

**FORT MYERS BEACH, FLORIDA  
DEPARTMENT OF COMMUNITY DEVELOPMENT  
ZONING STAFF REPORT**

**TYPE OF CASE:** Special Exception

**CASE NUMBER:** FMBSEZ2010-0007 (Nemos on the Beach)

**LPA HEARING DATE:** June 8, 2010

**LPA HEARING TIME:** 9:00 AM

**I. APPLICATION SUMMARY:**

Applicant: Estero Beach Holdings LLC

Request: Special Exception in the DOWNTOWN zoning district to allow consumption-on-premises of alcoholic beverages in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership, including an existing patio surfaced with paver blocks located landward of an existing retaining wall but within the EC zoning district; to include beer, wine, and liquor.

Subject property: Legal description is attached as **Exhibit A**.

Physical Address: 1600 Estero Boulevard, Fort Myers Beach, FL 33931

STRAP #: 24-46-23-W3-0011.0000

Future Land Use designation: Pedestrian Commercial (landward) and Recreation (seaward)

Zoning: DOWNTOWN (landward) and EC (Environmentally Critical) (seaward)

Current use(s): Restaurant with 2COP beverage license and outdoor seating, including existing patio in EC zoning district.

Adjacent zoning and land uses:

Adjacent properties are designated as Pedestrian Commercial Future Land Use Map (FLUM) category (except Gulf of Mexico beach, designated Recreation FLUM)

- North: Shopping center (Seafarers Plaza and Helmerich Plaza), zoned DOWNTOWN
- South: Undeveloped beach, zoned EC
- East: Pierview Hotel, zoned DOWNTOWN
- West: Vacant lots currently occupied by a commercial recreation facility (inflatable waterslide), then a commercial parking lot, then a bar/cocktail lounge, all zoned DOWNTOWN.

## **II. RECOMMENDATION**

Staff recommends **APPROVAL** of the requested Special Exception to allow consumption on premises of alcoholic beverages in a restaurant providing outdoor seating areas that are within 500 feet of a dwelling unit under separate ownership.

If the Town Council chooses to approve the requested special exception, staff recommends that approval be subject to the following conditions:

1. The area of the subject establishment used for consumption on premises must be confined entirely to the areas shown on the floor plan attached hereto and incorporated herein by reference as **Exhibit B**, including the interior of the first floor of the building, the front porch, and the rear patio.
2. Music and other audible entertainment are prohibited before 10:00 AM and after 10:00 PM of each day in outdoor seating areas, and must comply at all times with applicable ordinances.
3. Sales, service, and consumption of alcoholic beverages must not begin earlier than 7:00 AM and must end no later than 2:00 AM during each day.
4. The use must comply at all times with the provisions of LDC Section 34-1264(k), as may be amended from time to time, and must at all times in operation be licensed as a permanent public food service establishment with seating, in accordance with Chapter 509, *Florida Statutes*, and applicable state agency rules.
5. The use must comply at all times with lighting standards, including the regulations for the protection of Sea Turtles provided in LDC chapter 14, article II.
6. The special permit approved by the Lee County Hearing Examiner in case 95-07-162.02S is hereby declared null and void.

7. Approval of this special exception does not create a vested right to reconstruct or replace the brick patio or retaining wall located in the EC zoning district on the subject property, which are limited by LDC Sections 34-3242 and 34-3245. New construction and/or replacement of existing structures in the EC zoning district must comply with all requirements of the LDC and Comprehensive Plan at the time of permitting.

### Recommended Findings and Conclusions

1. *Whether there exist changed or changing conditions [that] make approval of the request appropriate.*

The location of the request was approved in 1995 for consumption of alcoholic beverages on the premises in conjunction with a restaurant, and the allowable seating areas were established through the 2007 appeal. The Comprehensive Plan and Land Development Code do not distinguish classes of restaurants that (in addition to non-alcoholic beverages and food) serve beer only, beer and wine only, or beer, wine, and liquor. The applicant's request does not implicate a change in use except insofar as the approved use was limited by special conditions attached to a prior special permit, subsequently modified by a Town Council decision of an administrative appeal. The modifications to the allowable seating area through the 2007 appeal have made it possible for the establishment to obtain a special restaurant (SRX) series beverage license. Staff recommends the finding that there **do exist** changed or changing conditions and that they **do make** approval of the request appropriate.

2. *Whether the request is consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan.*

The subject property is in the Pedestrian Commercial FLUM category, on Estero Boulevard and near other restaurants, bars, hotels and retail stores. Comp Plan **Policy 4-B-6**, regarding the Pedestrian Commercial FLUM, states that commercial activities must contribute to the pedestrian-oriented public realm. The beach and streets northward to Lynn Hall Park and southward to the Lani Kai are heavily traveled by pedestrian beachgoers. The existing restaurant is oriented toward this foot traffic, though it has essentially no parking area for patrons arriving by automobile. The outdoor seating areas are located on porches and patios separated by railings and elevation from the sidewalks and the beach. Staff recommends the finding that the request, as conditioned, **is consistent** with the goals, objectives, policies, and intent of the Comprehensive Plan with regard to this commercial area.

3. *Whether the request meets or exceeds all performance and locational standards set forth for the proposed use.*

A restaurant is a use permitted by right in the Downtown zoning district. Because dwelling units under separate ownership are located within 500 feet of the subject property, a special exception is necessary in order to allow an outdoor seating area. Performance and locational standards for the restaurant use were addressed through permitting for prior remodeling activities, and through the 1995 variance as modified by the 2007 appeal. There are no specific performance or locational standards in Town regulations for a restaurant with outdoor seating areas that serves beer, wine, and liquor, that differ from the standards that apply to a restaurant with outdoor seating that serves beer and wine only. Staff recommends the finding that the request, as conditioned, **meets or exceeds** all performance and locational standards set forth for the proposed use.

4. *Whether the request will protect, conserve, or preserve environmentally critical areas and natural resources.*

Construction of additional structures in environmentally critical areas has not been requested or permitted. The existing wood retaining wall is not proposed to be replaced or expanded. As conditioned, the use will be required to comply with current sea turtle protection standards. Staff recommends the finding that approval of the request, as conditioned, **will** protect, conserve, or preserve environmentally critical areas and natural resources.

5. *Whether the request will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property.*

The existing surrounding uses include a hotel, a shopping center, bars and restaurants, and a few dwelling units. Within the Pedestrian Commercial Future Land Use Map category, adjacent lots could potentially be redeveloped with commercial or mixed use buildings in accord with the regulations of the DOWNTOWN zoning district or through planned development rezoning. The recommended conditions clearly restrict the use to specific areas of the floor plan and prohibit any further expansion. Staff recommends the finding that the requested use, as conditioned, **will be** compatible with existing or planned uses and **will not** cause damage, hazard, nuisance, or other detriment to persons or property.

6. *Whether the requested use will be in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.*

The existing restaurant use has already received a variance related to parking requirements, and was required to comply with lighting and other similar requirements set forth in LDC Chapter 34 at the time of remodeling. The consumption on premises of alcoholic beverages use, as conditioned, will be

required to comply with the applicable standards in LDC Chapter 34, Article IV, Division 5, for consumption on premises in a restaurant regardless of the type or series of state license. The appropriate limitations on an outdoor seating area for consumption on premises that is allowed by special exception are for Town Council to determine through the hearing process, during which process they should find that the conditions attached are reasonably related to the special exception requested. Staff recommends the finding that the requested use, as conditioned **will be** in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34.

### **III. BACKGROUND AND ANALYSIS**

#### **Introduction and Background:**

Patrick Ciniello, on behalf of Estero Beach Holdings LLC, has requested a special exception in the DOWNTOWN zoning district to allow consumption-on-premises of alcoholic beverages in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership, including an existing patio surfaced with paver blocks that is located landward of an existing retaining wall but within the EC zoning district. The applicant has specifically indicated a desire for approval to include sales, service, and consumption of beer, wine, and liquor.

The subject property was granted a special permit for consumption-on-premises of alcoholic beverages ("COP") in a restaurant with outdoor seating by the Lee County Hearing Examiner in 1995, in case 95-07-161.02S. Simultaneously the subject property was granted a variance to reduce the number of parking spaces required by 1995 regulations from 17 spaces to the then-existing 6 spaces. The special permit was subject to the following conditions:

1. The special permit is limited to a 2-COP beverage license for beer and wine in conjunction with a restaurant.
2. The special permit is limited to a 1,106 square-foot restaurant with 12 indoor seats and 50 outdoor seats.
3. Outside entertainment and/or the service of beer and wine in the outside seating area for group parties or special events shall not extend beyond 10:00 PM nightly.

The variance was subject to the following condition:

1. The variance is limited to a 1,106 square-foot restaurant with 12 indoor seats and 50 outdoor seats.

In 2006 the property owner requested an administrative interpretation of the Land Development Code, seeking a determination that the 1995 special permit and variance had been modified between 1995 and 2006 to allow a further reduction

in the number of required parking spaces from the 6 spaces required by the 1995 variance to one single space that remained after construction of a roofed porch between the building and Estero Boulevard. The request also sought an interpretation that the 1995 special permit and variance had been modified between 1995 and 2006 to allow expansion of the restaurant seating area to the new roofed porch, exceeding the limitation on the number of square feet and number of seats in the conditions. Disagreeing with the administrative interpretation issued in response to the request, the property owner appealed the interpretation to the Town Council in early 2007. In Resolution 07-13, Town Council granted the appeal and determined that the required number of parking spaces had been reduced and that the allowable seating area had been expanded. The 2007 appeal did not address the condition limiting the license to a 2-COP for beer and wine with a restaurant, or the limits on the hours for outdoor entertainment.

### Analysis:

The subject property is zoned DOWNTOWN and is in the Pedestrian Commercial Future Land Use Map (FLUM) category, except that seaward of the 1978 Coastal Construction Setback Line, the property is zoned EC (Environmentally Critical) and is in the Recreation FLUM category. The existing improvements include a partly enclosed CBS building, originally built about 1958, with about 1100 square feet of floor area on the ground floor and a smaller second floor configured as an apartment. Most of a patio area between the building and the Gulf of Mexico is shaded by flexible awnings. A small portion of this existing patio area extending about twenty feet seaward of the flexible awnings, but landward of an existing retaining wall, is located in the EC zoning district. A roofed porch was constructed between the 1958 building and Estero Boulevard approximately 1997. At the southeast side of the roofed porch is the only remaining portion of the site (other than the beach) that is not covered by a building or patio. This paved area serves as a single parking space and as a walkway for access to the building.

The subject property is generally located between the Pierview Hotel and vacant lots that formerly contained other hotels, and is across Estero Boulevard from a retail store and a fast-food restaurant that are located within an existing shopping center. Dwelling units are located on Crescent Street, to the northeast, and on Canal Street, to the southeast.

The Comprehensive Plan encourages pedestrian-oriented development in the downtown area, generally conceived as the area within the Pedestrian Commercial FLUM category. The Comprehensive Plan was not in effect at the time of the prior special permit approval in 1995, and the Town Council did not evaluate the alcoholic beverage use according to the criteria for a special exception in the 2007 appeal. Since the adoption of the Comprehensive Plan, the Town's zoning has been amended, and the property was rezoned from C-1 to

DOWNTOWN in the general rezoning of all land within the Town to reassign property from County zoning districts to Town zoning districts, which took place on March 3, 2003. The DOWNTOWN zoning district was designed to implement the Comprehensive Plan's community design concepts for the Town's commercial core area, and to accord with the Pedestrian Commercial FLUM category.

The restaurant's outdoor seating areas are located on patios and porches, as required in the DOWNTOWN district in accordance with LDC Section 34-678(e)(4).

#### Existing patio in the EC zoning district

The existing site development on the subject property includes a brick patio that is seaward of the building. A portion of this patio is shaded by flexible awnings, but a small area of the patio, between the awnings and an existing wood retaining wall, extends seaward of the Coastal Construction Setback Line ("1978 Line"), into the EC (Environmentally Critical) zoning district and the underlying Recreation FLUM category. The ends of the existing wood retaining wall are coterminous with the ends of existing concrete retaining walls on the adjoining properties. The existing building was originally built in the 1950s according to the records of the Lee County Property Appraiser. The patio area seaward of the building was the location for the 50 outdoor seats approved by the Lee County Hearing Examiner in the 1995 special permit.

The applicant has not requested a special exception to expand or replace the patio or retaining wall in the EC zoning district. The patio and retaining wall remain nonconforming with regard to their location.

As LDC Section 34-678 provides, patios and porches may be appropriate locations for restaurants to provide outdoor dining areas on private property. This business has an existing patio with an existing seating area that extends into the Town's EC zoning district and is therefore nonconforming because the seating area's use was specifically approved by Lee County prior to the adoption of the Town's Comprehensive Plan and prior to the Town's rezoning of the area seaward of the 1978 Coastal Construction Setback Line. Regardless of the nonconforming status of the seating area's use, new or expanded structures and uses in the EC zoning district, aside from a very limited group of uses provided in LDC Section 34-652(d), can only be allowed by special exception.

The special exception process is a process by which Town Council can determine if the use of the existing patio can be expanded to include a slightly different form of alcoholic beverage service in the EC zoning district (liquor, in addition to the beer and wine already allowed). Since this is an unusual situation, staff has recommended some additional factual findings to acknowledge and clarify that new development for commercial uses is not

generally allowed in the EC zoning district and that this expansion is arguably *de minimis*.

If removed, the existing patio in the EC district could not be replaced without a special exception. Staff has recommended a condition to make this requirement clear in the event Town Council chooses to approve the current request. LDC Section 34-1264(g) requires that all areas approved at a location must be under the same permit and subject to the same rules and regulations, so it would not be possible to approve the increase in license type to allow liquor sales, service, and consumption outside the EC district and prevent it in the EC district, unless the applicant were willing to forego entirely the use of the EC district area for seating.

#### Outdoor seating for on-premises consumption of alcoholic beverages

The regulations of the DOWNTOWN zoning district encourage restaurants to provide outdoor seating areas located on porches or patios, largely between enclosed buildings and the street. The use of existing structures and developed areas that are within the EC zoning district is a separate issue, already discussed.

This vicinity is one of the most intensive commercial areas of the Town, and aside from a few dwelling units on Canal Street and Crescent Street, and a few dwelling units located in mixed-use buildings, it is far from residential uses. Other restaurants and bars serving alcohol on the premises, many of which include outdoor seating areas, are located in Times Square and on Old San Carlos Boulevard to the north, and on both sides of Estero Boulevard to the south.

The sidewalks on both sides of Estero Boulevard, the availability of seasonal commercial parking lots, and the popular use of the beach near the County fishing pier and Lynn Hall Park, help to attract beach-going pedestrians to the area. The applicants' restaurant is merely one among a large number of commercial uses in this part of the Town, several of which have outdoor seating near the beach. Although residential buildings are located in the immediate vicinity, on Canal Street, the area of the subject property has been zoned to allow commercial uses for many years, and contains primarily commercial uses. The presence of visiting pedestrians transiting between parking areas, retail stores, restaurants, the beach, and nearby motels, is a long-established custom that will not be altered by approval or denial of the current request. The Comprehensive Plan's vision of this area does not require that it be transformed from an intensively commercial area into a primarily residential district. The immediate vicinity is within the Pedestrian Commercial FLUM category, except for the beach.

The applicant indicates its intent to operate between the hours of 11:00 AM and Midnight, Sunday through Thursday, and 11:00 AM and 2:00 AM, Friday and

Saturday. These hours are within the external limit that prohibits service between 2:00 AM and 7:00 AM daily throughout the Town. Although the applicant has essentially stipulated a willingness to abide by these hours, in order to limit the use to these hours (or any other hours other than 7AM to 2AM daily) the Town Council must find that such a condition is necessary to protect the public health, safety, and welfare. If testimony or evidence pertaining to limiting the hours of the use is introduced in the hearing process, the LPA and Town Council should afford it all due consideration.

The applicant has offered to end live outdoor entertainment at 10:00 PM, in accord with a condition originating in the 1995 special permit. The Town has a noise ordinance that regulates noise both before and after 10:00 PM of each day. Staff has recommended a condition matching the applicant's stated intent to end live outdoor entertainment at 10:00 PM because the Town's noise ordinance requires adherence to stricter noise limits after 10:00 PM. Live outdoor entertainment after 10:00 PM would be likely to violate the noise ordinance.

The building floor area proposed to be used for seating is indicated on the floor plan attached as **Exhibit B**. The floor area includes the interior of the first floor of the building, the covered porch between the building and Estero Boulevard, and the patio seaward of the building, including both the areas shaded by the flexible awnings and the open-air area that is located in the EC zoning district but landward of the existing retaining wall.

In the past, County- and Town-issued location-specific approvals for alcoholic beverage uses have sometimes contained limitations on the number of seats and the type and/or series of license, apparently in an effort to limit potentially adverse effects on the neighboring properties and possibly to aid with enforcement issues involving unauthorized expansions of seating areas. Staff does not recommend conditions be included limiting the number of seats or the type and/or series of state beverage license. The seating area can be limited by reference to the applicant's site plan, which clearly delineates the seating area from other parts of the site such as the open beach seaward of the retaining wall and the second-floor apartment. Changes to the types of seats used in the seating area or amendments to the building code could allow a somewhat different seating capacity within the same floor area in the future. The prior conditions limiting the number of seats were essentially removed (or declared to have been removed through unknown processes) by the 2007 appeal, and the current request does not propose to increase the area used for seating. A future restaurant operator may find it economically advantageous to acquire a different type or series of state beverage license and use it in conjunction with a restaurant use, either to serve beer only, to serve beer and wine, or to serve beer, wine, and liquor. The LDC does not distinguish between restaurants that serve beer, restaurants that serve beer and wine, and restaurants that serve beer, wine, and liquor, except in LDC Section 34-1264(h)(1), which limits expansion in circumstances in which "a legally existing establishment engaged in

the sale or service of alcoholic beverages...is made nonconforming by reason of new regulations contained in this chapter.” Staff has no basis in policy to develop theories or evidence to support the notion that locations serving beer only, beer and wine only, or beer, wine, and liquor, should be regulated differently by the Town.

If Town Council chooses to approve the request, staff recommends that the 1995 special permit be specifically declared null and void to prevent ambiguity over which resolution authorizes the use, and which conditions still apply. The 1995 variance, as affected by the 2007 appeal, should remain in effect, as together the two actions continue to allow the use without requiring additional parking to be provided.

#### **IV. CONCLUSION:**

Regulations for the DOWNTOWN zoning district encourage outdoor dining, and many restaurants have followed the vision of the Comprehensive Plan in accordance with these regulations and are providing outdoor seating areas where alcoholic beverages are served as a part of a menu of full-course meals as required by LDC Section 34-1264(b)(2). The current request is essentially a request to change one of the conditions placed on the subject property by prior resolutions approving the use.

If Town Council finds that the requested use is contrary to the public interest or the health, safety, comfort, convenience, and/or welfare of the citizens of the Town, or that the request is in conflict with the criteria of LDC Section 34-88, Town Council should deny the request as provided in LDC Section 34-88(4). So doing would not divest the subject property of the approval provided by Lee County and by the prior Town Council action in 2007 but would merely prevent the applicant from upgrading its beverage license to a different type. If Town Council chooses to approve the request, special conditions necessary to protect the health, safety, comfort, convenience, or welfare of the public may be attached if Council finds that such conditions are reasonably related to the requested special exception. Staff has recommended conditions for the Town Council's convenience. Staff's recommended condition limiting the hours for sales, service, and consumption of alcoholic beverages on the premises is based upon the general policy established by the Town Council in Ordinance 96-06. A condition limiting sales, service, and consumption of alcohol on the premises to more restrictive hours, such as the hours of operation requested by the applicant, could be established if Town Council finds that such a condition is necessary to protect the health, safety, comfort, convenience, or welfare of the public at this particular location.

Staff recommends **APPROVAL** of the requested special exception, as conditioned.

Exhibits:

Exhibit A – Legal Description of Subject Property

Exhibit B – Floor plan

Attachments:

Attachment A – Hearing Examiner Decision in Case 95-07-161.02S

Attachment B – Town Council Resolution 07-13

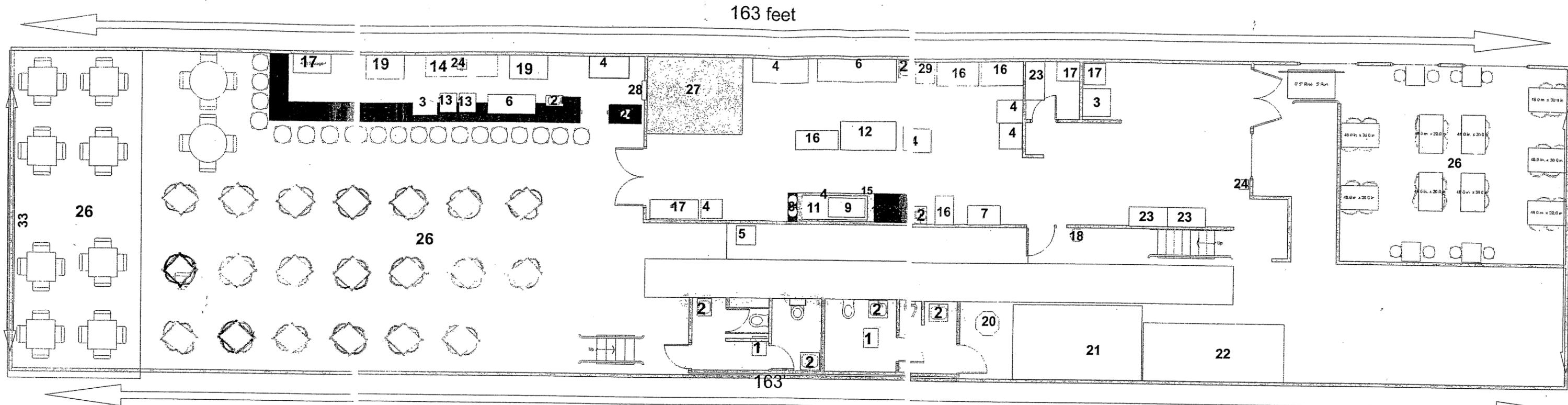
**Exhibit A**  
**SEZ2010-0007**

A tract or parcel of land lying in Section 24, Township 46 South, Range 23 East, Estero Island, Lee County, Florida, said parcel being more particularly described as follows:

Commencing at the southwest corner of Block E, CRESCENT PARK ADDITION, as recorded in Plat Book 4, Page 46, Public Records of Lee County, Florida, on the east line of Section 24, Township 46 South, Range 23 East; thence S.00°44'25"E. on said east line for 53.28 feet to a point on the southerly right-of-way line of Estero Boulevard; thence N.70°35'51"W. on said southerly line for 122.74 feet to the **Point of Beginning** of the property herein described; thence continue N.70°35'51"W. on said southerly line for 35 feet; thence S.19°24'09"W. for 284.27 feet to the waters of the Gulf of Mexico; thence southeasterly along said waters for 35.17 feet, more or less, to a point on a line perpendicular to aforesaid southerly right-of-way line; thence N.19°24'09"E. for 287.74 feet to the **Point of Beginning**.

Description based on survey by Charles D. Knight, LS6056, BWLK project no. 40032, dated 12/8/08. Basis for bearings: southerly line of Estero Boulevard bearing S.70°35'51"E.

# Nemo's On The Beach



## Equipment List

- |     |                                 |     |                         |
|-----|---------------------------------|-----|-------------------------|
| 1.  | Ventilation Fan                 | 20. | Grease Trap             |
| 2.  | Hand Sinks                      | 21. | Propane Tank Area       |
| 3.  | Ice Machine                     | 22. | Dumpster Area           |
| 4.  | Ice Machine                     | 23. | Dry Storage             |
| 4.  | Refrierator/Freezer             | 24. | POS System              |
| 5.  | Mop Sink                        | 25. | Bar                     |
| 6.  | 3-Compartment sink w/drainboard | 26. | Table & Chairs          |
| 7.  | Steam Table                     | 27. | Walk In Cooler          |
| 8.  | 2 Burner Stove                  | 28. | Draft Beer Taps         |
| 9.  | Flat - Top Griddle              | 29. | Steamer                 |
| 10. | Fryer                           | 30. | Portable Fire Extinguis |
| 11. | Char Broiler                    |     |                         |
| 12. | Sandwich Prep Table             |     |                         |
| 13. | Ice Bins                        |     |                         |
| 14. | Bottle Beer Refrigerator        |     |                         |
| 15. | Hood with Suppression System    |     |                         |
| 16. | Work Table                      |     |                         |
| 17. | Pepsi Bag N Box System          |     |                         |
| 18. | Water Heater                    |     |                         |
| 19. | Bottle Chillers                 |     |                         |



OFFICE OF THE HEARING EXAMINER, LEE COUNTY, FLORIDA

HEARING EXAMINER DECISION

SPECIAL PERMIT & VARIANCE: CASE 95-07-161.02S  
APPLICANT: JAY URSOLEO  
HEARING DATE: September 18, 1995  
28

I. APPLICATION:

Filed by JAY URSOLEO, 1154 Estero Blvd., Ft. Myers Beach, FL 33931 (Applicant/Owner); CARLETON RYFFEL, AICP, INC., 6309 Corporate Ct. SW, Suite 207, Ft. Myers, FL 33919 (Agent).

Requests:

95-07-161.02S A Special Permit in the C-1 (Commercial) district for consumption on premises with outdoor seating per Land Development Code (LDC) Section 34-1264(a); and

95-07-161.05V A Variance in the C-1 district from the parking space requirement of 14 spaces per 1,000 square feet of total floor area (total of 17 spaces) per LDC Section 34-2020(2)1.2., to allow the existing six parking spaces.

The subject property is located at 1154 Estero Blvd., Fort Myers Beach (south on San Carlos Blvd. to Estero Blvd., turn left to site on the right side of street), in S24-T46S-R23E, Lee County, FL. (District #3)

The Strap # as furnished by the Applicant is: 24-46-23-00-00011.0000

II. STAFF RECOMMENDATION: APPROVE SPECIAL PERMIT WITH CONDITIONS; APPROVE VARIANCE WITH A CONDITION

The Department of Community Development Staff Report was prepared by Pam Houck. The Staff Report is incorporated herein by this reference.

III. HEARING EXAMINER DECISION:

The undersigned Lee County Hearing Examiner APPROVES the Applicant's request and GRANTS a Special Permit in the C-1 (Commercial) district for consumption on premises with outdoor seating per Land Development Code (LDC) Section 34-1264(a) for the real estate described in Section VIII. Legal Description WITH THE FOLLOWING CONDITIONS:

1. The Special Permit is limited to a 2-COP beverage license for beer and wine in conjunction with a restaurant.
2. The Special Permit is limited to a 1,106-square-foot restaurant with 12 indoor seats and 50 outdoor seats.
3. Outside entertainment and/or the service of beer and wine in the outside seating area for group parties or special events shall not extend beyond 10:00 p.m., nightly.

The undersigned Lee County Hearing Examiner APPROVES the Applicant's request and hereby GRANTS a Variance in the C-1 district from the parking space requirement to allow the existing six parking spaces for the real estate described in Section VIII. Legal Description WITH THE FOLLOWING CONDITION:

1. The Variance is limited to a 1,106-square-foot restaurant with 12 indoor seats and 50 outdoor seats.

IV. HEARING EXAMINER DISCUSSION:

This is a request to change the use of the subject property located in the Times Square area of Fort Myers Beach. The subject property is a small lot (35 feet by 163 feet) lying between Estero Boulevard and the

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Gulf of Mexico, developed with a two-story building and six parking spaces. The first floor of the building is currently being used as a real estate sales office, and the second floor contains a seasonal rental apartment. The property is zoned C-1 and designated "Urban Community" in the Lee Plan. It is situated in the midst of tourist-related commercial zoning/uses including motels, rental cottages, bars, fast-food and other restaurants, and retail shops.

Applicant intends to relocate his real estate business to a storefront office in the Helmerich Plaza across Estero Boulevard, and wants to convert the first floor of this building to a small eat-in/take-out restaurant, with consumption on premises of beer and wine. His plans include take-out windows at the front (facing Estero Boulevard) and rear (beach-side) of the building, a small inside dining room (maximum of 12 seats), and an outside seating area for about 50 seats on the beach. To make this conversion in uses, Applicant must obtain a Special Permit allowing the consumption of alcoholic beverages in the outdoor seating area, and a variance from the parking requirements for the indoor restaurant use.

Staff recommended approval of the Special Permit for the consumption of beer and wine in the outdoor seating area, with conditions. They found that the proposed use was compatible with the other tourist-oriented uses surrounding the property, and was consistent with the other development in the Times Square area, as well as with the intent and provisions of the Lee Plan and the Land Development Code (LDC). It was their opinion that Applicant's proposed hours of operation (6:00 a.m. to 12:00 midnight, daily) were compatible and consistent with the hours of the surrounding commercial uses. They noted that Applicant was not required by the LDC to provide any parking spaces for the outdoor seating area, so there was no issue regarding on-site parking for the outdoor use; the existing parking spaces were deemed sufficient.

Staff recommended two conditions on the approval of the Special Permit. One condition limited the Special Permit to a 2-COP (beer and wine) license used in conjunction with the restaurant. This condition would prevent Applicant from establishing a beer and wine cocktail lounge/bar use on the site. The second recommended condition limited its approval to the 1,106-square-foot restaurant with 12 inside and 50 outside seats.

Staff also recommended approval of the Variance from the LDC minimum parking requirement of 17 spaces for the restaurant to require only the six existing parking spaces. They limited the Variance approval to the 1,106-square-foot restaurant with 12 inside and 50 outside seats. They found that the location of the lot in the intensely developed Times Square area of Fort Myers Beach, the small size and shape of the subject property, the existing development on the subject property, and the lack of available vacant property in the vicinity of the subject property all combined to create a hardship for the Applicant in complying with the parking requirements. Staff found that, given the hardship, the Variance met the criteria for approval set out in Section 34-145 of the LDC, and was consistent with the intent and purpose of the Lee Plan and the LDC. They also determined that the proposed restaurant use would be in the best interests of the general public, particularly the tourists visiting the beach area, and would not be a detriment or hazard to public health, safety or welfare. They also found that the proposed use would not attract or generate more vehicular traffic than the previous use, given the pedestrian nature of the beach visitors, the site's proximity to several motels, and Applicant's intent to cater to/attract pedestrians instead of drive-by customers.

During the hearing, an objection was raised on behalf of the Fort Myers Beach Civic Association to the County/Hearing Examiner proceeding with the hearing and deciding the case. The Association argued that the Hearing Examiner had the discretion to defer the hearing or to deny the case so that it would be heard by the new Town Council, which has yet to be elected. It is the opinion of the undersigned Hearing Examiner that such "discretion" resides solely with the Board of County Commissioners (BOCC) and can only be transferred to the Hearing Examiner by formal action of the Board. Since the Hearing Examiner has received no such authorization or any other instruction from the BOCC that cases involving Fort Myers

Beach property are to be deferred, postponed or denied, the undersigned Hearing Examiner is required, by ordinance, to hold the hearing and render a timely decision.

An objection was raised that the proposed requests did not adequately address and mitigate the traffic impacts that would be suffered by Estero Boulevard, a constrained road. The Fort Myers Beach Civic Association argued that, without a mitigation plan, the requests were inconsistent with the provisions of Objective 22.1, particularly Policy 22.1.13. Staff pointed out that a traffic study and mitigation plan is not required for approval of the Special Permit or Variance. The traffic issue and other concurrency management issues are generally reviewed and addressed during the development order stage, at which time Applicant will be required to perform the necessary mitigation, if any.

The undersigned Hearing Examiner concurs with Staff's analysis, findings and recommendation of approval of the Special Permit and the Variance, as each are conditioned. The Hearing Examiner finds that both the requests, as conditioned, meet the criteria for approval set out in Section 34-145, and are consistent with the Lee Plan and the Land Development Code. It is the opinion of the undersigned Hearing Examiner that Staff's assessment of the hardship preventing Applicant from complying with the minimum required parking spaces for the restaurant use is correct and consistent with the hardship found in similar cases involving other commercial businesses located in the Times Square area of Fort Myers Beach.

However, it is also the opinion of the undersigned Hearing Examiner that the hours of operation of the outdoor seating area should be consistent and compatible with those of other outdoor seating uses in the immediate vicinity. The Hearing Examiner finds that, since the second floor of this building houses a rental dwelling unit and the three motels have sleeping accommodations in close proximity to the outdoor seating area, some provision should be made to ensure that these visitors are not unduly disturbed by the outdoor use. The Hearing Examiner believes that the condition limiting the outdoor use in a similar request on the adjacent property is likewise appropriate in this case. For these reasons, the undersigned Hearing Examiner imposed a condition on the approval of the Special Permit that beer and wine should not be served and no outdoor entertainment or special events/parties should occur on the outdoor seating area after 10:00 p.m., nightly.

V. FINDINGS AND CONCLUSIONS:

Based upon the Staff Report, the testimony and exhibits presented in connection with this matter, the undersigned Hearing Examiner makes the following findings and conclusions:

As to Special Permit Request a):

- A. That there is no error or ambiguity which must be corrected by the Special Permit.
- B. That the trend toward outdoor eating and drinking areas in the tourist-oriented Times Square area of Fort Myers Beach makes approval of the Special Permit, as conditioned, appropriate.
- C. That the Special Permit, as conditioned, does not have a negative impact on the intent of Chapter 34, Zoning, of the Land Development Code.
- D. That the Special Permit, as conditioned, is consistent with the goals, objectives, policies, and intent of the Lee Plan, including Policies 18.2.1 and 22.1.13, and with the densities, intensities and general uses set forth in the Lee Plan.
- E. That the Special Permit, as conditioned, meets or exceeds all performance and locational standards set forth for the proposed use.
- F. That urban services, as defined in the Lee Plan, are or will be available and adequate to serve the proposed restaurant use.

G. That the subject property is located on the Gulf of Mexico on Fort Myers Beach, and the Special Permit, as conditioned, will not have an adverse impact on the beach ecosystem.

H. That the Special Permit, as conditioned, will be compatible with existing or planned uses, and will not cause damage, nuisance, hazard or other detriment to persons or property.

I. That the location of the subject property and the proposed use do not place an undue burden upon existing transportation or other services and facilities, as the Lee Plan and the Land Development Code require Applicant to mitigate any adverse traffic impacts arising from the proposed use.

J. That the requested use, as conditioned, will comply with all applicable general zoning provisions and supplemental regulations pertaining to the use, as set forth in the Land Development Code.

K. That granting the requested Special Permit, as conditioned, is not contrary to the public interest, public health, public safety, public convenience or public welfare of the citizens of Lee County.

As to Variance Request b):

A. That exceptional or extraordinary conditions or circumstances inherent in the size and shape of the land, its location in the Times Square area of Fort Myers Beach, its development with a two-story building, and the lack of available vacant land in the vicinity create a hardship for the property owner which is not generally applicable to other lands in the same zoning district.

B. That these conditions or circumstances are not the result of actions of the Applicant taken subsequent to the adoption of the Land Development Code, but arise from the beach area's development which, generally, predates the zoning regulations.

C. That the literal interpretation of the provisions of the Land Development Code would deprive the Applicant of rights commonly enjoyed by similar properties in the same district under terms of the Land Development Code.

D. That the Variance, as conditioned, is the minimum variance that will relieve the Applicant of an unreasonable burden caused by the application of the parking regulations to his property.

E. That the granting of this Variance, as conditioned, will not be injurious to the neighborhood or otherwise detrimental to the public health, safety or welfare.

F. That the condition or situation of the subject property is not of so general or recurrent nature as to make it more reasonable and practical to amend the Land Development Code.

G. That the condition imposed on the Variance is reasonably related to the impacts anticipated from the proposed use, and with the other Lee County Land Development regulations will protect the health, safety, welfare, and interests of the general public and visitors to the beach.

VI. PRESENTATION SUMMARY:

After the Hearing Examiner placed all witnesses under oath, Pam Houck, Division of Zoning and Development Services, presented the Staff Report in this request for a Special Permit and a Variance in the C-1 zoning district for property located at 1154 Estero Boulevard, on Fort Myers Beach. The Special Permit is to allow consumption on premises (COP) with outdoor seating; the Variance is from the required number of parking spaces for a restaurant. The regulations require 14 spaces per 1,000 square feet of floor area for restaurants. In this case that would require a total of 17 spaces; however, the Applicant is asking to provide only the six existing spaces.

Mrs. Houck referenced an aerial photograph and noted the location of the subject property (outlined in red) in the Times Square area of Fort Myers Beach. She pointed out the location of Helmerich Plaza and McDonald's directly across Estero Boulevard from the subject property. On either side of the proposed restaurant are two motels; the Ramada Inn to the south and Howard Johnson's to the north. One of these motels recently obtained a Special Permit for outdoor seating for their existing bar (Jimmy B's). The Times Square area contains restaurants, retail stores, jet ski businesses, etc.

The Applicant's intent is to change his existing real estate business office to a primarily "take-out" restaurant with outdoor seating. A small amount of indoor seating is proposed also. The Applicant intends to convert 1,106 square feet of the building to the restaurant use with approximately 142 square feet of this amount to be devoted to the indoor seating. Mrs. Houck noted that all this would take place on the first floor of the building; the second story of the building contains a rental apartment.

Presently, three parking spaces exist in the front of the site; the other three spaces are stacked on the side.

The Special Permit is to allow a 2-COP beverage license for beer and wine. There will be approximately twelve seats inside, and 50 seats outside. The proposed hours of operation are from 6:00 a.m. to 12:00 midnight, daily.

The Special Permit location is within 500 feet of several residential rental uses. She noted the approximate location of these units to the east, and to the northeast (along Crescent Street). There are also some mixed uses in this area, as well as multi-family uses further down Crescent Street (across from the back side of McDonald's). If the Special Permit is granted, this locational standard will be met. The outdoor seating does not require additional parking under Lee County regulations.

Staff is recommending approval of the Special Permit for the outdoor seating and the 2-COP liquor license with two conditions. The first condition limits the 2-COP beverage license in conjunction with a restaurant. Condition 2 limits the Special Permit to the 1,106-square-foot restaurant with twelve indoor seats and 50 outdoor seats.

Mrs. Houck noted that the Special Permit will not be needed if the Variance for the off-street parking is not approved. Staff recommended approval of the variance from the parking requirements with the condition that it is also limited to the 1,106-square-foot restaurant with twelve indoor seats and 50 outdoor seats.

The Applicant submitted a couple of traffic studies done for other restaurants in this area with the application. One is for the Matanzas Seafare Company located at the bridge on the bay side of the island; the other is for the McDonald's restaurant located across Estero Boulevard from the subject property. The Matanzas' study showed that approximately 37 percent of their customers either arrived on foot or by boat (there is a dock facility adjoining the site). The McDonald's study showed that approximately 70 percent of their customers arrived by foot.

The subject property is on the beach side of Estero Boulevard, and the proposed use is going to be geared towards the beach. A lot of pedestrian traffic occurs in this area. Additionally, the motels on either side have no food service - other than their bars. It is anticipated, therefore, that a lot of traffic will be drawn from these motels. The Applicant anticipates that approximately 95 percent of their trade will come from the beach. If, this is the case, this activity will actually draw less vehicular traffic than the existing real estate office.

Staff did find a hardship for this Applicant based on the existing, surrounding uses in the Times Square area, which in itself is very unique. A finding of hardship is necessary for approval of the variance. Staff recommended approval of the variance request, with conditions.

The Hearing Examiner observed that no condition had been recommended by Staff limiting outdoor entertainment, and questioned whether Staff had discussed with the Applicant the possibility of outdoor entertainment? Mrs. Houck stated that this had been discussed, but she had not recommended any conditions because this was in the heart of the Times Square area and was an appropriate place to have outdoor entertainment. Additionally, the County had a Noise Ordinance in place, and Staff had not felt that this type of conditioning was necessary for this location.

The Hearing Examiner referenced the Jimmy B's case, and noted that the outdoor use had been limited. Since the subject property was located between two hotels, there might be some concern. In response to a question by the Hearing Examiner, Carleton Ryffel, Applicant's representative, confirmed that Jimmy B's was located next door. The Hearing Examiner stated her belief that noise issues needed to be addressed in the instant case as were addressed in the previous case.

Jay Ursoleo, the Applicant, stated that he had no desire to have outside entertainment. He noted that Jimmy B's provided enough entertainment; he had received complaints from his apartment tenants about the noise from Jimmy B's. He also observed that there was enough music coming from Jimmy B's, so that he wouldn't have to pay for any.

The Hearing Examiner asked about the 6:00 a.m. time, and why it was necessary, to which Mrs. Houck responded that the Applicant intended to serve breakfast. In response to another question, Mr. Ursoleo indicated that beer and wine would not be served with breakfast.

Charles Bigelow, an attorney representing the Fort Myers Beach Civic Association and Judy FitzSimons, asked Mrs. Houck if this site was within the boundaries of the Town of Fort Myers Beach, to which she replied yes. Mr. Bigelow noted that, attached to the Staff Report, was a letter from Scott Whipple (Redevelopment Specialist with the Community Redevelopment Agency [CRA]). In response to questioning, Mrs. Houck stated her belief that Mr. Whipple was working on a study for the Times Square area, but, to her knowledge, this study had not yet been adopted by the CRA.

Mr. Bigelow indicated that the letter states "Mr. Ursoleo's proposal compliments the efforts of the Lee County Community Redevelopment Agency . . . ." and asked if these "efforts" were a Staff plan at this time? Mrs. Houck stated that this was her understanding. Mr. Bigelow asked if the intent was to submit the CRA Plan to the Town Council, when it was formed, for adoption? Mrs. Houck stated that she did not know. Mr. Bigelow noted, therefore, that the only information Mrs. Houck had regarding this Plan, was this letter indicating that there was a plan in progress, and Mrs. Houck replied he was correct. She thought she had seen a copy of the Times Square area plan, but still wasn't sure what it actually looked like.

Mr. Bigelow asked Mrs. Houck if she knew what issues this Plan was trying to address? Dawn Perry-Lehnert, Assistant County Attorney, objected that Mrs. Houck had already indicated she was not fully versed in this Plan, or what was going on with the Plan, and to continue asking questions about this Plan was unnecessary. Mr. Bigelow argued that he did need to ask a few questions because Mrs. Houck did have some knowledge and he was trying to define what knowledge she did have. If she did not have any knowledge, this was fine.

When asked what his point was, Mr. Bigelow replied that he was representing the Civic Association for Fort Myers Beach, as well as Judy FitzSimons, an individual. Their objective was to preserve, for the Town Council, any land use decisions on Fort Myers Beach which might have a significant impact on the island. A number of such proposals were scheduled to be heard by the Hearing Examiners, and they were now on the "eve" of the formation of the city. He was trying to demonstrate that there were plans in progress on which the instant proposal and the other forthcoming cases would bear significantly. He believed that, because of

these plans and the fact that the changes did not appear to be imperative, these decisions should be deferred, one way or the other, for the Town Council to determine.

With regard to "plans in progress," Mr. Bigelow stated that there were two plans in progress. There was obviously the CRA plan for the Times Square area, and there was also the Town's plan, which is being prepared in compliance with Chapter 163 mandates that a town or any local government develop a comprehensive plan. It was also clear that the impetus for the formation of the city was to address their land use issues on Fort Myers Beach. In light of these plans and other factors, these cases/decisions should be deferred until the city government is in place, instead of trying, "ad hoc", to create a plan for the city.

There were two ways for this deferral to be accomplished. One was to raise this issue in this manner; the other was for him to attack this particular application under the rules that "we play by" and build a negative record. His clients were seeking to preserve the decision, not to prejudice it; however, if it could not be deferred, then he had to prejudice it.

The Hearing Examiner asked Mrs. Lehnert if she had any response to Mr. Bigelow's statements. Mrs. Lehnert responded that, in effect, Mr. Bigelow was asking the Hearing Examiner to declare a moratorium on any zoning changes on Fort Myers Beach, by deferring the case. It was recognized that Fort Myers Beach would be a town in its own right very shortly as their Town Council elections were upcoming. However, no one in the County was sure what the Town Council would do about processing land use applications. There were different schools of thought as to whether the Town Council would continue to allow the County to act in its behalf for a certain period of time, i.e. making zoning decisions, etc., during which time the Town Council could make a smooth transition. It was Mrs. Lehnert's belief that, if the Hearing Examiner deferred this case, the Applicant could be waiting months or years for a decision because there was no time certain for its processing. This was an unknown and worked a hardship on the Applicant.

The Applicant has a right, under the County's regulations and the regulations currently in effect on Fort Myers Beach, to go forward at this time. It was her belief the Applicant should be permitted to proceed. If Mr. Bigelow had objections to the Variance and the Special Exception requests which could be made within the confines of the existing and applicable regulations, then he should make those objections. The Hearing Examiner should not, in effect, declare a moratorium in this case, because this issue was going to arise again in other cases which would be coming forward before the Town Council was seated.

The Hearing Examiner asked Mrs. Houck whether she had received any notification from their superiors or the BOCC that applications for cases on Fort Myers Beach should be handled in any manner which was different than that of cases in other parts of the County. Mrs. Houck replied that she had not. The Hearing Examiner questioned what, until Staff received this type of information or instruction, was Staff's responsibility? Mrs. Houck stated that it was to continue reviewing applications and issuing recommendations on all cases that were filed with the County. The Hearing Examiner observed that, therefore, it was not Staff's "place" to determine what should or should not go forward for hearing based upon its location in the County, and Mrs. Houck indicated that this was correct.

Based upon that information, the Hearing Examiner requested that Mr. Bigelow limit his remarks to the issues at hand, and noted that he could ask about Mrs. Houck's knowledge of the CRA plans. However, since she had already indicated she had no real knowledge of these plans, there was no need to go into any real depth or detail about them. The Hearing Examiner stated her understanding of the direction Mr. Bigelow was going, but noted that she understood and supported the County Staff's position as the Hearing Examiner's Office had also not received any direction from the BOCC about not allowing these cases to proceed. The BOCC was the existing governing body for Lee County, but the Town of Fort Myers Beach did not currently have a governing body. Therefore, there was no manner

in which the two government bodies could coordinate the handling of these cases. With that being the case, the Hearing Examiner ruled that her office properly had jurisdiction of the case before them and that Zoning Staff was correct in processing the application and bringing it forward for hearing. Mr. Bigelow was entitled to appeal or challenge that ruling in any manner he felt appropriate, i.e., circuit court.

Mr. Bigelow stated that it was not his intent to challenge the jurisdiction of the County; he was only appealing to the Hearing Examiner's discretion. His basis was that rezonings, Special Exceptions, and variances were done to implement a [local comprehensive] plan; there was no other reason for doing these zoning-type requests except that. Additionally, it was his opinion that Lee County's actions were not legal. He believed that, since County Staff was aware that the Town of Fort Myers Beach was attempting to prepare a comprehensive plan, on which the case at hand could have a direct effect, it was within the Hearing Examiner's discretion to either defer or to deny the application, unless some basis why this should not occur is demonstrated.

The Hearing Examiner disagreed with Mr. Bigelow's interpretation simply because the subject property was not governed by any other regulatory body. She noted that she was not disputing the fact that the property was located within the Town of Fort Myers Beach. So long as this property was governed by Lee County, she had jurisdiction of it; however, she had no discretion to refuse to hear the case as she had not been given this discretion by the BOCC. Finally, the decision on whether to proceed or not on Fort Myers Beach cases was a policy decision with county-wide implications; only the BOCC could make this policy decision. She was not empowered by the BOCC to make such a policy decision.

The Hearing Examiner acknowledged Mr. Bigelow's point was that the BOCC could not direct the Hearing Examiner in individual cases, but added that the BOCC could provide her with an overall policy directive, such as stating that no cases originating from Fort Myers Beach would be processed. Mr. Bigelow stated that, as everyone knew, the BOCC was not going to do this. In fact, Fort Myers Beach was now a city because of the BOCC's inattention to the problems in that area, and he knew that this inattention was going to continue.

The Hearing Examiner asked when the referendum was for the creation of the city, and it was noted that it was on or around July 25, 1995. The Hearing Examiner pointed out that the instant application was received by the County prior to the "Town" being voted in. Mr. Bigelow stated his understanding of this fact, but noted the vote was post-legislative by the State. This really did not go to these issues, but it did go to estoppel. The tragedy of all this was that they were going to build a negative record, and, because of this challenge, there would be no estoppel or vested rights created for the applicant.

Mr. Bigelow continued his cross-examination of Mrs. Houck by asking if Mr. Whipple's memorandum played any role in her evaluation of this application. Mrs. Houck replied no. He then questioned why it was attached to the Staff Report, to which Mrs. Houck responded as a courtesy to Mr. Whipple and for informational purposes. Mr. Bigelow questioned whether Mrs. Houck had any information which would cause her to conclude that the present use of the property was unreasonable? Mrs. Houck stated that this would depend on what Mr. Bigelow meant by "unreasonable". Mr. Bigelow asked, to her knowledge, the use provided an economically viable return? When Mrs. Houck replied that she didn't know, Mr. Bigelow queried if she have any indication that it did not?

Mrs. Lehnert objected and stated that she did not see the relevance of Mr. Bigelow's questions about the current uses versus the request for a different use. Mr. Bigelow explained that one of the considerations in a variance was whether there was a requirement that a use be changed because the present use was unreasonable, and thereby denied the property owner of constitutional rights. Mrs. Lehnert stated that the variance request itself was with respect to parking, and the current parking was not being changed. The Applicant was asking for a variance to legitimize the parking with what currently exists (six parking spaces).

Mr. Bigelow disagreed. What was being proposed was to change the parking so that a different use could be accommodated. It was not to bring the present use or the present level into conformity with the existing use.

Mr. Bigelow again asked Mrs. Houck if she had any knowledge that indicated that the owner was presently denied a economically viable use of his property, to which Mrs. Houck replied that she did not. Mr. Bigelow noted that, in fact, the property had been used for the existing purpose for some time. Mrs. Houck was not sure exactly how long but agreed that it had at least been there for several years. He asked if she knew of any reason by which the Applicant was being compelled to change the use? Was the County compelling the Applicant to change from the office use?

In the absence of the Assistant County Attorney, the Hearing Examiner objected to this line of questioning; noting that there had been no testimony that the Applicant was being compelled to do anything. She added that it was an accepted fact, both in state and county law, that any property owner has the right to ask for a change of use on his property; whether the new use was granted was within the discretion of the governing body.

Mr. Bigelow explained that his questioning was based on the fact that, for a variance to be granted, there must be a hardship, and this hardship must not be of the Applicant's making. He was trying to demonstrate that the decision to change the use was solely the Applicant's choice. They were under no compulsion; therefore, there was no hardship - except of their own making.

The Hearing Examiner stated her belief that the hardship went towards providing the number of parking spaces on the small lot; not changing the use. Mr. Bigelow argued that providing parking only became a hardship when the Applicant changed the use. The Hearing Examiner indicated that she understood his argument, but did not necessarily agree with it. Mr. Bigelow asserted that the hardship in this case was in not being able to comply with the regulations for the use that the Applicant was proposing. The Hearing Examiner asked the Assistant County Attorney if she wished to make any argument as to an owner's right to a use in a specific zoning district? In other words, a zoning district has multiple or numerous possible uses by right, and, so long as the property owner is within that zoning district, he can have any one of those uses if he can meet the other criteria; even if "meeting the criteria" means obtaining a variance.

Mrs. Lehnert agreed with the Hearing Examiner's statement, and added that, under Chapter 34 of the Land Development Code (LDC), there were considerations for granting a variance (Section 34-145). One of those criteria was "exceptional or extraordinary conditions or circumstances that exist which are inherent in the land, structure, or building involved, and that such exceptional or extraordinary conditions or circumstances create a hardship on the property owner, and are not applicable to other lands or structures or buildings." In this situation, the subject property was located in the "downtown" area (i.e., Times Square) of Fort Myers Beach. The property has C-1 zoning; the appropriate zoning to do what the Applicant is proposing to do. He is constrained only by the fact that this property is too small. [As an aside, Mrs. Lehnert stated her opinion that the Applicant should be making this argument - not County Staff.] However, in this instance, there is a piece of property which requires a variance based upon the property itself, i.e., the confines of the property, and what can or cannot be done on it.

The Hearing Examiner asked if it was the County's position that the use itself did not generate the hardship, but that the piece of property did? Mrs. Lehnert responded that, under the considerations outlined in the Zoning Ordinance, this was correct. The Hearing Examiner stated that the reason she had not requested that the Applicant argue this point was that Mr. Bigelow was questioning Staff's decision in this matter, and County Staff needed to be able to substantiate their decision; the Applicant should not be put in the position of arguing Staff's case.

After the Hearing Examiner asked Mr. Bigelow to get to the point of his questions, Mr. Bigelow asked Staff whether the decision to put a restaurant on this site was solely the Applicant's? Mrs. Houck replied "to her knowledge, it was as this was what was requested in the application. He asked her if she knew of anything which was compelling the Applicant to do this, and Mrs. Houck replied that she could provide Mr. Bigelow with her opinion if that was what he wanted. Mr. Bigelow restated his question asking if she knew of any compulsion, and the Hearing Examiner clarified "within the County's regulations?" Mrs. Houck replied no. Mr. Bigelow asked whether the present use of the site could continue without the variance, to which Mrs. Houck responded yes.

Mr. Bigelow questioned Mrs. Houck about the reference to Jimmy B's being an adjacent use. She explained that Jimmy B's was adjacent to one of the adjacent motels. In response to several other questions, Mrs. Houck replied that Jimmy B's was a bar that sold alcoholic beverages located approximately 100 feet from the subject property. She did not know if there were other bars within 500 feet of the subject property, and, when questioned about the Surf Club, admitted that she could not remember where it was located.

Noting the residential uses within 500 feet, Mr. Bigelow pointed out that this was significant because of Section 34-1264 (Sale or service for on-premises consumption). Mrs. Houck agreed. Mr. Bigelow then asked whether the presence of the residential uses was significant because of Section (b)(1) (Prohibited locations), which states:

- a. ... no establishment for the sale or service of alcoholic beverages for consumption on the premises shall be located within:
  - ...
  2. Five hundred feet of a dwelling unit under separate ownership ....

In response Mrs. Houck stated "with some exceptions", to which and Mr. Bigelow added that subsection 2. ended with "except when approved as part of of a planned development." Mrs. Houck pointed out that there were more exceptions than just that one.

Mr. Bigelow asked if it was also significant because of the location of other establishments in this area selling alcohol? Mrs. Houck replied that there were two methods for approval of a COP. Under certain standards an administrative approval could be obtained, but, under other circumstances, an applicant must go through the Special Permit (public hearing) process or be approved as part of a planned development. In the instant case, the Applicant is actually entitled to the two methods of approval. He chose to go for the Special Permit, because of convenience and less expense. If the variance were to be approved for the restaurant, the Applicant would be entitled to receive an administrative approval for the indoor consumption. However, because the outdoor seating is within 500 feet of those uses listed (i.e., residential, day care, etc.), the Applicant must obtain the Special Permit.

In response to Mr. Bigelow's request for LDC authority supporting her explanation, Mrs. Houck referenced Section 34-1264(a)(1) [Administrative approval] and noted that subsections a. through h. further set out what uses were entitled to administrative approval. Subsection h. lists "Restaurants groups II, III and IV," as being entitled to administrative approval. Mr. Bigelow read from this specific section:

Restaurants groups II, III and IV, and restaurant with brew public license requirements, provided the standards set forth in subsections (b)(2)b and (b)(3) of this section are met.

and asked if this was correct. Mrs. Houck stated that it was. Mr. Bigelow noted, therefore, that the prohibited locations under (b)(1) were not required, and Mrs. Houck indicated that was correct. Mrs. Houck clarified that she was referring to (b)(2)b. [Restaurants groups II, III and IV] on page 34-295. This subsection provides criteria for compliance. Mr.

Bigelow pointed out that one of the requirements under this section dealt with parking [subsection (3), on page 34-296] and was applicable to restaurants. This section states:

Any restaurant providing alcoholic beverages for consumption on the premises shall comply with the parking requirement set forth in section 34-2020(2)1.3.

He asked if there was anything in this section which caused Mrs. Houck to believe that this meant "or a less number of parking spaces, if a variance is granted." Mrs. Houck replied that, when a variance was granted, the Applicant was in compliance with the parking requirements. Mr. Bigelow maintained that the Applicant would not be in compliance with this section, but with the variance. Mrs. Houck and Mrs. Lehnert both noted that it was a variance from this section. Mr. Bigelow agreed, but questioned again whether the Applicant would be in compliance with the section, which the ordinance says he must comply with.

Mrs. Lehnert observed that they were asking the same question. Mrs. Houck has indicated that, if the Applicant gets a variance from this section, this variance made them be in compliance with the section. This was the purpose of the variance.

Mr. Bigelow held that this was an interpretation for the Hearing Examiner to make; however, if the Hearing Examiner were to refer to this section she would find that it doesn't say "or such lesser amounts as may be granted through variances." It says simply that the parking requirements of the section must be complied with. The Hearing Examiner asked Mr. Bigelow if he could point out any provision in the LDC that combined the required action with "or a variance if it could be granted"? Was this standard language somewhere in the LDC? Mr. Bigelow responded that, in most situations, the variance would not be; however, this was setting up standards for a Special Exception. The Hearing Examiner questioned whether Mr. Bigelow was arguing that locational standards were not subject to variances. Mr. Bigelow replied that, in the case of an alcoholic beverage, there was a specific requirement for parking, and his argument was that this was not variable. The Hearing Examiner stated her understanding of Mr. Bigelow's position.

The Hearing Examiner requested that Mr. Bigelow not ask Mrs. Houck for legal interpretations of the LDC, noting that some of his questions were asking for this. Mr. Bigelow observed that Mrs. Houck knew the regulations better than any of them, and he was only trying to get through this issue as quickly as possible. He concluded his cross-examination at that point.

Mr. Ryffel indicated that he would modify his presentation somewhat so that he could respond to some of the issues raised by Mr. Bigelow. He pointed out that he and the Applicant were implementing a comprehensive plan with this request. He admitted that it wasn't the Beach plan, but they were implementing an adopted plan by acting under the current rules. They filed this application in accordance with the rules, and it was accepted and reviewed by Staff.

In terms of the incorporation of the beach area, the vote was being appealed, so there was no Town of Fort Myers Beach at this point. It was unknown how this appeal would turn out. There have been articles in the newspaper about the (Town Council) elections and the possibility of runoff elections which would take additional time.

It was his opinion, based on what he has seen in dealing with other communities and cities, that delay was the cruelest form of denial, and he did not feel it was fair to the Applicant. The Applicant was operating under Lee County's rules in good faith, and Lee County needed to continue with the processing of this case.

In terms of the Staff Report, he stated that the Applicant was in agreement with and had no objections to Staff's findings.

Mr. Ryffel provided a short history of the Applicant's attachment to the beach area. Applicant's family had been on the island for approximately half a century. Mr. Ursoleo's mother started Jewell Real Estate in 1945, and his father had been involved in real estate and land use matters for beach properties. In fact, Mr. Ryffel assisted Mr. Ursoleo's father (now deceased) with several of his land use cases.

Mr. Ryffel also pointed out that the Applicant was a Realtor by profession as well as a builder. While it was true that Mr. Ursoleo was "looking out after his own interests," he had a genuine affection for the Beach. He and his family have been there for a number of years, and they do care about what happens on the Beach. Mr. Ursoleo feels that what he is doing is very appropriate for this area.

The upstairs (second story) of the subject property is a seasonal rental dwelling unit. Mr. Ryffel remarked that, in the past, both John Wayne and Chuck Connors had stayed in this unit.

Mr. Ryffel referenced his letter of July 19, 1995 (submitted as part of the application, Exhibit VI-D) which provided an explanation for the Applicant's request for the Special Permit. This letter also outlines very carefully what the hardship basis was, and he would be addressing it and responding to some of the questions raised by Mr. Bigelow.

In addition to the letter, there were four pages of other attachments to the application which embody the findings of traffic studies done for the Matanzas Seafare Company and McDonald's restaurant. These also provide justification for the requests. It was his belief that the parking, given these reports, was adequate for what was being proposed. As far as the general area itself is concerned, the subject property is located within the core of the island business community. This is, generally, a mixed use area, and largely a pedestrian area. The proposed use was one which he considered as "infill" development and a revitalization effort. He noted that it was not "infill" in the sense that the property was vacant (since it was a developed parcel), but that it was located within the confines of this generally intensive area and was a re-use of the property. Revitalization and redevelopment of an island developed such as Fort Myers Beach is a logical evolutionary stage in its life.

There are three motels immediately adjacent to the subject property, all owned by James Kotsopoulos: a Howard Johnson's, a Ramada Inn, and a Days Inn. In addition, Jimmy B's Beach Bar was attached to one of those motels. Directly across the street is a McDonald's within the Helmerich Plaza. Mr. Ryffel referenced the "hoopla" which surrounded the approval of the McDonald's restaurant, specifically the Civic Association's claims of "doom and gloom," how traffic was going to be congested, etc. The Association was very much opposed to the drive-thru as well; however, there had been none of the problems predicted by that association. The addition of McDonald's has revitalized this obsolete shopping center, which had been largely vacant, and has much improved this part of the island. In fact, in planning terms, McDonald's has been responsible for the removal of much of the blight, a word which the Civic Association likes to use a great deal.

After an interchange with Mr. Bigelow, Mr. Ryffel continued with his presentation, referencing the letter from the CRA. He noted that it stated the intended use was consistent with what the CRA perceived to be redevelopment plan for this area. Mr. Ryffel had personal knowledge that the CRA has been meeting and discussing the Times Square and other areas at the beach for several years. He acknowledged that he had not personally attended any of those meetings, but was aware that there were efforts underway to do something with this area.

Mr. Ryffel submitted a number of letters [Applicant's Composite Exhibit 1] of support from property owners either in the area immediately adjacent to the subject property, or within very close proximity. He added "certainly within 500 feet." One of letters, a form letter which he prepared, was distributed to some of the businesses and reads:

As a nearby property or business owner, I hereby support the application cited above for both the Special Permit and variance requested. Given the location of the property in a largely pedestrian area, the proposed use is one that is logical.

These letters were signed by various business owners such as Norman Primeau, West Coast Surf Shop; Tom Myers, the owner of the shopping center across the street which contains a variety of uses; the owners of the Sandman Motel; the Island Cozy Cafe (a potential competitor since it also serves breakfast, and beer and wine); Wings; Ramada Inn; Days Inn; Excel Hospitality, Inc.; letters from Helmerich Plaza; and other properties in the area.

Mr. Ryffel stated that Mr. Ursoleo currently has a real estate business at the subject location, as well as the upstairs seasonal rental unit. It was Mr. Ursoleo's intent to rent one of the currently vacant storefronts directly across the street in Helmerich Plaza for his real estate business, which will also remove more blight in this area.

In response Mr. Bigelow's questions about the continued use of the subject property, Mr. Ryffel explained that the Applicant wanted to build the real estate business into something bigger than it currently is, and wants to hire more associates. Mr. Ursoleo's mother started the real estate business, and then his father, and later the Applicant, became involved in it. However, he cannot expand the business because of the parking situation; so he preferred to move into the shopping center across the street to expand his real estate business.

In the "old days," when the subject structure was built, it was apparently fairly customary to have real estate offices on the beach; however, that is not true of today's market. The old structures/locations are being re-used for something else. The real estate offices are now located off the beach, and more to the interior of the county. He could not recollect any other real estate office currently located on the beach. This was probably the last one, and the property could have a better use due to the evolution of land uses in the area. This was a very common occurrence.

In response to an earlier question by the Hearing Examiner, Mr. Ryffel stated that the Applicant wanted to open the restaurant at 6:00 a.m. to serve breakfast.

In terms of the Special Permit, the CRA supported this application. Some discussion of outdoor seating is contained in the CRA's letter; outdoor seating is very common in this area. People obviously want to be outside when they are at the beach. The three adjacent motels owned by Mr. Kotsopoulos serve no food; the only service they have is "finger food" at Jimmy B's, such as little hot dogs, etc., in the afternoon. Jimmy B's does not, however, provide sandwiches. These motels have a combined total of approximately 100 rooms, and other similar motels are located nearby.

The Applicant is asking for twelve seats inside the restaurant. Mr. Ryffel noted that this was more at his suggestion than from the Applicant's desire. If they had not requested the indoor seating, they would not have needed the parking variance; only the Special Permit. Outdoor seating does not have any parking requirements. He asked the Applicant, however, to include this in the request to provide a place for customers when it was raining or for people who preferred air conditioning. He felt it would be a good business decision. The area behind this building could accommodate approximately 140 seats, but the Applicant is only asking for 50 seats outside, which they believe is more than adequate.

If the Hearing Examiner felt that the parking variance wasn't justified, then the Applicant would be willing to drop the indoor seating portion of the request. However, he felt that they could show hardship and prove that the proposed use made a lot of sense. In terms of hardship, parking is a "general" requirement. It was a County-wide rule based on various uses and these requirements were contained within a table. In his opinion, special locations and circumstances sometimes make this adherence a hardship. For example, going by the rules, the McDonald's

restaurant directly across the street would be short approximately 60 to 70 parking spaces. They were, however, granted a parking variance when they clearly showed the majority of their traffic was mostly pedestrian because of their location in the beach area.

He referenced the McDonald's survey attached to the application, which studied 15 beach-oriented McDonald's around the United States, and lists the percentages of their pedestrian traffic and drive in traffic. Two-thirds of these McDonald's had 100 percent of their traffic from pedestrians. When the case was heard for the McDonald's at Fort Myers Beach, the Applicant agreed to settle on a figure of 70 percent pedestrian traffic, even though they knew this was a low number. It worked fine, but it was very conservative.

This McDonald's is across the street from the beach; Mr. Ursoleo's property is directly on the beach, which means it will be even more pedestrian oriented. Matanzas Seafare Company is a restaurant on the bay, and is also pedestrian oriented. A study done during a week in peak season, revealed that 37 percent of their customers arrive by foot or by boat.

In that respect, it was his belief that the required parking should go from the "general" to the "specific." This case should be examined on its own merits. He estimated Mr. Ursoleo's pedestrian factor at 90 percent; therefore, their need was only two parking spaces - not the six existing spaces.

The subject property is limited in terms of its land. It is in a very special location where there is a very limited need for parking, given the use being proposed. It was his belief that, if this were looked at in the "bigger picture" in terms of traffic in this area, allowing this use will actually reduce traffic because guests from the motels will not have to drive somewhere to eat. They will be able to walk to the restaurant.

He pointed out that his July 19th letter also cites numerous Lee Plan Policies, Objectives, and Goals with which this property or use would comply.

He reiterated that, in his opinion, the "specialness" of the property had to be reviewed and acknowledged, which he felt proved the parking requirements are unreasonable for this site.

The Hearing Examiner questioned Mr. Ryffel as to his qualifications and asked if a copy of his resumé was on file with the Hearing Examiner's Office. Mr. Ryffel confirmed that it was on file, and the Hearing Examiner incorporated this document, by reference, into the record of this case and accepted Mr. Ryffel's appearance as a land use planner on behalf of the Applicant.

Mr. Ryffel stated his belief that his testimony and written arguments in his July 19th letter provided sufficient evidence in support of the Applicant's requests, particularly relating to the hardship issue. Additionally, there were letters of support for the requests.

He inquired whether the Hearing Examiner had any problems with the requests, based on what she had heard or read in the file, which he might need to respond to? He also questioned the time frame in which the decision might be rendered in this case as Mr. Ursoleo was anxious to begin preparing drawings and getting his remodeling underway for his real estate office relocation.

The Hearing Examiner addressed the 6:00 a.m. opening for the service of breakfast, and the fact that the Applicant did not anticipate serving beer or wine at this hour. Mr. Ursoleo interjected that the Hearing Examiner was welcome to include a stipulation (condition) that this would not occur, stating he had no objection to this. It was suggested that appropriate hours might be from 11:00 a.m., until 12:00 midnight.

With regard to outdoor entertainment, the Hearing Examiner noted that Mr. Ursoleo had expressed no desire for this; however, she had concerns about

any future owners or successors in interest. She questioned whether Mr. Ursoleo would have any objection to a condition on the Special Permit similar to that imposed on Jimmy B's to restrict the hours and any outside entertainment? Mr. Ursoleo answered that he had no problem at all with this type of conditioning.

Mr. Bigelow, in his cross-examination of Mr. Ryffel, noted that he did not have a copy of Mr. Ryffel's resumé, and asked Mr. Ryffel whether he was a land use planner, to which Mr. Ryffel replied yes. Mr. Bigelow questioned whether Mr. Ryffel was an expert in traffic analysis? Mr. Ryffel responded that he knew more about traffic, and its impact, etc., than a layman would know, but had no degree in traffic engineering or formal special training. However, he felt that he had some special training in traffic engineering from his experience with traffic aspects in land use planning.

In response to questions by Mr. Bigelow, Mr. Ryffel stated that he had prepared the application, and the only traffic information that he had submitted with that application were the studies for the site across the street (McDonald's) and the Matanzas Seafare Company. He believed these reports were germane. Mr. Bigelow noted, therefore, that the Applicant's traffic analysis was based on taking studies which were applicable to McDonald's and Matanzas Seafare Company, and interpreting them for the subject site. Mr. Ryffel indicated that this was correct. Mr. Bigelow asked whether Mr. Ryffel had done any comparison of the traffic on the subject site with its present use versus the use which was proposed? Mr. Ryffel replied that he had thought about doing this, but had come to his conclusion about the traffic impacts and parking needs. Mr. Bigelow asked whether Mr. Ryffel had done any studies, and Mr. Ryffel stated no, he had used common sense. Mr. Bigelow asked if Mr. Ryffel had submitted any studies? Mr. Ryffel responded that, other than the two off-site studies, he had not. Mr. Bigelow then asked if any studies by anyone else for the subject site had been submitted, and Mr. Ryffel answered no.

Mr. Bigelow stated his understanding that Mr. Ryffel's resumé would be made part of the file, and the Hearing Examiner confirmed this. She explained that this was standard procedure. Mr. Bigelow stated that he had not objected to Mr. Ryffel's opinions, except in the area which he had just examined. He placed an objection on the record, and moved to strike Mr. Ryffel's testimony as to traffic generation and his opinions in that regard because Mr. Ryffel was not qualified as an expert in that field.

The Hearing Examiner asked County Staff if they had any response to this objection. Mrs. Lehnert indicated that she did not wish to respond in the Applicant's place, but it appeared to her that, in this type of request, a traffic study was not required. It was being provided to give the Hearing Examiner additional information on which to make a decision; it was not required that a traffic study be done. She also noted that it was her understanding that Mr. Ryffel had not been the person who had done these traffic studies; an engineer had done these studies. If these studies were done by an engineer who routinely did these types of studies, this gave more validity to the studies.

The Hearing Examiner stated her understanding of Mrs. Lehnert's response was that the County's regulations did not require the Applicant to submit a traffic study for this type of application. Mrs. Houck clarified that the variance request does not require this study. The Special Permit request only requires an analysis, and what Mr. Ryffel submitted was sufficient for this type of application. A full-blown TIS (Traffic Impact Statement) was not required. The Hearing Examiner asked Mrs. Houck, as a land use planner also, whether she had any doubts or objections to any of the information which Mr. Ryffel had submitted regarding the traffic assumptions, to which Mrs. Houck replied no.

The Hearing Examiner advised Mr. Bigelow that she was not going to grant his motion in its entirety. She recognized that Mr. Ryffel was not a traffic engineer; however, since County Staff had not had any problem with the information or with Mr. Ryffel's conclusions, she would accept these conclusions and Staff's position. She reiterated that she did

recognize Mr. Ryffel was not an engineering expert so far as traffic was concerned. It did not appear, either, than Mr. Ryffel had held himself out to be an expert in this field.

Mr. Ryffel stated that, in the planning profession, it was very common to use information derived from other experts; this was part of the process in reaching a conclusion. He believed that what he had done was very logical. He believed the traffic reports, in the context of the location of the two other properties, made very good sense to anyone with common sense. It was pretty obvious what the conclusion should be. As was pointed out, he is not a traffic engineer, but he was a planning expert and had been working on projects for 23 years; therefore, he should know something about how things work.

Mr. Bigelow again objected, pointing out that Estero Boulevard, under the Lee Plan, was considered a constrained road, and the Plan requires any traffic impacts - any impacts at all on Estero Boulevard - to be mitigated. No trip/traffic mitigation and no competent substantial evidence has been submitted in this case concerning these traffic impacts.

As to Mr. Bigelow's last comment, Mr. Ryffel stated his belief that the Applicant has shown in their presentation that, while Estero Boulevard is a constrained roadway, the effect of what the Applicant was proposing would be less than what exists today.

The Hearing Examiner stated that she would conduct a site visit prior to rendering a decision in this matter. Considering that a Special Permit has already been granted for Jimmy B's bar next door, and the fact that the individual property sizes at the Beach were small, it was her inclination to approve the Applicant's requests - with conditions. These conditions would be similar to others which have been recommended in similar cases discussed during the course of this hearing, as well as those recommended by Staff for these requests. She would however, reserve this final decision until after she had visited the site and had determined whether any other conditions might be appropriate for this site and the proposed use.

VII. PUBLIC PARTICIPATION: The following persons appeared at the hearing or became "parties of record" in this case by submitting written materials:

ADDITIONAL COUNTY STAFF:

1. Dawn PERRY-LEHNERT, Assistant County Attorney, Lee County, P.O. Box 398, Ft. Myers, FL 33902-0398

FOR:

1. Frank W. HELMERICH, c/o Huntingburg Corp., 5845 Riverside Cir., Ft. Myers, FL 33919

Letter: I have no problem with the parking variance because Ft. Myers Beach is totally unique. No property on the beach meets the current code for parking or other DSO requirements in that much of it was built in the 1950's and 1960's.

2. Andrew C. SEPESI, 500 Estero Blvd. #294, Ft. Myers Beach, FL 33931  
Comment Card: Property owners should be able to use their property for best use and improvement.

3. James KOTOSOPOULOS, Pres., Consolidated Construction Corp., Consolidated Realty Holdings, Inc., United Realty Holdings, Inc., c/o Days Inn, 1130 Estero Blvd., Ft. Myers Beach, FL 33931

Letters: Sent five letters as property and business owner of above named companies, as well as Days Inn, Ramada, Edgewater Resort Motel, and Excel Hospitality, Inc. All letters in support of application, and state the following reasons for support: "Given the location of (subject) property is in a largely pedestrian area, the proposed use is one that is logical." "Our customers would be able to walk to the proposed use site and would not require the use of their vehicles." "Our hotel has a high occupancy and my guests would be able to walk to the proposed use site and would not require the use of their vehicles." "The proposed use site

would be a welcome addition to our island and a convenience to nearby residents of Fort Myers Beach and the visiting tourists in our area." [See Applicant's Composite Exhibit #1]

4. HELMERICH PLAZA (Units 1149, 1145, 1141, 1139, & 1133 Estero Blvd., Ft. Myers Beach)

Letters: Five letters from shop owners within Helmerich Plaza: As a nearby property or business owner, I hereby support the application cited above for both the Special Permit and variance requested. Given the location of the property in a largely pedestrian area, the proposed use is one that is logical. [See Applicant's Composite Exhibit #1]

5. Tim ANGLIM, c/o Wings, 150 San Carlos Blvd., Ft. Myers Beach, FL 33931

Letter: Same as Letter #4 above. [See Applicant's Composite Exhibit #1]

6. Bradford J. BERRON, c/o Island Cozy Cafe, Inc., 1021 Estero Blvd., Ft. Myers Beach, FL 33931

Letter: Same as Letter #4 above. [See Applicant's Composite Exhibit #1]

7. Richard N. JACK, c/o Sandman Motel, 1080 Estero Blvd., Ft. Myers Beach, FL 33931

Letter: Same as Letter #4 above. [See Applicant's Composite Exhibit #1]

8. Thomas F. MYERS, c/o Seafarer's Village, 1113 Estero Blvd., Ft. Myers Beach, FL 33931

Letter: Same as Letter #4 above. [See Applicant's Composite Exhibit #1]

9. Norman PRIMEAU, c/o West Coast Surf Shop, 1035 Estero Blvd., Ft. Myers Beach, FL 33931

Letter: Same as Letter #4 above. [See Applicant's Composite Exhibit #1]

AGAINST:

1. Charles BIGELOW, Esq., 2242 Main St., Ft. Myers, FL 33901

Comment Card: Representing Ft. Myers Beach Civic Assoc.; Judy FitzSimons  
Testimony: See Section VI. Presentation Summary.

VIII. LEGAL DESCRIPTION:

From the Southwest corner of Block E, CRESCENT PARK ADDITION, as recorded in Plat Book 4, Page 46 of the Public Records of Lee County, Florida on the East line of Section 24, Township 46 South, Range 23 East, run along said line for 53.28 feet to the South line of existing county road (Estero Boulevard) right-of-way 50 feet wide;

THENCE run Northwesterly at an included angle of 69°48'15" with said section line, along the South side of said right-of-way for 122.63 feet to the POINT OF BEGINNING of the land hereby conveyed;

THENCE continue along the South line of said right-of-way for a distance of 35 feet;

THENCE run Southwesterly perpendicular to said road a distance of 179 feet, more or less, to the Gulf of Mexico;

THENCE run Southeasterly along said Gulf of Mexico to a point perpendicular to the POINT OF BEGINNING of the lands hereby conveyed, being approximately 35 feet, more or less;

THENCE run Northerly and perpendicular with the right-of-way of the existing county road 179 feet, more or less, to the POINT OF BEGINNING, together with all Riparian rights. thereunto belonging, being on Estero Island, Lee County, Florida.

IX. UNAUTHORIZED COMMUNICATIONS:

Unauthorized communications shall include any direct or indirect communication in any form, whether written, verbal or graphic, with the Hearing Examiner, or the Hearing Examiner's staff, any individual County Commissioner or their executive assistant, by any person outside of a public hearing and not on the record concerning substantive issues in any proposed or pending matter relating to appeals, variances, special

permits, rezonings, special exceptions, or any other matter assigned by statute, ordinance or administrative code to the Hearing Examiner for decision or recommendation .... [Administrative Code AC-2-5]

No person shall knowingly have or attempt to initiate an unauthorized communication with the hearing examiner or any county commissioner [or their staff] .... [LDC Section 34-52(a)(1), emphasis added]

Any person who knowingly makes or attempts to initiate an unauthorized communication ... [may] be subject to civil or criminal penalties which may include: [Section 34-52(b)(1), emphasis added]

Revocation, suspension or amendment of any permit variance, special exception or rezoning granted as a result of the hearing examiner action which is the subject of the unauthorized communication. [LDC Section 34-52(b)(1)b.2.]; OR

A fine not exceeding \$500.00 per offense, by imprisonment in the county jail for a term not exceeding 60 days, or by both such fine and imprisonment. [LDC Section 1-5(c)]

X. APPEALS:

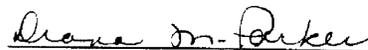
This Decision becomes final on the date rendered. A Hearing Examiner Decision may be appealed to the Circuit Court in Lee County. Appeals must be filed within thirty (30) days of the date the Hearing Examiner Decision is rendered.

XI. COPIES OF TESTIMONY AND TRANSCRIPTS:

A. A complete verbatim transcript of the testimony presented at the hearing can be purchased from the Official Court Reporter, 20th Judicial Circuit, Lee County Justice Center, Fort Myers, Florida. The original documents and original file in connection with this matter are located at the Lee County Department of Community Development, 1831 Hendry Street, Fort Myers, Florida.

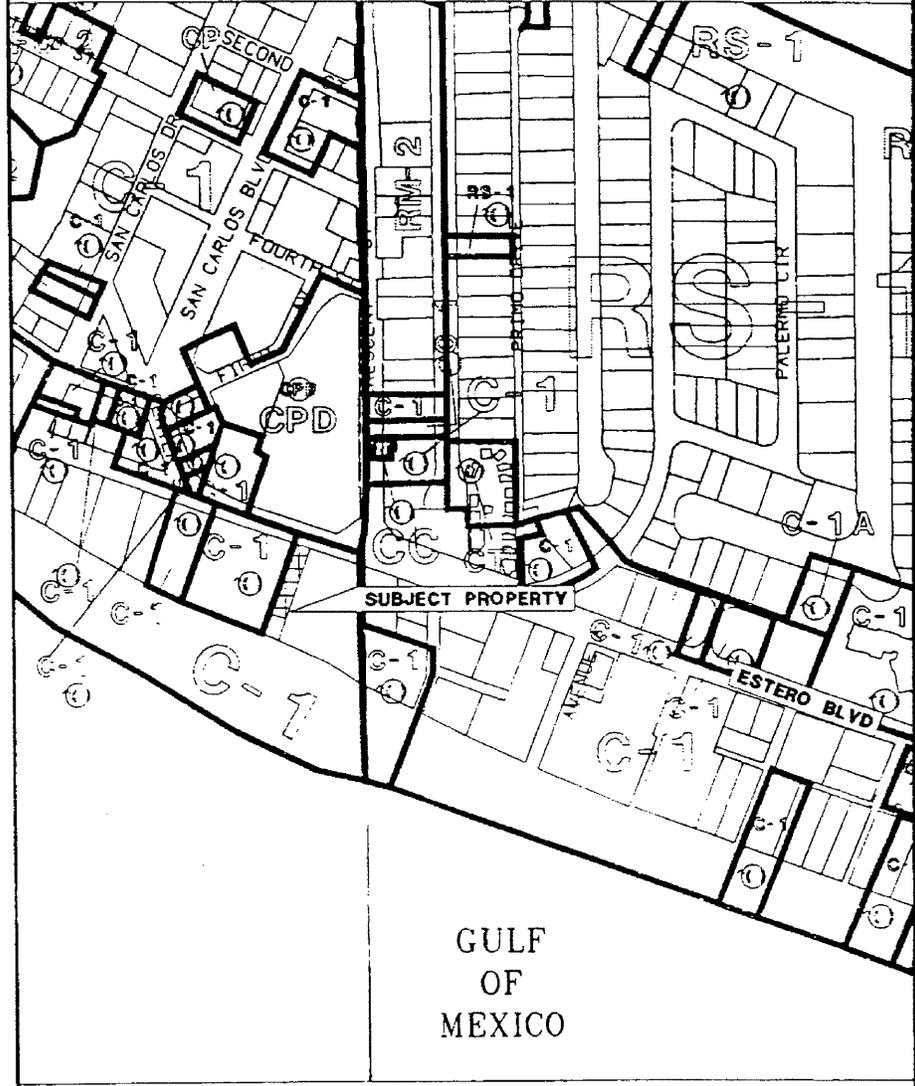
B. The original file and documents used at the hearing will remain in the care and custody of the Department of Community Development. The documents are available for examination and copying by all interested parties during normal business hours.

This decision is rendered this 10th day of October, 1995. Copies of this decision will be delivered to the offices of the Lee County Board of County Commissioners.



DIANA M. PARKER  
LEE COUNTY HEARING EXAMINER  
2269 Bay Street  
Post Office Box 398  
Fort Myers, FL 33902-0398  
Telephone: 941/338-3190

# ZONING MAP



GULF  
OF  
MEXICO

**A** 95-07-161-02 S



RESOLUTION OF THE TOWN COUNCIL OF  
THE TOWN OF FORT MYERS BEACH, FLORIDA  
RESOLUTION NUMBER 07-13

WHEREAS, Estero Beach Holdings LLC (hereafter "Appellant") is owner of one (1) platted lot, with a street address of 1154 Estero Boulevard, Fort Myers Beach, Lee County, Florida and legally described in Exhibit "A", which is attached hereto and hereby incorporated by reference; and

WHEREAS, Appellant requested an administrative determination from the Town of Fort Myers Beach in Case Number FMBADD2006-00004 regarding the expansion of alcoholic beverage consumption on-premises and reduction of parking on the subject property (and related issues of seating capacity on the subject property) from that approved pursuant to SP 95-07-161.02S, without public hearing approval; and

WHEREAS, in response to Appellant's request, the Town Director of Community Development Department found that the Town did not approve expansion of the area for on-premises consumption of alcoholic beverages and that the Town did not approve a reduction of the parking required by SP 95-07-161.02S for the subject property (with related findings regarding seating capacity on the subject property) and issued an administrative determination in Case Number FMBADD2006-00004 with such findings; and

WHEREAS, Appellant thereafter filed an appeal of the Town's administrative determination, styled as Case Number FMBADM2007-00001 for a public hearing before Town Council of the Town of Fort Myers Beach, Lee County, Florida; and

WHEREAS, the public hearing on FMBADM2007-00001 was properly noticed and duly held on February 20, 2007, before the Town Council; and

WHEREAS, following consideration of testimony from the Appellant, staff, the public, and further consideration of all documentary evidence presented by all persons, the Town Council granted Appellant's appeal.

NOW THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA, AS FOLLOWS:

SECTION 1. Finding of Fact and Conclusions. The Town Council makes the following Findings of Fact and Conclusions: The Town Council draws an inference from the evidence provided that a parking agreement was in existence at all relevant times and the staff report is therefore without merit. The Town Council directs Town staff to determine the seating capacity of the subject property, including the addition thereto, after due consideration of Town requirements and life/safety requirements set forth by the Fort Myers Beach Fire Control District and otherwise.

.SECTION 2. Determination by the Town Council. The Town Council finds as follows:

- A. The Town did previously properly approve expansion of the area for on-premises consumption of alcoholic beverages in accordance with Appellant's appeal; and
- B. The Town did previously properly approve a reduction of the parking required by SP 95-07-161.02S for the subject property.

The foregoing resolution was adopted by the Fort Myers Beach Town Council upon motion by Councilmember Meador and second by Councilmember Reynolds and ,being put to a vote, the result was as follows:

Dennis Boback, Mayor	AYE
Don Massucco, Vice Mayor	AYE
Garr Reynolds	AYE
Charles Meador, Jr.	AYE
William Shenko, Jr.	AYE

APPEAL DULY **GRANTED** this 20th day of February, 2007.

ATTEST:

TOWN OF FORT MYERS BEACH

By:   
Michelle D. Mayher, Town Clerk

By:   
Dennis C. Boback, Mayor

Approved as to form by:

  
\_\_\_\_\_  
Anne Dalton, Town Attorney