

MINUTES
FORT MYERS BEACH
Local Planning Agency

Town Hall – Council Chambers
2523 Estero Boulevard
Fort Myers Beach, FL 33931

Tuesday, May 10, 2011

I. CALL TO ORDER

Meeting was called to order at 9:02 AM by Chairperson Joanne Shamp. Other members present:

Bill Van Duzer
John Kakatsch
Hank Zuba
Rochelle Kay
Carleton Ryffel
Tom Cameron

LPA Attorney Marilyn Miller

Staff present: Community Development Director Walter Fluegel, Tina Ekblad, Planning Coordinator; Keith Laakkonen, Environmental Services Coordinator; and Town Manager Terry Stewart.

II. PLEDGE OF ALLEGIANCE and INVOCATION

Ms. Kay

III. SPECIAL COMMENT-TOWN MANAGER TERRY STEWART

The board and Mr. Stewart welcomed new member, Tom Cameron. Mr. Stewart explained that his presence at this meeting is basically to help clarify positions regarding the COP issue on the beach, since this topic has generated discussions and confusion at other levels. He said that the LPA worked hard on a resolution back in 2009 but for some reason it had never been brought forward for the Council's review at that time. Since then, he discovered it and sent it forward but the Council "rejected the premise that was within the resolution," in that that resolution dealt with the Comp Plan "and the Comp Plan essentially did not provide for it, therefore it was barred." The Council's policy decision, he said, was that it should be dealt with within the LDC. He explained that there is a "unique situation" on the island in that there are some locations where there is service of alcohol "within the confines of the property owner's property that happens to go out onto the sand where they can serve alcohol and alcohol can be consumed at those locations." He continued that there are no rules or regulations in place at this time to control how this is done by those locations or any other locations that might be in this position in the future. Now there is service of alcohol on the beach in places with the Town having no regulation over this so the "Council's vision was from a policy matter,

that this board should undertake an opportunity to provide a recommendation of frameworks” to bring to Council about how to regulate and manage the service of alcohol on the beach in an equitable fashion. Mr. Stewart continued to explain the Council’s position regarding sending this topic and said that the new Community Development, Mr. Fluegel, has been directed by Council to provide a new framework for a different course of action to revise this item.

Ms. Shamp thanked him for addressing the LPA directly about this and asked if there were any questions or comments at this time but asked that public comment be held until later in the meeting.

IV. MINUTES

A. Minutes of April 12, 2011

Motion: Ms. Kay moved to accept the minutes, as corrected with minor edits.

Seconded by Mr. Kakatsch;

Mr. Ryffel asked that his recorded comments be changed for clarity.

Vote: Motion passed 7-0.

V. PUBLIC HEARINGS

A. DCI 2011-002 ROWE RPD

LPA swore the witnesses, as well as all those present who will make public comments. Staff testified that there was public notification in local newspapers as Ms. Shamp asked members for any ex-parte communications. Mr. Van Duzer made a site visit, as did Ms. Shamp who also received an email but didn’t respond; Mr. Ryffel made a site visit and received 2 calls from citizens who wondered what this involved and he did some “historical research” talking to other property owners.

Ms. Shamp called for the applicant to present its case. Mr. Hartzall of Pavese Law Firm, spoke for the applicant, Mr. and Mrs. Chris Rowe of 324 Estero Blvd., property owners. He gave a brief background of the case and the reasons why they are requesting a rezoning of the property from Residential Multi-family to Residential Planned Development. He stated that they were told by their realtor at the time they purchased the property that they could legally have up to 4 units there and, based on their needs at the time, that was reasonable. They have a disabled son who in their care and they wanted to build him a separate quarters close to family, even though he is fairly well functioning, to give him some independence. They met with Dr. Shockey who advised them they could not use the property as a 4 unit, but he researched and learned that the property had been used as a triplex in the past and could be eligible for 3 units under the Pre-disaster Build-back regulations if the applicant would apply for this planned development process. He stated that the applicant is aware that this is a cumbersome process but it allows for flexibility by the Town in placing certain restrictions and regulations on any approvals.

The applicant testified that the existing building is a 2 story, stilt building built in 1963 with additions from 1970, and not structurally stable. The Pre-disaster Build-

back regulations allow for structures like this to be essentially rebuilt before a disaster can cause it to be totally demolished. Mr. Hartzall asked that Alexis Crespo, Planner, Bill Glass, Architect and Strictland Smith, Engineer, be recognized in the record as experts in their fields but Ms. Miller opined that this is not required in this quasi-judicial hearing. Ms. Shamp appreciated the statement of their credentials for the record:

Alexis Crespo, certified Planner, with a Bachelor's degree in Urban and Regional Planning, is a lead AP (Accredited Professional) and is President of the local chapter of the Caloosa Planning and Zoning Assoc. and has been recognized as an expert in planning and zoning in local counties.

Mr. Smith is a registered professional engineer in the state in matters of civil engineering and drainage matters. Mr. Glass is an architect G2 Architecture, an AIA, and an expert in architecture.

Ms. Crespo testified with a Power Point presentation. She gave an overview of the topics she would discuss as they related to the codes, Comp Plan, LDC, etc. The request is to rezone the 6500 sf property to allow for a residential planned development to provide for a 3 unit parcel. She said that the property is actually 19,000 sf with about 12,300 of it seaward of the coastal control line and the remaining area is the 6500. The existing structure is built to 11.3' which is "way below" the current FEMA standards, and this structure has been approved as a triplex use. To the north are single housing units of Pink Shell, commercial planned development; to the south is zoned as beach, environmentally critical; the east has mixed residential use, with a condominium resort; west is CPD zoning with mixed residential future land use and currently has an 8 story complex. Additional photos showed surrounding properties further out in that area and Ms. Crespo gave details about these, commenting that the subject property is the only one still standing that is outdated and single story. She also showed all of the different zoning districts in this area. Ms. Crespo continued that approval of this application would allow for the new construction to be up to current FEMA standards, address general safety issues and improve aesthetics overall. The applicant is requesting the use as a triplex with standard accessories, such as pool and fencing, and parking will be under the building with a maximum number of spaces in accordance with the LDC.

Ms. Crespo stated that the Master Concept Plan (in packets) is proposed with 2 deviations: the first from table 34-3 of the LDC and applies to maximum heights in the zoning district, 30 ft. and 3 stories but the applicant is requesting 35 ft and 4 stories, due to current compliance requirements and compatibility in the neighborhood. She said that staff has agreed with this deviation; the second is from 34-3237 of the Pre-disaster Build-back provisions involving square footage (she passed out a floor plan). The plans provide for 3000 sf per unit and show an increase of the pre-existing structure. She stated that staff has found that this will not negatively impact surrounding area or the health, safety or welfare of the Town.

The presentation continued to show more views of the property and the proposed changes as they impact the neighborhood. Staff has included a waiver from TIS because there is such minimal impact from this request. Ms. Crespo discussed the impact of the proposed change on Chapter 34 and said that this application meets all of the setback requirements, special requirements of the zone and is consistent with Ch 34. There will be no impact to the natural resources on the beach and the environmentally critical area will remain the same. Ms. Crespo referred to Comp Plan compliance 4B2 and said that the application is consistent with those provisions as well as 4B8 (Recreation Land Use). Policy 4B1, Pre-disaster Build-back, looks at density of the property, allowing the property to be restored back to that density, and RPD zoning; this application is in compliance with this policy. Policy 4E2, coastal setbacks, does not apply since there is no construction proposed to impact this area. Ms. Crespo ended by opining that the proposal and application are in compliance with the Town of FMB Comp Plan and said that the staff report supports approval of the application, with 6 conditions, and the applicant is in agreement with those conditions.

Ms. Shamp opened the floor for LPA questions. Ms. Kay asked about the height of the building and the fact that applicant is stating that there is no impact on the neighborhood when she said there has been concern by neighbors. Mr. Hartzall said that this is because some of the neighbors would like to see a short structure remain there but what is being proposed is within their rights as to what is allowed.

Mr. Kakatsch asked if the building will actually be 52 ft. high and the applicant agreed, adding that FMB measures from the base flood line (Ms. Shamp verified this in the code).

Ms. Shamp asked if the 35 ft. includes the cupola. They were not readily able to give the additional square footage of this. She also asked if there was a possibility to move the structure landward to prevent changing the view; this is not possible without encroachment.

Mr. Zuba asked about the total sf of the previous triplex that was on the site and he was not pleased with receiving a new floor plan at this late time. He said this is a substantial increase in the sf and the applicant agreed that it must be due to the FEMA standards, etc. Mr. Zuba asked about the designation of 3 of the "multi-family units" to be used as short-term rentals. The applicant would like to reserve that option but Mr. Zuba said this would make it a commercial use. He also requests that staff give a report on the current condition of the building and how it is considered unsafe. The applicant clarified this by saying that they are not suggesting that the building is unsafe in that it should be condemned but rather that it does not meet current codes for structures in the flood zones. Ms. Crespo interjected that, if the LPA objected, the applicant would consider removing their rental request from the application.

Ms. Shamp asked for the staff testimony and noted for the record that Mr. Stewart left the meeting. Ms. Chapman addressed the meeting on behalf of staff of FMB. She

read 2 letters that were received this morning from time-share residents of the adjoining property (see attached). One was from a weekly owner of Beach Club 1, unit 393, and it stated that the owners object to the rezoning. The other letter was from a weekly owner of Beach Club 1, #326, who also objected due to the impact the proposed building would have on their view and sunsets. She testified that the applicants did a thorough job in their presentation and their application. She said the property is within a V zone and the base flood elevation there is 17 ft. In general, staff agrees with the applicant's proposal and she addressed each segment.

Ms. Chapman referred to the first deviation, dealing with height from 30 ft, 3 stories to 35 ft, 4 stories, and said that the LDC dictates that height is measured from base flood elevation level, without roof structure measured in. She stated that the second deviation deals with the interior square footage and the applicant will amend their requested sf down closer to 9000 sf. Policy 4D1 was used to address this and it is consistent. Staff recommends the rezoning with the following conditions:

1-proposed buildings and all amenities must comply with the FEMA regulations at the time of the development order; 2-reiterate that the cupola remains uninhabitable space; 3-a commercial grade sprinkler and alarm system is included in the plans and installed at construction; 4-applicants must meet all environmental requirements of the LDC, including but not limited to dune vegetation and sea turtle lighting, etc.; 5-at the time of development order, the applicant must address all storm water issues and use best storm water practices to address any issues that remain on site; 6-applicant will provide any FL DEP approvals and permits, along with their development plans, at the time of their development order.

Ms. Shamp asked for LPA questions directed at staff. Mr. Kakatsch asked how many elevators were planned and the applicant answered that there is only one.

Mr. Van Duzer stated that Policy 4E1 says "up to the original square footage" but that is not what the applicant is proposing. Ms. Chapman replied that the Pre-Disaster plan allows for deviation, as does the Planned Development process to give flexibility in permitting. Mr. Fluegel added that under the policy it also states "existing lawful density and intensity." He said that 4C2 is the only place where the word "intensity" is used in relationship to commercial, so this is an area of "policy interpretation." He said that staff felt that there is enough latitude therein to address the sf or "intensity" issue.

Ms. Shamp asked what the maximum sf for the lot size normally, without a pre-existing structure. Ms. Miller referred to Table 34-3 wherein it talks about RM but it is confusing and she opined that an argument could be made to build to the setbacks and the maximum height.

Mr. Cameron asked if the rental units would then qualify this as a commercial use. Ms. Miller stated that that area is exempted.

Mr. Zuba said that this “troubles” him because it is a major increase in “density and intensity.” Mr. Fluegel attempted to clarify that “density” in this instance refers to the number of units and not the sf, which is “intensity.”

Mr. Fluegel said that this comes down to the intent of pre-disaster policies because property owners who want to make improvements, run into these problems of the “50% rule,” which dictates that “once the value of the improvement exceeds 50% of the depreciated value of the existing improvements,” the entire structure must be rebuilt in compliance with current FEMA standards, which are arduous and costly. He said that the basic intent of the policy is to create the economic incentive whereby an owner would want to build back and elevate. Mr. Zuba commented that he understands the intent of the Pre-Disaster build-back is to elevate and get a better unit; however, he questions whether “buying 6 ft. of elevation and the incentive for that is giving 10,000 sf of residential area” is a fair trade. He worries that this is a “very troublesome precedent.” Ms. Chapman pointed out that it is important to look at the context of each case; for example this property is located between 2 very tall, denser usage structures.

Short recess at 10:42 AM; reconvened at 10:59 AM.

Ms. Shamp opened public comment.

John Boucher, from Estero Island Beach Villas addressed the meeting, adding that his property is not a “time-share,” as referred to by the applicant, and said there are 42 units with 42 owners. This property shares a property line with the subject property. He gave a brief history of the property, which is now owned by the applicant, and said that there have been many complaints since they took over from the residents at the Villas, including having police respond to remove their renters from the Boucher’s pool. He said that this new proposal will make the already nuisance property “compounded by 3 times,” with the addition of units to rent. He said that the family dwelling approach is fine but the application says possible rental units, and even though the applicant says he’s willing to withdraw that, Mr. Boucher has no confidence in that promise because there is no way now to enforce the short term rental issue. He said that this proposal will go from 1680 sf interior cottage to 13,650 sf, adding that the public hasn’t been given the edited floor plan which just appeared today, and feels this is a huge deviation. Mr. Boucher said that the other deviation talks about the allowance from 30 ft. to 35 ft. and said that the “35 ft.” is really 60 ft. because there is 17 ft. FEMA regulated finished floor plus 35 ft. to the soffit and a peak that is about 8 ft., taking it up to 60 ft., making this a building about 38 ft. wide by over 60 ft. tall. He continued and pointed out that the application says that this proposed height “will not impact existing views of the Gulf of Mexico from adjacent properties;” he said that this is not so. He asked that the LPA consider the size, the negative impact on the adjacent properties, the “very unreasonable deviation requests” and the misleading statements in the application, and urged the LPA to recommend that this be denied.

Ms. Lucinda Keller addressed the meeting and said she has lived here for many years and seen this “Déjà vu” before and said it seems like the focus of the Town is on the NW area of the island and feels there is too much influence in some areas. She feels that there is too much favoritism for certain people and that granting this proposal is unfair.

Mr. Larry Crossman of 250 Estero Blvd., the Estero Island Beach Villas, and said that since the current owners have taken over the subject property, there have been constant problems with renters there disturbing the neighborhood with their disregard of the other properties. He said there are spring-breakers climbing over fences into neighbor’s pools, trashing properties, partying and having police respond to quiet them down and does not want to see this “times 3” with the addition of units. He added that it will also obstruct their view and said that there was never a problem with the previous owners for all the years they were there. He is opposed to the application.

Mr. Jim Schuster was sworn in and addressed the meeting. He said he has owned his unit at Beach Club 1 about 23 yrs. and he wanted to voice his concerns and represents several of the other owners there. These owners feel that their view will be constructed and they wanted to be on record that they object.

Ms. Shamp closed public comment and invited the applicant to present further testimony but he asked for Mr. Ryffel’s comments first.

Mr. Ryffel said that he used his background as a planner to research this so he could bring a different view to the board. He agreed that the applicant and staff reports are very similar so he referred to the staff report where he made his notations for comment. Mr. Ryffel pointed out the reference to a “single-family residential” on the first page because as it applies to 4E1 in the Comp Plan, this is an important factor. On pg 3, it discusses “historically documented units” and he said he has “real doubts about that” because a triplex is 3 dwelling units attached that each have a kitchen, a bath and a door. He said that he doesn’t see this on any of the cards provided and he feels that there is not sufficient evidence that this was ever a true triplex. On the same pg., the Pre-Disaster Build-back is described and Mr. Ryffel referred to 4E1 here which he said says that you can replace the same use, which is single family here, up to the original sf, which is 1680sf and not 13650sf. He added that if this gets approved he would like to see how staff comes up with justification of that kind of increase; he added that 4E1 specifies these things and he opined that changing it would need a Comp Plan amendment to change that wording. Therefore he feels that this zoning case is “premature.”

Mr. Ryffel continued to point out areas of concern, such as pg. 4 where it reads “additionally the proposed density of 3 units is a historically documented number,” and again said that this has not been adequately proven. He said that the Pre-Disaster plan “looks at what is there and not what used to be” which, in this case, is a single-family home, so he feels that is what the applicant is entitled to. Additionally, LDC

sec. 34-3237 dealing with describing a unit, partially states “*a rebuilt residential building may exceed the density limits on vacant land, but cannot exceed the legally documented number of dwelling units in the building immediately before the natural disaster.*” In this case, he continued, there is 1 unit in that building. Moving on to pg. 5, he referred to the paragraph which states “the residential uses and the historically documented 3 units do not exceed the general densities and intensities set forth in both the Comp Plan and the LDC.” However, he said that the acreage of the property now is 1.5, with 6500sf, and with 1 unit the density is 6.66; making this 3 units, the density will be about 20 units per acre so he feels that this usage will exceed the densities and intensities. He added that the general density in this area is 6 units per acre, the maximum. Mr. Ryffel discussed the Pink Shell and the position it was in a few years ago when they had 2 buildings and wanted to rebuild using the Pre-Disaster plan but add sf to it so they had to transfer some of the uses to their parcel across the street to be able to enlarge it; had they not been able to do so, they would only have been allowed the same sf that was already there. He said that the applicant is asking for a 900% increase in sf and feels that this is not reasonable and approval of this would be a “dangerous move.”

Ms. Shamp again gave the applicant an opportunity to speak. Mr. Hartzall said that the applicant still feels they meet the requirements of the staff report and all the LDC and Comp Plan points. He said one of the key components for rezoning in both codes relates to any changed conditions that warrant the rezoning. He said that looking at an existing building and deciding that rebuilding will be limited to what is there now is not economically feasible. He added that approval of this would guarantee that the new structure will be built to current standards allowing for a safer structure. He addressed a point made by Mr. Ryffel regarding “3 doors” and asked Ms. Crespo to again show slides that address the doors. He said he cannot explain how the structure got from the original triples to the current use. Mr. Ryffel interrupted to ask if there are the “required” 3 kitchens and baths and Mr. Hartzall said there are not but referred to the LDC Sec. 34-632 5c wherein it describes “lock-off units” being treated as density units or dwellings for the owner to rent them out, with or without kitchens.

Mr. Hartzall again referenced Comp Plan 4E1 in the staff report on pg. 3 wherein density (dwelling units) and intensity (square footage) up to the original sf and said it is a restriction on commercial square footage and not on residential sf. Furthermore, he pointed out the last sentence which states “*the Town Council may approve additional enclosed sf only if an existing building is being elevated on property that allows commercial uses.*” However, he continued that the LDC does have a restriction, which states that “the replacement building cannot exceed the density and intensity of the existing building as measured for residential buildings” and then points to the Post-Disaster section which restricts increasing the size from what was originally there. This is the reason, he explained, why the applicant is going through this process, to deal with this from a LDC basis. He insisted that applicants would not go through this difficult process for something this small normally. In addition, he reminded the members that with or without this approval, the applicant can put up a building even taller than what they are asking for, according to the new FEMA

standards, which would impact views more than this plan. Mr. Hartzall commented that he still questions the 1.2 floor area ratio and wonders if it applies to residential development and, if so, he would request that the LPA recommend a deviation to that requirement (in Table 34-3) to make it consistent with the 9000sf limitation for deviation #2. Ms. Shamp asked for clarification, as did other members, stating that they were confused. There was discussion of the dimension table, which gives an area ratio of 1.2 for RM and Ms. Miller agreed it is not clear. Mr. Fluegel commented that there are commercial uses allowed for RM zoning districts. Then, he added, going back to the Comp Plan to Policy 4C2, it is the only policy that refers to intensity, thus the purpose for having deviations.

Mr. Hartzall commented on condition 3, regarding the alarm and sprinkler system, and said he believes it relates to NFPA 13, but would like staff to clarify that.

Ms. Miller commented that the definition in the LDC for dwellings, they are not required to have kitchens but must have contained sleeping and sanitary facilities. She said the Pre-Disaster plan and said that its reference to “density and intensity” refers you back to the post-disaster build-back 34-3238, which states that a “rebuilt residential building may exceed the density when it is for new buildings on vacant land, but cannot exceed the legally documented number of dwelling units in the building immediately before the natural disaster.” She added that it is up to the LPA to determine what is sufficient documentation to verify that.

Mr. Hartzall requested that the applicant’s request for the rental units be withdrawn since it seems to be the biggest problem and, if it is removed, it should eliminate the need for condition 3. Mr. Fluegel asked if the applicant would go as far as to agree to a prohibition of short-term rentals. Mr. Hartzall agreed that by withdrawing this request, the applicant recognizes it would be a prohibited use but Mr. Fluegel insisted that it be specifically stated and the applicants agreed.

Mr. Kakatsch asked if they would consider withdrawing the height requirement of 35 ft. and keep the 30 ft. situation. Mr. Hartzall denied this request but said they might acknowledge this as a recommendation by the LPA.

LPA discussion: Mr. Ryffel asked Mr. Van Duzer about the hazard mitigation section, since he helped draft it, and asked if Policy 4E1 applies only to commercial. Mr. Van Duzer stated that his recollection is that it included residential structures. He said that everything on the beach side of Estero Blvd. is exempt from short-term rental restrictions anyway. Mr. Van Duzer said he would make a motion to deny this application until they have had an opportunity to consider all of the items in the Comp Plan and LDC and change them to bring them up to date and make them clear and consistent. He said that these codes need to be carefully revised to protect the residents and be sure they are all doing things according to the latest standards.

Ms. Shamp stated that they still need discussion before a motion but asked if there could be a show of hands as to a consensus about this. She asked if there was an

opposing view or if they are all in agreement. Mr. Kakatsch said that they need to facilitate people like the Rowses but still try to keep the deviations to a minimum, thereby trying to live by the rules. He said that if they do not work with the applicant to make this happen, things will get worse and the property may be constantly rented to college kids and partiers. Mr. Kakatsch moved that the LPA go forward with this plan and upgrade the beach.

Ms. Kay favors bringing the whole plan down to 2 floors rather than 3 floors but she agrees with Mr. Kakatsch's comments about things getting worse.

Motion: Mr. Van Duzer moved that the LPA deny the Resolution 11-005 for the ROWE RPD.

Seconded by Mr. Ryffel;

Discussion: Mr. Ryffel agrees that they should work with the applicant but feels that if they vote for this, they are essentially throwing out the standards in the LDC and the Comp Plan.

Mr. Van Duzer again stated that he feels the Comp Plan needs to be edited and updated, not rewritten.

Mr. Kakatsch said that they should stay within as few exceptions as possible and allow the applicant to proceed.

Ms. Shamp said that her job is to make decisions based on the LDC and the Comp Plan, and not from personal opinions, even though she likes to see people who invest in the beach by attempting to do things to make it better. She said that they need to look better at Policy 4E1, which is Pre-disaster Build-back, and feels it is clear as to the sf, etc. requirements. In the Policy 4C34, which relates to the opportunity to apply for variances regarding height, it talks about the Town having the option to modify, approve or deny these requests and goes on to include that "particular attention would be paid to any permanent view quarters to the Gulf waters that could be provided in exchange for allowing a building to be taller than 2 stories." Ms. Shamp continued to refer to the various Policies and regulations and said they are very clear in that basically you can rebuild to what size existed before but not to gain a bigger structure.

Restated Motion: Mr. Van Duzer moved that the LPA deny the Resolution 11-005 for the ROWE RPD.

Seconded by Mr. Ryffel;

Vote: Motion passed 6-1, with Mr. Kakatsch casting the "nay" vote.

Ms. Shamp closed the hearing at 12:21 PM. There was a short break.
Reconvened at 12:30PM.

B. Mermaid Special Exception Hearing – FMBSEZ 2010-0003

Ms. Miller swore in the witnesses and staff confirmed the Notice of Public Hearing advertisement. Ms. Shamp polled members for ex-parte communications. Mr. Kakatsch had a site visit; Mr. Van Duzer knows the applicant; Ms. Shamp had a site visit, but there were no other communications.

Ms. Chapman presented the staff report regarding this request and said this was before the LPA in January but there has been a small amendment to the original request. The request is for a special exception in the downtown area to serve alcoholic beverages in an outdoor seating area at 1204 Estero Blvd. (she referred to a visual aid) in the form of a tiki hut in the rear and a small area in the front patio. She stated that staff recommends approval with the following conditions:

1-the subject property for outdoor consumption is combined with in the tiki hut and the front patio shown in the diagram and the applicant has proposed that a hedge will define the area in the front for consumption; 2-sales and service of alcohol will not begin earlier than 9:00Am and will not be any later than 2:00 AM; 3-audible entertainment is prohibited before 11:00AM and after 10:00 Pm Sunday through Thursday, and 11:00 AM and 11:00 PM on Friday and Saturdays, and will at all times be comply with the Town ordinances.

Ms. Chapman said that there was one letter received by the Town, from George Gannon, about this and Merlo's property, which she read for the record (see attached). The letter was to express Mr. Gannon's concern about a "night noise factor" which he feels will be created by allowing these COPS and said that there is a lack of enforcement on the part of the Town and law enforcement to control the "ongoing party atmosphere" that is happening on the beach, damaging the reputation of FMB as a destination for families. Mr. Gannon strongly objects to approval of these exceptions.

Scott Van Sullo, owner of the Mermaid Lounge and Liquors, addressed the meeting and pointed out there is outdoor seating across from his property at the Beach Doggy-Dog and next to him at a small restaurant.

LPA questions for the applicant: Ms. Kay asked if the outside rear plans have changed and the applicant said it has not, as he explained the slight change in the front part. He said his business will not allow any nuisance behavior like the Lani Kai does.

Mr. Ryffel asked for an explanation of where the deck is located and what it looks like. The applicant explained why the deck is there and that there is a plan for hedges.

Mr. Zuba asked how many seats exist and how many would be added by this approval. The applicant said it was calculated by sf rather than capacity. Ms. Chapman said they used the formula of 1 per 75sf for outdoor seating and referred to her diagrams, saying that they do meet the parking requirements. Mr. Zuba also asked if there will be some landscaping there and it was confirmed that there will be some added.

Ms. Shamp opened the floor for public comment. Ms. Lucinda Keller said that "in season, that area is a bottleneck" and said this "variance" should not be granted.

Mr. Lee Melsick and said that the applicant and his family have been here for years and should be trusted to do what they propose. He said that there is no reason to think there will be trouble or any problems with this business as these are good supporters of the community and they keep their word. He fully supports the approval of this request and feels that the improvements planned will “spruce up” that part of the boulevard.

Ms. Shamp closed public comment and the testimony portion of the hearing and asked for LPA discussion. Mr. Ryffel supports the application but would like to change the third condition regarding the music in front of the business. He pointed out that the applicant didn’t request it and he feels it should be taken out. The applicant commented that they have no intention of having any entertainment in front, except in the case of a special occasion, and then he would apply for a permit. Ms. Miller said it could just be edited to show the change.

Motion: Mr. Zuba moved to approve the application, as edited.

Seconded by Mr. Zuba;

Vote: Motion passed 7-0.

The hearing was closed at 12:54.

C. Merlo’s Special Exception-FMBSEZ2010-0006

Ms. Miller swore in the witnesses and staff confirmed the Notice of Public Hearing advertisement. Ms. Shamp polled members for ex-parte communications. Ms. Shamp and Mr. Ryffel had site visits only.

Staff testimony: Ms. Chapman testified that this is for a special exception in the downtown area to serve alcoholic beverages in an outdoor seating area (she referred to diagrams) in the downtown zoning district. Presently, the business serves food on the deck area but is not permitted to serve alcohol. She stated the business had been granted interior consumption on the premises with a stipulation that should they request outdoor alcohol service, they would need to provide additional parking for the increased sf. She state that this would be an additional 3 spaces and said that the owner also owns a parking lot adjacent to the business and Mr. Primo will supply the additional spaces.

Staff recommends approval of this special exception, with the following conditions: *1-the area for outdoor consumption be confined entirely on the 470sf deck; 2-signage will be posted to designate the extra parking spaces; 3-sales and service of alcohol will not begin earlier than 7:00Am and will not be any later than 12:00 midnight; audible entertainment is prohibited before 11:00AM and after 9:00 Pm 7 days a week, and will at all times be comply with the Town ordinances.*

Ms. Chapman read a letter received by the Town from Mr. George Gannon, owner of the Beacon Motel, in which he objects to the approval due to the noise nuisance it will create, adding that he has “lost guests from time to time because of these late into

the evening partying heightened by the drinking of alcoholic beverages...” (see letter).

Ms. Kay asked about a part of condition 1 (pg. 4 of 7) and Ms. Chapman stated it is just a technical phase used in the Comp Plan and there was an explanation by Ms. Miller.

Mr. Zuba asked about any landscaping requirements but Ms. Chapman stated the Town has not made that a condition because it is an elevated structure but would certainly include this if suggested by the LPA.

Ms. Shamp asked about the hours of operation of the parking lot since the extra parking will be provided by that lot. Mr. ??? answered for the applicant and stated that there are no problems with that lot closing and there are signs on the spaces designating them for Merlo’s.

Mr. Ryffel asked if there is an easement or some type of written agreement for the applicant to use those spaces, especially in the event that the parking lot transfers ownership. Ms. Chapman stated that there was not because “Norm” owns both properties. Ms. Miller opined that language could be added to the resolution to provide this and thereby guarantee the use of the spaces.

Public comment was opened:

Ms. Lucinda Keller objected to the approval of this exception, stating that “if that right-of-way between Primo’s parking lot and that house is closed for coastal, fire whatever is needed in that area, I will take it to the state because I have a title to the property across the street...” and said “it will not happen!”

Mr. Lee Melsek addressed the meeting and he said this is yet another request for alcohol to be served “at the front doors of single-family homes” and outdoor entertainment also “at the front door of people’s homes.” He continued that “calling the cops isn’t always getting it done for these people.” He objects to the granting of these exceptions more and more because they violate the rights of the neighbors by playing their music loud and at night. Mr. Melsek pleaded with the board to “at some point address that issue,” suggesting that they begin doing that by denying this exception.

Mr. John Albion, President of the FMB Chamber of Commerce, stated that there are rules in place for all businesses and residents and he feels that this particular issue not be dealt with on a case-by-case basis. He said that this is a good business, the owners are “good people,” and he feels the Town should work with them when they are willing to “play by the rules.” He added that this is “critical for the future of FMB that there is a balance between commercial, restaurants, retail and taking care of the residents nearby.”

Public comment was closed and Ms. Shamp invited LPA discussion. Mr. Ryffel pointed out that the applicant did not request music so he opined that they limit this, adding that "they didn't ask for it and I'm not gonna approve it." He feels that there is no intent on the part of the applicant to have any music so he suggests taking that part out of the language.

Ms. Kay asked if currently are permitted to serve beer and wine and Ms. Chapman advised that they have a 2 COP license.

Motion: Mr. Ryffel moved to approve the application with the recommended conditions: Condition 3 is to read "music and audible entertainment are prohibited; signage must be installed at Norm's parking lot indicating which spaces are reserved exclusively for the subject property and owner shall obtain and record a parking easement for those spaces. The requested special exception is consistent, etc.; the requested special exception, as conditioned, exceeds all performance standards; the requested special exception, as conditioned will protect, conserve, etc.; the requested special exception, as conditioned will be compatible with the existing and planned uses and will not cause damage, nuisance or other detriment to persons or property; the requested special exception, as conditioned will be in compliance with general zoning provisions, etc.;

Seconded by Mr. Zuba;

Vote: Motion passed 7-0.

Hearing closed at 1:21 PM and there was a recess for lunch.
Reconvened at

(TRANSCRIBER'S NOTE: Recording was not started upon the reconvening of the meeting and started somewhere after adjourning as the LPA and beginning as the HPB, as conversation below reflects).

VI. ADJOURN AS LPA AND RECONVENE AS THE HPB

Motion: Mr. Van Duzer moved to adjourn as LPA and Reconvene as HPB.

Seconded by Mr. Zuba;

Vote: Motion passed 6-0 (Mr. Ryffel left).

Ms. Kay was talking about the Smith Cottage being historic and therefore not required to be raised to FEMA standards. The meeting will be June 23, 2011 at 11:30 AM for this.

Ms. Kay said that Mr. Zuba had suggested using a standard form of recognition of historic properties on the beach but Ms. Ekblad felt that it wouldn't really go anywhere. Ms. Ekblad clarified that there are the 3 different boards, the HPB, the HAC and the Estero Island Historic Society, and they need to work together to address these projects to eliminate duplication of efforts and resources.

Motion: Ms. Shamp moved to adjourn as LPA and Reconvene as HPB.
Seconded by Mr. Kakatsch;
Vote: Motion passed 7-0

VII. ADJOURN AS HPB AND RECONVENE AS THE LPA

Meeting was reconvened at 1:51 PM, with the same members still present.

VIII. COMMUNITY DEVELOPMENT DIRECTOR ITEMS

A. COP Policy Discussion

Mr. Fluegel referred to a memo given to members, with attachments, and gave a brief history of the development of this discussion. He stated that he was given the task of reviewing the Town's policy, Comp Plan and LDC influence regarding the subject and he didn't interpret the Comp Plan to prohibit alcohol on the beach. Later, Council rejected the LPA's interpretation, which was based on a consultant's report, and directed staff to prepare another approach to regulate this. In this memo, pg. 2 shows the different approaches he suggested and Council decided to use a more "administrative" approach, which was presented in a draft form at the last meeting.

Mr. Fluegel continued that there really is no current regulatory scheme for dealing with COP on the beach, there is no zoning control. He said what the Town does have is Chapter 4 in the Code of Ordinances, the "open container" law but it gives no authority to local enforcement officers to enforce it so these are reliant on the sheriff. He said that this lack of regulation and zoning enforcement has created a problem with the existing businesses that seem to be "grandfathered in" and they have no rules to be held to. Mr. Fluegel pointed out that the Town has already allowed commercial service-oriented uses in the EC zoning district, like Jet Ski, chair and parasail rentals.

Mr. Fluegel said that they came up with an administrative process, adding that there are currently 15 establishments presently that have liquor licenses and he feels that these can easily be dealt with in an administrative manner. New ones coming in can be handled differently, as special exceptions but he focused on the existing 15 and questioned how they should deal with resorts as opposed to the restaurants and in consideration of the location of each business. The proposal is to deal with them "as a whole" with a consistent set of rules but still asked for the LPA's recommendations and guidance.

Ms. Shamp thanked him for his patience and attention in responding to the LPA, especially after the last meeting, and was appreciative of his efforts to slow this down and help make the process more comprehensive.

Ms. Shamp asked for public comment:

Mr. Pat Sinono, owner of Nemo's On the Beach. He said what they need is "a fair playing field" for all businesses and agrees that there should be a fair standard.

Mr. Frank Schilling of 6672 Estero Blvd. congratulated the LPA for “opposing the spread of alcohol across the beach.” He said that in this case he does not side with the businessman, which he usually does, and opposes COP on the beach. He feels that the Council should deal with the major issues facing them rather than spending so much time and energy for on the handful of people who want to continue to expand the alcohol service on the beach.

Mr. Tom Babcock addressed the meeting and reminded that he has already supported the LPA’s resolution banning the expansion of alcohol on the beach. He feels that their interpretation of the Comp Plan was appropriate and allowed them to make the appropriate decision based on it. He said that most people’s opinion of the area is that it is a family beach and there are many places for adults to go and drink, if they choose to do so, without having to add more places. He pointed out that even Miami Beach has decided to move forward with a ban on sale and consumption of alcohol on the beach due to litter and rowdy people due to it. He added that the right place to deal with this is in the LDC where uses and regulations are defined and supports making changes in the LDC. He suggested that, should they make changes in the LDC, the 3 “grandfathered” businesses be given specific time periods to come into current compliance, adding that this is a zoning rather than property rights issue.

Mr. Bob Young addressed the meeting and commended the LPA for its past decisions on this issue. He also feels that this is a difficult issue but does not support expanding alcohol services throughout the beach as the code allows now.

Ms. Shamp asked for LPA discussion:

Mr. Fluegel commented first about a “separation of issues.” He said that there are a few issues to consider here, including the “open container” law which applies to anyone drinking on the beach. He said that that even the term “public beach” is not clear as it relates to private property and these regulations. Mr. Fluegel opined that his approach would address the 3 “grandfathered,” adding that it doesn’t mean they are “grandfathered for compliance with any future zoning requirements that go to health, safety and welfare issues. He also suggested a geographical limitation to keep certain regulations in specific areas and/or a conditional use permit, needing an annual performance evaluation with revocation measures.

Mr. Van Duzer referred to the 3 “grandfathered” businesses and asked if they owned out to the high-water line. Mr. Fluegel said he could not find anything to support that these people own to that line but Mr. Van Duzer said had come to the Town because they couldn’t serve alcohol on the beach according to the LDC and showed papers to support that they own to the high-water line. Due to that, the Council granted them the exception to serve alcohol there. Mr. Fluegel said it still crossed a zoning line and went into a different zoning district then. Ms. Miller agreed that, if this is true, anyone else who owns to that line, should have the same rights. Discussion ensued about the zoning lines and property owner rights to the high-water line.

Mr. Zuba asked how EC zones are defined and Mr. Fluegel replied that is coterminous with the 1978 Coastal Construction Control Line and pointed out that this is also coterminous with the Recreation Future Land Use Line. Mr. Zuba said that they do have the opportunity then to be able to regulate what goes on in that zoning district and referred to a memo by Jerry Murphy wherein he noted that if they found it to be an intrusion, they would have the ability to regulate COP in that district. Mr. Zuba feels that this is an intrusion and wondered why the open container law isn't of use in regulation. Ms. Miller replied that it applies to public and not private property.

Mr. Ryffel commented on a handout he had that was distributed by MRTF and read a sentence "all waterfront property on the island is privately owned; public use is permitted from the water to 10 ft. landward of the high tide line; 25 beach accesses and 3 public parks...provides legal access to the beaches." It goes on to discuss open containers and alcohol consumption "the drinking establishments along FMB have specific boundaries within which you may consume or in your possession open containers of alcoholic beverages...it is unlawful to consume or have in your possession an open container alcoholic beverage on a semi-public or public street, sidewalk, parkway, beach or parking lot located in the Town of FMB." Some discussion ensued about the differences between private and public beach areas.

Mr. Fluegel interjected that there is a requirement in the code that if the applicant property is within the 500 ft of a public park, he must apply for special exception for COP. He pointed out that the mean high-water line is public park line.

Ms. Shamp said that the fact that there is nothing in the code to enforce consumption means to her that COP on the beach was not an allowable use in the Comp Plan; therefore, when the LDC was written, they didn't regulate it because it wasn't allowed. Ms. Shamp said that she has reviewed this issue in the LDC and prepared a document with her views, which she passed out, and said that her research into the Comp Plan and the LDC has made her understand that this is not allowed in the LDC either. She referred attention to her second paragraph "in reviewing the LDC references are found to indicate that the proposed COP expansion is prohibited. LDC Sec 14-3A15 states that 'it is unlawful or prohibited for any person to do, conduct or permit any commercial activities on the beach or dunes not explicitly authorized by this code or other Town ordinances' and I do not see that COP on the beach is explicitly authorized. There exists no explicit authorization of the COP in the Comp Plan..." (see report). She continued that the LDC's strongest prohibition to the newest COP expansion is LDC sec 34-1574B wherein it states that "except in instances of overriding public interest, new roads, private land development or expansion of existing facilities within wetlands or sandy beaches that are designated in the recreation category in the FMB Comp Plan, shall be prohibited." LDC sec 34-652A designates the purpose of the EC zone is to designate that the preservation of the beach is critical to the Town and restricts it uses and Sec 34-652B says that the application is intended to prevent a public harm by precluding the use of land for purposes that adversely affect a defined public interest. Additionally, she points out that Sec 34-609 states that where there are conflicts between the LDC and the Comp

Plan regarding development and zoning districts, the Comp Plan will prevail. Sec. 34-652D states that “no land use in the EC zone shall be permitted by right, except those permitted by the FMB Comp Plan.” Ms. Shamp continued to read several paragraphs in her report which referred to specific sections of the LDC and the Comp Plan dealing with COP, restricted zones and applicable stipulations dealing with this issue. In summary, she opined that this is not allowed by the LDC.

Mr. Babcock commended Ms. Shamp for her intensive research, as did the other members and thanked her for her diligence and hard work in bringing this comprehensive report to light.

Mr. Ryffel said that personally he doesn't like expanding the COP but he understands that decisions have been made by “our boss and we are advisory to them.” He added that he “unalterably opposes” any administrative approvals of COP but he gave some options that he came up with. Recognizing that the existing COPs are in different places and went through different approval methods, he realizes that they need to be addressed in that light. One suggestion is “COP is permitted on the beach on any pro up to within 50ft of the mean high tide with an existing COP license, and located in the Time Square area only, subject to any reasonable conditions including that alcohol must be purchased at an existing bar to be consumed on the beach; there will be no sales, wait staffed tables or carts of any kind however powered on the beach.” An alternative to that would be the same without prohibiting sales of wait staff. He then discussed properties outside of Time Square, with existing COPs, not including those for whom COP was approved as part of a planned development. These properties may seek approval via special exception, “alcohol must be purchased at an existing bar to within 50ft of the mean high tide; there will be no sales, wait staffed tables or carts of any kind however powered on the beach.” He feels that this will cover people who go into a bar, buy a drink and take it outside to sit on the adjacent beach. As far as the properties with COPs that were part of planned development, they “must request permission for consumption of the beach via an amendment to their approved planned development and “alcohol must be purchased at the existing bar and may be consumed on the beach up to 50ft of the mean high tide and there will be no sales, wait staffed tables or carts of any kind however powered on the beach.”

Mr. Ryffel's last suggestion says you can buy a drink in an existing bar and consume it on the sand but there will be no sale or service on the sand. He handed out copies of the document for review. Mr. Fluegel likes the options and said they address the issues of equity. Discussion took place about wait staff and the purpose they serve.

Ms. Kay wondered how they would address the existing places and they discussed the possibility of a “sunset” condition. Mr. Fluegel suggested taking Mr. Ryffel's option #2 to Council. Ms. Shamp pointed out that there is still a problem with area of the premises and Mr. Fluegel said it would need to be run by the state, too. More discussion took place about space and area as well as parking spaces designated for these businesses.

Ms. Shamp asked how underage drinking is controlled normally if someone has a COP on a premise. Ms. Miller said it usually just is regulated by the owner to ensure that no one underage is drinking. Code Enforcement Officer Shane Hidle replied and said that many places use a bracelet identifier for underage patrons.

Mr. Fluegel asked if there was a consensus direction on Mr. Ryffel's option to allow him to explore it.

Mr. Zuba, Mr. Cameron and Mr. Ryffel like this option; Mr. Van Duzer wants to see what happens with Town Council before he decides; Mr. Kakatsch is opposed to drinking on the beach, Mr. Van Duzer agreed with this and doesn't want to see any consumption on the beach; Ms. Kay feels that the beach should not be a place to drink; Ms. Shamp remains that she does not believe the Comp Plan or LDC support expansion but she realizes that the LPA has been charged with this task and she must work to bring the LPA to a decision. She feels that they have a 2-part question: do they approve drinking on the beach or, if Council passes it anyway, what restrictions do they suggest be put in place.

Mr. Fluegel asked if they would be agreeable to fashioning an ordinance that says that, as a board they still remain opposed to any expansion of COP in the EC zoning district; however, if it is allowed by Council, they would suggest the approach to take. This way they wouldn't be giving up their right to fundamentally be opposed to the expansion but they would be saying that this is the way to do it, if it is going to be approved anyway. Ms. Miller added that the LDC can be amended at any time and Council has directed them to do that for COP on the beach.

Mr. Ryffel said that he feels that the LPA looks at and understands the LDC and Comp Plans better than the Council because they need to as an advisory to the Council. He wants Ms. Shamp's research work attached to their recommendation and sent to Council so that they may see the work that was done and all of the areas that apply to this issue.

Ms. Shamp asked what Mr. Fluegel would like at this point, since he has been directed to get this done. He said that he would like to see an LPA resolution that memorializes their thoughts and show that they are still against this but that they include a suggestion as to how to proceed if it is going to get approval anyway. He said that staff will still go back and work on certain provisions when this comes back to the LPA next time. Ms. Shamp feels that a public hearing is premature and asked what the others thought. Mr. Van Duzer asked Mr. Ryffel if he agrees with Ms. Shamp and he said he does. Mr. Van Duzer was ready to make a motion to send it back to Council and tell them that the LPA does not want anything to do with COP expansion. Mr. Zuba said that Council members need to be made aware of the liability issues in passing this. Ms. Kay wondered how this could be acceptable if the whole thing requires amending the LDC. Mr. Ryffel said that if something is to go forward, he insists that their reports and options go along with their recommendation. Mr. Cameron agrees that there should be a recommendation to Council, letting them

know that they were split on their decision to allow any alcohol whatsoever, but if they must go forward, they should consider the LPA's recommendations. Mr. Zuba said he is not so opposed to option #2 and is not sure he would say no alcohol completely but he would like to see this discussed further. There was brief discussion about the options and Ms. Shamp opined that they need to work on this a little longer but they would like some of the laws after Mr. Fluegel's meetings with state officials. Mr. Fluegel agreed and hopes that they can have a workshop before it moves on, adding that he hopes to meet with LPA members separately if agreed.

Ms. Shamp asked for further public comment and Mr. Schilling addressed the meeting, saying that he is appalled that the Town Council would even consider moving ahead with this when the Code and Comp Plans both regulate against it. He thinks that the LPA has valuable experience and obvious knowledge and it is time Council listened to what they say.

Mr. Lee Melsek said that Mr. Ryffel's compromise is not solving the problem and it does not stop the spread of alcohol on the beach. He said there is no difference if a waiter takes the drink out or the patron does it himself. He said that both Mr. Van Duzer and Kakatsch are right in standing up for the solid principles they stood on and directed them to challenge the Council, asking "otherwise, why are you guys here?" He said that it is wrong for Council to violate the LDC and go against the idea of making this a family beach. He said they are here for the community and "not to be puppets of the Council."

Ms. Babcock asked if this resolution would make the beach a better place to live or work. She said that if they must pass this that there be strict rules to protect the residents and wondered why there is such a rush to get this through. She is confused about the LPA's position as an advisory board when they are so knowledgeable yet the Council doesn't listen.

Public comment closed.

IX. LPA MEMBER ITEMS AND REPORTS

Nothing to report.

X. LPA ATTORNEY ITEMS

Ms. Miller had nothing to report.

XI. LPA ACTION LIST REVIEW

Resolutions to Town Council

- Special exceptions-Mermaid Lounge
- Merlo CPD-TBD

Future Work Activities

- ROW Residential Connection; Van Duzer-TBD
- LDC 613-14 10-255 Storm Water-TBD

- Post-disaster reconstruction/recovery-TBD; Ms. Miller
- IPMC (code enforcement clean-up) possibly June-all LPA
- COP ordinance

XII. ADJOURNMENT

Motion: Mr. Ryffel moved to adjourn.

Seconded by Mr. Cameron;

Vote: Motion passes 6-0 (Mr. Kakatsch left).

Meeting adjourned at 4:09 PM.

Adopted _____ with/without changes. Motion by _____
(DATE)

Vote: _____ Signature: _____

- End of document