton stated this item was brought forward without prior legal review, however noting that should the reference to a special exception process remain in the ordinance, it would have to go through the LDC review process.

Councilmember Raymond felt he did not know enough about it to make a decision.

Councilmember List stated there were many people in town that urgently want Council to do something about the ordinance because it was not working for anyone, however did not feel confident to have a hearing on March 1st and really understand the issue.

Councilmember Babcock wanted Council to workshop the issue before sending

it to the LPA.

C. Town Manager Search Update

Interim Town Manager Jack Green indicated the plan was going forward as scheduled.

Public Comment Opened

No Public Comment

Public Comment Closed

D. Beach Nourishment Update

Interim Town Manager Green indicated staff received some materials late on Friday and had not had time to take a hard look at the interlocal recommendations coming from the County as well as some of the other materials. It was going before the BOCC on January 26th. Staff would have a memo and recommendations breaking down the interlocal specifically to Council by the 1st.

Public Comment Opened

No Public Comment

Public Comment Closed

E. Discussion of the Purchase Opportunities of Seafarers Property

Mayor Kiker indicated it would take two appraisals and maneuvering legal issues and multiple owners and attorneys. Mayor Kiker indicated the banks bought back the property and that he had occasion to talk with Ray Judah and the lady that handles the County's real estate. The suggestion was the County wanted to look at the beachfront with Mayor Kiker suggesting moving Estero Boulevard behind the property. Mayor Kiker stated it was suggested that a group be put together consisting of people from the county, from Council, staff and local business people to work together as a team and talk about the property. Mayor Kiker also suggested talking with the owners to see if the property could be cleaned up with the addition of some trees to improve the property.

Councilmember Babcock felt it was the time for the Town to make some decisions regarding the property. Council decided there was a need to address the issue in a workshop.

X. TOWN MANAGER'S ITEMS

A. Alternate Banking Signatory

Mr. Green indicated it took over a month to get it through the banks to sign checks and there was a need for one other person to be able to sign checks. Councilmember Raymond was chosen.

B. Water Utility Refinancing

Mr. Green indicated it took time to get refinancing and staff needed direction to move forward. Council agreed.

C. Seven Seas Walk-through

Mr. Green indicated following the February 1st meeting the Seven Seas should be substantially completed and a walk through by Council would be appropriate. Council agreed, asking Mr. Green for a reminder email regarding the same.

XI. TOWN ATTORNEY'S ITEMS

Attorney Dalton indicated the plan was to have a new Town Manager on February 1st. At that time Mr. Green would still be employed so he would need to be made transition team leader or some appropriate title with Attorney Dalton requesting direction to retitle Mr. Green.

XII. COUNCILMEMBERS ITEMS AND REPORTS

Mayor Kiker requested a switch in times for the two Council meetings in March, requesting the March 1st meeting be a 6:30 PM start time and the March 15 meeting be a 9:00 AM start time. Council concurred.

Councilmember List noted the Horizon Council meeting at the Broadway Palm Dinner Theater January 29th from 11:30 to 1:30.

XIII. ADJOURNMENT

MOTION: Councilmember List made a motion to adjourn with a second by Councilmember Babcock.

VOTE: Motion passed 5 to 0

Motion adjourned at 1:45 a.m.

Adopted _____ With/Without changes. Motion by _____

Vote: _____

Michelle D. Mayher, Town Clerk

▪ End of document.