

FORT MYERS BEACH  
**LOCAL PLANNING AGENCY (LPA)**  
Town Hall – Council Chambers  
2523 Estero Boulevard  
Fort Myers Beach, Florida  
**October 14, 2008**

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**AGENDA**

**[all time frames are informational and approximate]**

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**10:30 A.M.**

- I. Call to Order**
- II. Pledge of Allegiance**
- III. Invocation**
- IV. Town Capital Improvement Program (CIP) Items**
- V. Administrative Agenda**
  - A. Discussion of seasonal parking (LDC Section 34-2022) (Mandel/Barnes) 30 minutes
  - B. Discussion of COP standards (LDC Section 34-1261 et seq.) 30 minutes
  - C. Resolution of Appreciation for Gerald E. Murphy, AICP, CFM (Kay) 10 minutes
- VI. Adjourn as LPA; Convene as HPB**
  - A. Administrative Agenda**
    - Update on Historic Property Plaques Project 5 minutes
- VII. Adjourn as HPB; Reconvene as LPA**
- VIII. LPA Member Items and Reports** 5 minutes
- IX. LPA Attorney Items** 5 minutes
- X. Community Development Director Items** 5 minutes
- XI. LPA Action Item List Review** 5 minutes
- XII. Public Comment**

**Adjourn no later than 4:00 P.M.**

**Next Meeting:** October 21, 2008 at 10:30 am

**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, October 14, 2008**

- I. CALL TO ORDER:** The regular meeting of the Local Planning Agency (LPA) was called to order on Tuesday, October 14, 2008 at approximately 10:40 am. by Chairman Dennis Weimer. Other members present at the meeting:

Rochelle Kay  
Bill Van Duzer  
Joe Yerkes (late)  
Joanne Shamp  
Alan Mandel  
Evie Barnes – excused absence

Staff present at the meeting:      Dr. Frank Shockey, Interim Community Development Director  
Anne Dalton, LPA Attorney

- II. PLEDGE OF ALLEGIANCE:** The Pledge of Allegiance was lead by Mr. Weimer and recited by all present.

**III. INVOCATION**

- IV. TOWN CAPITAL IMPROVEMENT PROGRAM ITEMS:**  
Nothing to report.

**V. ADMINISTRATIVE AGENDA**  
(Short break to wait for Mr. Yerkes)

**A. Seasonal Parking (LDC Section 34-2022) Mr. Mandel/Ms. Barnes**

Mr. Mandel referred to a report passed out to all members and stated that he had conferred with Mr. Gerola (who had addressed the LPA at the last meeting). The dates of seasonal parking had been informally charged by a prior Town Manager but, according to Mr. Gerola had not been recorded so, since then, dates have been changed back to Nov. 15<sup>th</sup> to July 15<sup>th</sup>. Some of Mr. Gerola's suggestions are that the Town acquire three times the parking there is now, maybe buying Snug Harbor because there is a seasonal lot adjacent to it that is available; a water taxi so visitors can park under the bridge on the San Carlos side and be taxied across. In addition, there is a concern about the cost of parking, the lack of signs to mark available parking areas and some other

items in the report.

Ms. Shamp inquired about hours of operation for the parking and what constitutes “open” and “closed.” Discussion ensued regarding what action staff wants in this matter and seasonal and permanent parking lot differences.

Mr. Yerkes opined that any changes to be made would need to embrace all parking areas and stated that he feels that signage should be up to Town staff and not necessarily up to the LPA.

Mr. Van Duzer stated that he wanted to address the issues and move the matter forward to Town Council for approval, with a change in the dates for seasonal parking to Nov. 1<sup>st</sup> to the end of July, and include weekends and holidays. In addition, there should be stronger guidelines and compliance with regulations.

Ms. Dalton asked if Mr. Van Duzer was proposing a year round lot but Mr. van Duzer clarified, saying that the seasonal lots be closed August, September and October except for weekends and holidays during those times. Also, there is the question about the three year time frame. Mr. Van Duzer suggested abolishing that part and allowing people to do this for anytime, in an effort to extend parking on the beach to get traffic off the roads quicker. He also is in favor of “park & ride.”

Mr. Mandel commented that, with the proposed dates, there should be special permitting options for special events.

Mr. Yerkes suggested just giving the temporary lot operators the opportunity to be permanent operators, requiring them to comply with code etc. He supports doing away with temporary, seasonal lots and having all lot owners apply and comply with the same regulations.

Ms. Kay stated that there should be general rules for all lot owners and not two sets.

Ms. Shamp also questioned the reasoning for the differentiation between temporary and permanent parking lots. She also agreed that there should be one type of parking lot on the beach, having signage and aesthetic regulations which apply to all evenly.

Mr. Weimer asked Dr. Shockey to explain the permitting. Dr. Shockey stated that the code provides for an annual permit, up to eight months, or for one period, on a year-round basis, for up to three years. Discussion ensued regarding code that applies to permitting and the number of lots that are deemed seasonal, annual, etc.

Mr. Yerkes and Ms. Dalton discussed the ADA requirements for handicapped parking spaces and it was suggested that this could be addressed in permitting.

Mr. Weimer asked the attorney and staff if there is a need to clean up discussion about whether Section D applies only to Section C or both B and C. Ms. Dalton opined that Section D applies to the eight month and the three year lots and that the delineation is in whether this is an enforcement issue or changing the LDC.

Mr. Mandel sympathized with the seasonal lot owners and pointed out that if they deem it too expensive and inconvenient to comply, they may not offer parking at all and that would be counterproductive to the Town’s traffic issues. Ms. Dalton cautioned that the policy the LPA is considering may be seen as unfair to one group and cause legal problems.

Mr. Weimer, attempting to conclude, stated that the main is whether the time annual dates should be changed. Ms. Kay agreed with Mr. Van Duzer and Ms. Shamp’s comments about all of the lots having to comply with some standard of safety, compliance, etc. Mr. Mandel suggested that the LPA hear from the permanent lot owners before making a decision on changing the permitting regulations.

Some discussion ensued regarding commercial parking lots and what steps would be involved if the Town was interested in doing that. LPA sees this as twofold: short term and long term solutions are necessary. Ms. Dalton suggested postponing any decision at least until Ms. Barnes is able to add her report. Mr. Weimer agreed.

More discussion referring to the existing ordinance.

Mr. Weimer asked for agreement from members to ask Mr. Mandel and Ms. Barnes to continue the discussion and speak with more of the public lot owners and get their views for the issues; all agreed to continue the task force.

#### **B. Discussion of COP standards (LDC Section 34-1261 et. Seq.)**

Dr. Shockey reported on the state standards for beverage licenses and land use. The two main types found within businesses on the beach are 2 COP and 4 COP, COP meaning Consumption on Premises and it means patrons are served and consume the beverages on the premises. 2 COP would be beer or wine and 4 COP is beer, wine and harder liquors. Other licenses also include series which can be attached to the type of license, for instance 4 COP SRX, this is a special restaurant license provided by the state, as a sort of privilege instead of having to have a standard COP license, which is more expensive and there are more restrictions. The problem the Town is running into with these is people have a business and they want to serve liquor and the state tells them they need zoning approval to get their licenses. In the LDC are the standards for the applicant to get zoning approval from the Town. Dr. Shockey referred to his report, handed to members, which listed all of the specific and difficult regulations for individual locations.

Mr. Weimer observed that this issue should be addressed as separate issues, of location and beverage service and hours of operation, instead of as one issue. Dr. Shockey agreed and it was decided that the most immediate need is the one dealing with time. State regulations were discussed, Chapter 562 "except as otherwise provided by county or municipal ordinance, no alcoholic beverages may be sold, consumed, served or permitted...between the hours of midnight and 7:00 AM of the following day."

#### **Discussion referring to time regulations only:**

Mr. Mandel suggested starting with the legal time limits, and not giving any one business an advantage over any other business, and then considering each business by neighborhood. Ms. Kay pointed out that the "strictly" alcohol bars, seem to be starting early and closing later than the businesses that have food too. Mr. Weimer cautioned that changing the regulations may affect the character of the beach and wondered why the Town wouldn't just stick with the existing state regulations. Mr. Van Duzer suggested developing general standards, from the consultant and staff reports, and present them to the LPA. He stated that the staff could then approve the licenses up to a certain point, with special exceptions going before Town Council.

Ms. Shamp's concern is restricting the identity of the island, meaning valuing the businesses vs. attempting to satisfy just the residential image of the island. She believes that no one should be able to restrict drinking times and amounts, and that the business community needs to be supported. She favored the times being 7-12 and later on weekends, perhaps restricting to the downtown area. More discussion ensued regarding the distance from businesses serving alcohol, especially outdoors, and time restrictions. Mr. Yerkes agreed with Mr. Weimer who suggested a separate restriction for inside service and outdoors, especially when serving alcohol. Entertainment is also an issue,

both in and out of doors. Decibel levels were argued and taken into consideration, as further discussion went on for a lengthy period.

Ms. Dalton interjected that it might be useful to focus on a series of bullet points for the consultant to bring back concepts to the LPA rather than continuing to get a consensus at this meeting. Mr. Weimer agreed. Ms. Shamp referred to Mr. Weimer's earlier question of whether it is possible to separate the issue of entertainment and the issue of alcohol-related noise. She stated that it can be separated and that it is critical to do so for the sake of the businesses in general. Mr. Yerkes pointed out that, in his business, he is spending quite a bit of money to enclose his deck so that he can serve food and alcohol outside at night without interfering with the neighborhood. He stated that he cannot serve food and alcohol, at night, without disturbing the neighborhood, and that it has nothing to do with entertainment.

Mr. Weimer stated, for the record, that the LPA is in consensus that there ought to be consistent times for the serving of alcohol, that there may be a differentiation between inside and outside for the serving during those times, with perhaps a stipulation, somehow, of later outdoors hours as long as a sound attenuation along with it. Long discussion ensued regarding fairness of enforcement, times of service, decibel levels, etc.

Ms. Shamp offered that the LPA list the six separate concerns: times and hours of operation, entertainment/music issues, advertising issues, outdoor seating issues customer requirements, buffers and enclosures and #7, differences by zone, for the consultant to address. More discussion ensued regarding these points and neighborhoods, etc.

Ms. Dalton suggested breaking the package down to separate issues and only moving forward with what the LPA has a consensus on, for direction to the consultant, Jerry Murphy.

**Mr. Weimer called a recess for lunch; 1:00 PM.**

**Reconvened at 1:35 PM.**

Ms. Kay clarified that the consultant is to be asked to suggest times tables, entertainment and noise levels for drafting of a resolution. Mr. Weimer pointed out that there is also a question about advertising for these establishments. Dr. Shockey explained, referring to the current ordinance and discussion ensued. Ms. Shamp pointed out Sec. 30-153, referring to signs, seems as though it does not belong in the alcohol consumption ordinance.

Outdoor seating was addressed next. Dr. Shockey suggested the consultant bring forth options for this, too. Mr. Yerkes questioned how the Town could regulate this when there are so many factors to consider. Ms. Shamp argued that the items before the LPA, which are difficult to separate, should be referred back to the consultant for opinion. Mr. Yerkes was confused by certain items in the existing code which do not seem to be accurate. For the record, 34-1261, location of package stores, wherein it is stated that package stores cannot be within 500 ft. to any place of "...any other establishment primarily engaged in the sale of alcoholic beverages." Ms. Dalton directed that these are specifically the areas that need to be addressed with the consultant.

Mr. Weimer stated that the general consensus is that there are too many issues covered in this COP review that are already regulated elsewhere in the LDC, so the consultant

should help direct the LPA to tailor the package, giving attention to certain COP related items, as discussed earlier.

Ms. Shamp expressed that she was now becoming confused as to which sections the LPA should be reviewing and Dr. Shockey clarified. The main question is what is appropriate to regulate and how should that be accomplished. Ms. Dalton added that these conditions should be uniform, and enforceable throughout the Town.

Ms. Shamp feels that the alcohol ordinance stands alone, the hours should be set specific to the licenses, etc. She feels that the noise, signs, etc. should be separate issues and they are already covered under those specific ordinances. Some discussion ensued.

Ms. Shamp made a motion that the ordinance regarding alcohol and the issue of licenses not have conditions on them and it is requested that the consultant take a look at the existing COPs conditions to the extent that they are already codified somewhere else in the code, don't require them as conditions in a specific COP because they are already covered by Town rules; in the case that they are not, make recommendations as to options for the future of the Town; also other thoughts about what should be included in COP conditions. Mr. Yerkes seconded with the amendment. Voted, all in favor; motion carried 6-0, Ms. Barnes absent.

### **C. Resolution of Appreciation for Gerald Murphy - 2008-43 – read by Ms. Kay**

*“Whereas, the existence of the Town of Ft. Myers Beach Local Planning Authority is mandated by FL 163.3174, the LPA utilizes the services of Town staff to facilitate its fulfillment of obligations and duties pursuant to the requirements of Ft. Myers Beach LDC in the FL statute;*

*and, whereas, Gerald E. Murphy (Jerry Murphy), AICP, CFM has been the Director of the Department of Community Development for the Town for the past four years, commencing August 2004, has recently resigned to pursue other professional interests; and, whereas, Jerry Murphy, and the staff of the Department of Community Development under his direct supervision, has been the primary staff member assisting the LPA in fulfilling its' duties and obligations during that time period;*

*and, whereas, the LPA recognizes that Jerry Murphy's duties have been many and varied and required him to have a broad spectrum of knowledge in community development, disaster preparedness, long range and short range community planning and other matters that have further required his dedication and long hours of work to the greater good of the Town;*

*and, whereas, the LPA recognizes Jerry Murphy for consistently outstanding quality of professionalism in the work he has performed for the LPA and the Town of Ft. Myers Beach, his dedication to the best interests of the town, his mentorship of junior staff members, his ability to liaise effectively with other governments and third parties and his courteous, competent and cooperative attitude toward the LPA, Town Council and Town citizens.”*

*It is hereby the resolution by the Local Planning Agency as follows: “the LPA expresses its gratitude and appreciation to Jerry Murphy for the dedication and excellent service to the LPA, the Town Council and the citizens of the Town of Ft. Myers Beach over the past 4 years. The LPA includes within this resolution a strong vote of confidence in and to Jerry Murphy and wishes him well in his future endeavors. The LPA also recommends that the Town Council of Ft. Myers Beach issue a similar resolution of recognition and*

*appreciation with regard to the competency and professionalism of Jerry Murphy and his outstanding service to the Town over the past 4 years.”*

Ms. Kay moved to accept the resolution and Mr. Van Duzer seconded. Mr. Yerkes expressed sadness that Mr. Murphy is no longer with the Town and he will be missed. Vote was taken and passed 6-0; Ms. Barnes absent.

Mr. Van Duzer made a motion to adjourn as the LPA and convene as the HPB; seconded by Mr. Yerkes; motion carried 6-0.

**VI. ADJOURN AS LPA; CONVENE AS HPB:**

**Administrative Agenda**

Update on Historic Property Plaques Project

Dr. Shockey reported that he has mailed out the letters to prospective interested parties and has gotten 2 responses. Both parties seem positive about the issue.

Mr. Weimer stated the Historic Advisory Committee is scheduled to meet on Oct. 23 at 10:00 AM. Ms. Shamp added that the brochure was still not completed yet but the rest of the items are ready to move forward.

Mr. Mandel moved to adjourn as the HPB and reconvene as the LPA; vote taken and passed 6-0.

**VII. ADJOURN AS LPA; CONVENE AS HPB:**

**VIII. LPA Member Items and Reports:**

Mr. Yerkes reported that he attended the county's animal control workshop on the rewriting of the ordinance. He stated that this was a ridiculous meeting with the county having no control of the meeting, or the crowd. He said that the ordinance deals with nothing but dogs, cats and ferrets, with no specifics on leashing, etc. Mr. Yerkes opined that the Town should not adopt the county's ordinance but rather rewrite its own. However, the problem is whether or not the county animal control will be able to enforce the Town's ordinance.

Mr. Van Duzer asked about moving forward with the right-of-way issue before direction from Town Council and the feeling is that Town Council will direct first.

Ms. Kay asked if the Town attorney had any comment regarding the report she produced involving the historic landmark sign matter. Ms. Dalton referred to a provision in the LDC which covers the appeal process if the LPA has denied a determination of an historic or landmark sign; if someone wished to appeal an approval of a landmark or historic sign determination, what is that process? She pointed out that the appeal would not be proper to the LPA, since the process is a hearing, but could be taken to the Council. Further discussion ensued regarding who could appeal, case law, etc.

**VII. LPA Attorney Items**

Nothing to report

**VIII. Community Development Director Items**

Dr. Shockey reported that the appeal in the Lani Kai matter has been postponed until November 3<sup>rd</sup>. Ms. Dalton stated that the continuance was on the part of staff, due to personnel issues, etc.

**IX. LPA Action Item List Review**

- o Mr. Yerkes still scheduled for Nov. 3<sup>rd</sup> at 9:00 AM;
- o Mr. Weimer took over for the Lani Kai appeal.
- o LPA 2008-27 Fertilizer Ordinance – Ms. Shamp asked if she could introduce two experts, Mr. Hester and Mr. Rodwell, in the event there may be deeper scientific issues to be addressed. Ms. Dalton stated that this is certainly appropriate and probably helpful. Mr. Weimer agreed that these experts should be on the agenda for a presentation to the LPA in order to clarify issues to the LPA and Council. Ms. Dalton stated that Ms. Shamp’s association with these men in working on this report together would not be a Sunshine issue because the men are not members of the LPA, etc. The presentation is scheduled for October 20<sup>th</sup>.
- o The Rights-of-Way issue is still scheduled TBD, tentatively Nov. 17<sup>th</sup>.
- o 2008-40 – 138 Gulfview -- TBD
- o Refuse containers-introduction of topic to Town Council

Future work activities:

- Sea wall discussion – TBD
- Beach vegetation -- TBD
- Rights of way – TBD
- Storm water – October 21
- Hearing process for proposed LDC revision
- Seasonal Parking – extended for more research
- Animal Control – November 18<sup>th</sup>
- Alcoholic Beverages – November 18<sup>th</sup>
- Comp Plan Amendments – November 18<sup>th</sup>

**X. Public Comment**

None.

With no further business, Mr. Weimer asked for a motion to adjourn.

**XI. MEETING ADJOUNED -- 2:58 PM.**

Ms. Shamp moved to adjourn and the motion was seconded by Mr. Mandel; motion carried 6-0.

Next meeting October 21, 2008 at 10:30 AM – Workshop

Adopted 11-12-08 With/Without Changes. Motion by Ven Duzer/Yerkes  
(Date)

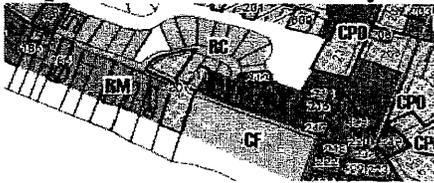
Vote: 7-0

Dennis H. Weimer  
Dennis Weimer, Chair

Dennis Weimer, LPA Chair

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**Town of Fort Myers Beach  
Department of Community Development**



**MEMORANDUM**

To: LPA

From: Frank Shockey, Interim Community Development Director

Date: October 8, 2008

RE: LDC Alcoholic Beverages provisions and prior approvals

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Throughout the Town's existence and under Lee County before incorporation, approval of alcoholic beverage consumption on premises ("COP") has been on a case-by-case basis, for individual establishments and individual locations. The Town's current land development regulations allow for administrative (staff) approval under some circumstances, and require approval to be issued only by Town Council through the special exception (public hearing) process under other circumstances. In either situation, conditions to mitigate the potential impacts of the COP use can be attached to the approval.

Recently members of Town Council have expressed discomfort that the conditions attached to one approval differ from the conditions attached to another approval, often in seemingly inexplicable ways. Although it is true that the conditions that are appropriate to mitigate potential impacts in one location often differ from the conditions that are appropriate in another location, an examination of the conditions attached to prior approvals suggests that such matters are often over-analyzed and could be standardized for easier enforcement and more consistent regulation.

Community Development Staff compiled the conditions attached to prior approvals for a nearly 10-year period from the Town's incorporation to 2004 and sorted them into the topical groupings, presented on the attached sheets. These groupings involve restrictions on the hours of the use; restrictions on music and other entertainment; restrictions on the visibility of external advertisement;

restrictions on numbers of seats and service area, in conjunction with specific uses such as restaurants and motels; restrictions requiring buffering or partial enclosures on outdoor seating; and restrictions purporting to limit the specific type and/or series of State alcoholic beverage license.

The hours of operation and the restrictions on entertainment appear to be the most widely variable. Some restrictions on entertainment went so far as to prohibit specific styles of music.

In any effort to develop standards, the requirements and limitations of Florida Beverage Law should be borne in mind. The Beverage Law provides limits to the hours of operation that apply unless the local government establishes other limits, for example. Also included are limitations on locations of certain types of establishments.

The Town Manager has engaged a consultant to develop some alternatives for future amendments to the Land Development Code, including this issue. At this time a discussion of general parameters for the standardization would be most helpful, so that specific alternatives can be discussed in the future.

Town of Fort Myers Beach  
Summary of all Types of Beverage Licenses and Restaurants with Licenses for  
COP/Outdoor Seating with Conditions, 1995-2004

1. The outdoor seating shall be limited to a 2-COP license for beer and wine in conjunction with a restaurant.
2. The Special Permit is limited to a 2-COP beverage license for beer and wine in conjunction with a restaurant.
3. The location is limited to a Group II Restaurant and a 2-COP service bar.
4. The Special Permit for consumption on premises with outdoor seating shall be limited to a 4-COP license for sale of beer, wine and liquor in conjunction with a Group II Restaurant.
5. The use of the outdoor seating area may only be in conjunction with the restaurant use and limited to a 4-COP-SRX beverage license.
6. The Special Permit is limited to a 4-COP SRX liquor license.
7. The 2-COP beverage license is in conjunction with a Group III restaurant.
8. The consumption on premises for a 4-COP-SRX beverage license shall be used in conjunction with a Group II restaurant located on the 6<sup>th</sup> floor of the hotel
9. The consumption on premises is limited to a 2-COP beverage license to be used in conjunction with at restaurant group III. A bar or cocktail Lounge is prohibited.
10. The applicant must provide proof semi-annually that food sales exceed 50% of total revenue.
11. The consumption on premises (4-COP SRX) is in conjunction with a Group III, Restaurant
12. The Consumption on Premises (4-COP-S license) is in conjunction with room service and a Group II Restaurant with a lounge
13. The consumption on premises for an S-hotel beverage license shall be used in conjunction with a hotel convention hall and meeting rooms
14. The consumption on premises shall be used in conjunction with a Group II restaurant located on the 6<sup>th</sup> floor of the hotel
15. The Consumption on Premises (4-COP-S license) is in conjunction with room service and a Group II Restaurant with a lounge
16. The Special Permit is limited to the indoor movie theater use only.
17. All sales must be conducted within the theater, no sales or consumption may occur outside of the building. This approval is limited to a 2-COP license only.
18. The consumption on premises is limited to a 2-COP beverage license to be used in conjunction with a restaurant, group III, including outdoor seating. Full menu will be available during hours of operation.
19. The subject COP with outdoor seating is limited to no more than one restaurant to be located within SeaFarer's Mall
20. Consumption on premises approval for the 2 outdoor seating areas is in conjunction with the existing 4-COP-S hotel/motel license
21. Consumption on premises is limited to a 4-COP SRX series license in conjunction with the existing Group II and Group III Restaurants.
22. Consumption on premises is limited to a 2-COP series license in conjunction with a Group III Restaurant.

23. The Special Exception is limited to on premises consumption of alcoholic beverages in conjunction with outdoor seating, limited to a 4-COP SRX beverage license to be used in conjunction with the group 3 restaurant as approved under VAR2001-00053.
24. The consumption on premises is limited to a 2-COP license to be used in conjunction with a restaurant, group III, including outdoor seating.
25. The outdoor seating is limited to use in conjunction with the existing Hooters Restaurant. The consumption on premises is limited to a 2-COP beverage license to be used on conjunction with a restaurant, group 3, including outdoor seating.
26. The approval limited the consumption on premises to a 2-COP beverage license.
27. The Special Exception is limited to on premises consumption of alcoholic beverages in conjunction with outdoor seating, limited to a 4-COP SRX beverage license to be used in conjunction with the Snug Harbor Restaurant, as approved under VAR2001-00053.
28. Consumption on premises (2-COP, beer and wine only) is only in conjunction with a Restaurant.
29. Should at any time the sale of beer or wine become the primary use of the establishment, this approval shall become null and void.
30. Package sales of beer and wine is prohibited.
31. The consumption on premises (4-COP SRX) is in conjunction with a Group III Restaurant.
32. The use of the outdoor seating area may only be in conjunction with the restaurant use and limited to a 4-COP-SRX beverage license.

Town of Fort Myers Beach  
Summary of all Hours of Operation and Alcohol Service Requirements for all Licenses  
for COP/Outdoor Seating with Conditions, 1995-2004

1. The outdoor seating shall only be used between the hours of 10:00am to 12:00 midnight, daily.
2. The consumption on premises in the outdoor seating shall only be between the hours of 10:00am and 12:00 midnight, daily.
3. Outside service of beer and wine in the outside seating area for group parties or special events shall not extend beyond 10:00pm, nightly.
4. Operation of the restaurant and consumption use in the outdoor seating area is restricted to the hours of 10:00am to 10:00pm, daily.
5. The hours of operation will be between the hours of 10:00am until 10:30pm, daily.
6. Hours of operation for the outdoor seating area are limited to 10:00am to 10:00pm, daily.
7. Service and consumption of alcoholic beverages in the outdoor seating area will be restricted to the hours between 8:00am to 10:00pm, daily.
8. The hours of operation for the outdoor seating will be restricted to the hours of 11:00am to 10:00pm. Hours of operation for service of alcohol shall be as follows:
  - i. Service to outdoor seating – 11:00am to 9:00pm
  - ii. Restaurant – 11:00am to midnight, daily
9. Restaurant service to outdoor seating will end at 9:00pm.
10. The hours of operation are limited to 11:00am to 12:00pm daily.
11. The hours of operation are limited to 7:00am to midnight.
12. The hours of operation for the outdoor seating area will be restricted to the hours of 11:00am to 12:00 midnight for Monday through Thursday, the hours of 11:00am to 1:00am for Friday and Saturday, and the hours of 12:00 noon to 10:00 pm on Sunday with food service available during all hours of operation.
13. Hours of operation are limited from 11:00am to 11:00pm.
14. Hours of operation for service of alcoholic beverages will be from 9:00am to 2:00am daily.
15. The sale of beer and wine may only occur during the hours of 12 noon to 11pm
16. Alcoholic beverages to be available at office desk from 12 noon to 8pm only.
17. The hours of operation for the outdoor seating will be restricted to the hours of 11:00am to 10:00pm daily.
18. The hours of use for the outdoor seating area shall be the same as the hours of the associated restaurant's food service operations, but in any case shall not be later than 11:00 pm.
19. The hours of operation for the 2 outdoor seating areas will be restricted to the hours of 9:00am to 10:00pm daily.
20. Hours of operation for service of alcoholic beverages in conjunction with the Group II and II Restaurants will be:

The Beach Dog House	10:00am to 10:00pm Monday through Sunday
The Cottage	10:00am to 2:00am Monday through Sunday

The Gulf Shores Grill 7:00am to 10:00pm Monday through Sunday

21. Hours of operation for service of alcoholic beverages in conjunction with the restaurant will be 11:00am to 9:30pm daily.
22. The outdoor seating will only be used in conjunction with the service of alcoholic beverages between the hours of 11am and 12am, Monday through Thursday and between the hours of 11am and 1am, Friday and Saturday and between the hours of 12pm and 10pm Sunday.
23. The outdoor seating will only be used between the hours of 11am and 9:30pm, Sunday through Saturday.
24. The hours the outdoor seating can be used to 10:00am to 12:00 midnight, daily.
25. The outdoor seating will only be used in conjunction with the service of alcoholic beverages between the hours of 11am and 12am Monday through Thursday and between the hours of 11am and 1am Friday and Saturday and between the hours of 12pm and 10pm on Sunday.
26. The hours of operation for the service of alcoholic beverages in conjunction with the restaurant will be from 10:30am to 11:00pm Monday through Sunday.
27. Hours of operation are limited from 5:00pm to 10:00pm.
28. The hours of operation for the outdoor seating will be restricted to the hours of 11:00am to 10:00pm.

Town of Fort Myers Beach  
Summary of all Music and Entertainment Requirements for all Licenses for  
COP/Outdoor Seating with Conditions, 1995-2004

1. Outdoor entertainment/music shall be prohibited.
2. Outside entertainment in the outside seating area for group parties or special events shall not extend beyond 10:00pm, nightly.
3. The following outdoor entertainments are prohibited: a) Live musical performances of bands, jazz musicians, drum musicians, and amplified musical groups or instruments; b) Sporting events, whether live or televised; c) Karaoke or other sing-along activities; and d) Recorded rap, jazz, heavy metal, or rock music. Live background music from a non-amplified piano or guitar, or recorded background music will be allowed, provided such music is played at a low volume. Background music does not include rap, jazz, heavy metal, or hard rock music.
4. No outdoor live entertainment will be permitted.
5. Live entertainment is limited to the hours of 10:00am to 8:00pm, daily.
6. Live outdoor entertainment, music, and/or any type of outdoor speakers are prohibited.
7. There shall be no live entertainment, juke boxes, or television sets in the outdoor seating area; only recorded background music (excluding rap, hard rock and heavy metal music) will be allowed.
8. Any outdoor entertainment is prohibited.
9. Entertainment and live music will be restricted to non amplified acoustic music such as but not limited to, classical guitar, violin, etc., and be contained indoors.
10. Live entertainment is not permitted in conjunction with the Consumption on Premises with outdoor seating.
11. Live entertainment is not permitted in conjunction with the Consumption on Premises with outdoor seating.
12. The hours of operation for the 2 outdoor seating areas, for outdoor music and/or entertainment, will be restricted to the hours of 9:00am to 10:00pm daily.
13. The following conditions will apply to any outdoor music and/or entertainment located around the pool area or the proposed elevated deck;
  - a. Recorded background music that is restricted to a mono background system, which is defined as a 60 amps system with speakers limited to 1 to 2 watts that provides for a volume that is kept at or below normal conversation level, is allowed.
  - b. Only non-amplified string instruments are allowed to be played "live" without plugging into the mono background system.
  - c. Entertainment and/or live music, (excluding non-amplified string instruments), which is defined as a keyboard that is limited to the function of a piano with our without a Disc Jockey, referred to as a "DJ" and/or a vocalist is allowed only when the keyboard and all microphones, for a "DJ" or vocalist are plugged into the mono background system and the volume is kept at or below normal conversation level.

- d. Any music that is played in the Lounge Area located on the first elevated floor must comply with Conditions 4.a, 4.b, and 4.c, or else the outside door(s) from the Lounge to the proposed elevated deck must be closed.
- 14. Outdoor music and entertainment are prohibited in the outdoor seating areas.
- 15. Outdoor music or entertainment is limited to 11pm and live music is limited to non-amplified acoustical music.
- 16. Outdoor music or entertainment is prohibited.
- 17. Outdoor music and entertainment is prohibited.
- 18. Prohibited outdoor music/entertainment.
- 19. Outdoor music or entertainment is limited to 11pm and live music is limited to non-amplified acoustical music.
- 20. Live outdoor entertainment, music and/or any type of outdoor speakers are prohibited.

Town of Fort Myers Beach  
Summary of all Advertisement Requirements for all Licenses for COP/Outdoor Seating  
with Conditions, 1995-2004

1. There will be no advertisements visible from Estero Boulevard or from the beach indicating the outdoor seating area or the service of alcoholic beverages.
2. No advertising of the restaurant is permitted except in connection with advertising for the hotel operation.
3. There will be no outside advertisement visible from Estero Boulevard or Ohio Avenue indicating the service of alcoholic beverages.
4. There will be no advertisement visible from Estero Boulevard or from the beach indicating the service of Alcoholic Beverages.
5. There will be no advertisement visible from Estero Blvd. or Carolina Ave., indicating the service of alcoholic beverages.
6. There will be no advertisement visible from Estero Blvd. or Alva Ave. indicating the service of alcoholic beverages.
7. There will be no outside advertisement visible from Estero Boulevard or Ohio Avenue indicating the service of alcoholic beverages.

Town of Fort Myers Beach  
Summary of all Indoor/Outdoor Seating and Service Requirements for all Licenses for  
COP/Outdoor Seating with Conditions, 1995-2004

1. The outdoor seating shall be limited to use in conjunction with a restaurant.
2. The consumption on premises in the outdoor seating is limited to the areas reflected on the site plan attached as Exhibit B to the Staff Report.
3. The Special Permit is limited to a 1,106-square-foot restaurant with 12 indoor seats and 50 outdoor seats.
4. The location of the outdoor seating area is limited to the 29-foot by 52-foot area as reflected on the Applicant's site plan attached as Exhibit B to the Staff Report, and is limited to a Group II Restaurant with a maximum of 63 seats.
5. The use of the outdoor seating area must be ancillary to, and in conjunction with, the motel use only.
6. The use of the outdoor seating area will be incidental and subordinate to the principal use (motel).
7. The Special Permit for outdoor seating is limited to the approximately 2,800-square-foot (40-foot by 70-foot) pool/patio and pavilion area located in the center of the facility as indicated on the site plan. The pool/patio area will contain 28 seats and the pavilion area will contain two tables with four seats each and 10 stools for a total of approximately 46 seats.
8. The service area of the Group II restaurant is limited to room service, and the pool/pavilion area at the center of the site.
9. The location of the Special Permit for consumption on premises in conjunction with outdoor seating is limited to the outdoor deck area (approximately 10 feet by 40 feet as shown on Attachment B to the Staff Report) which separates the retail use from the beach area, and on the first 50 feet of the beach which extends south from the deck area toward the water. The seating for both areas may not exceed 75 seats. The alcohol consumption portion of the beach area will be clearly marked.
10. The service of alcoholic beverages shall be only in the 9-foot by 9-foot tiki hut (as reflected on the site plan attached as Exhibit B to the Staff Report) which is limited to a Group II snack bar. The outdoor seating area for consumption of the beverages is restricted to the central courtyard/pool/activity area.
11. The use of the outdoor seating area may only be in conjunction with the motel use.
12. The location of the outdoor seating area is limited to the area designated on the applicant's site plan attached as B, not to exceed 60 seats in outdoor seating for a total of 159 seats.
13. The Special Permit is restricted to a 3,650 square foot restaurant with 40 outdoor seats at the location reflected on the site plan attached as Exhibit A. The restaurant with outdoor seating will be an accessory use to the marina use.
14. Service of food and alcohol from the tiki-hut will be eliminated. The outdoor seating area will be served only from the restaurant interior as part of the operation of a full service restaurant.
15. Consumption on premises in conjunction with outdoor seating is prohibited.

16. The location of the outdoor seating area is limited to the 785 square foot deck as shown on the applicant's site plan attached as Exhibit B. Use of a bar for the service of alcoholic beverage is prohibited. The applicant is limited to 52 seats on the outside deck and 50 seats inside the restaurant.
17. The total floor area of the restaurant facility shall not exceed 4,574 square feet in area. The approval for consumption on premises (4COP-SRX) is based on the floor/site plan marked received July 1, 1997 and does not approve the COP in conjunction with outdoor seating.
18. The approval for Consumption on Premises (4-COP-S license) is based on the floor/site plans date stamped Received September 11, 1998 by the Permit Counter and does not approve the COP in conjunction with outdoor seating.
19. No bar or pool-side service (motel).
20. The applicant is limited to 47 seats with no more than 24 to be on the outside deck. The location of the outdoor seating area is limited to a 453 square foot deck as designated on the applicant's site plan attached as Exhibit B.
21. The outdoor seating area shall not exceed 1500 square feet if located on the roof, and shall not exceed 1000 square feet if located on one of the lower levels.
22. The subject COP with outdoor seating is limited to no more than three restaurants to be located within SeaFarer's Village Mall and is limited to the following maximum floor area and capacity:
  - a. 2899 total SF with 152 total seats, including 1677 square feet of outdoor seating area with 84 outdoor seats (1<sup>st</sup> floor),
  - b. 3472 total SF & 155 total seats, including 1017 SF of outdoor seating area with 56 outdoor seats (2<sup>nd</sup> floor),
  - c. 2698 total SF & 165 total seats, including 1571 SF of outdoor seating with 132 outdoor seats (1<sup>st</sup> floor).
23. COP2000-00020 may be utilized for the proposed restaurant with 5160 total SF with 151 total seats, including 1086 SF of outdoor seating area with 60 outdoor seats (3<sup>rd</sup> floor).
24. Consumption on premises for the 2 outdoor seating areas is restricted to the areas depicted on the attached site plan, Attachment G (8,324 square feet pool-deck service area and 2,280 square foot deck located on the first elevated floor).
25. The approval for consumption on premises (4-COP SRX) is limited to the existing restaurant complex known as the Gulf Shores Grill, The Cottage, and The Beach Dog House and the existing outdoor seating areas shown on the wood deck on the above referenced floor plan.
26. Consumption on premises in conjunction with outdoor seating is prohibited.
27. The total outdoor seating capacity is limited to a total of 170 seats. The location of the outdoor seating area is as specified in Exhibits B, C, and D which are attached hereto and incorporated herein as reference. The outdoor seating in the "Courtyard area" is further limited to no more than 60 of the 170 total seats.
28. The total outdoor seating capacity is limited to 6 tables with a total of 24 seats in the outdoor seating area associated with Unit 7 of Key Estero Center as indicated on the applicant's site plan attached as Exhibit B.
29. The special Exception is limited to the expansion of an existing on premises consumption of alcoholic beverages in conjunction with outdoor seating to

include a proposed enclosure and expansion of the wooden deck in the front of the existing restaurant at this location.

30. The total outdoor seating capacity is limited to a total of 64 seats. The location of the outdoor seating area is limited to the "Existing rear deck" and "New front room addition" as shown in the Staff Report dated 9/6/02.
31. The outdoor seating will only be used between the hours of 11am and 12am Monday through Thursday and between the hours of 11am and 1am Friday and Saturday and between the hours of 12pm and 10pm on Sunday.
32. The total outdoor seating capacity is limited to 253 seats (an addition of 65 seats to the 170 seats approved under Resolution 02-40, Case No. COP2002-00095). The location of the outdoor seating is specified in Exhibits B, C, and D, attached hereto and incorporated herein by reference. The outdoor seating is further limited to no more than 72 seats in the 2,500 sq. ft. "Courtyard" area (Exhibit B) and no more than 60 seats in the additional 650 sq. ft. "Deck Extension" area (Exhibit D) approved for outdoor seating in conjunction with on premises consumption of alcoholic beverages outdoors by this request.
33. The approval for consumption on premises (2-COP) is based on the floor plan drawn on 9/21/03, approved by Lee County development services on 10/6/03 and does not approve the consumption of premises in conjunction with outdoor seating.
34. No outdoor seating is approved as part of this consumption on premises.
35. The location of the outdoor seating area is limited to the area as designated on the applicant's site plan attached as B, not to exceed 60 seats in outdoor seating for a total of 159 seats.

Town of Fort Myers Beach  
Summary of all Customer Requirements for all Licenses for COP/Outdoor Seating with  
Conditions, 1995-2004

1. Food and beverage service will be limited to guests of the Lighthouse Island Resort. The Applicants will post a prominently displayed sign indicating that the restaurant is for guests only.
2. The Special Permit for consumption on premises in conjunction with outdoor seating is limited to the use in conjunction with the existing retail use. The use of a bar/service bar on this property is prohibited. However, this does not prohibit the sale of draft beer and wine which is poured from a large bottle so long as it is consumed only in the designated locations. There will be no waiter or waitress service; the customers must order their drinks from inside the premises and directly from the person who pours the drinks.
3. Service and consumption of alcoholic beverages in the outdoor seating area is allowed only to guests or residents of the resort.
4. The ten (10) slips on the south side of the east pier (directly in front of the restaurant) will be dedicated to restaurant use only.
5. Sale limited to guests only and charged to occupied rooms.

Town of Fort Myers Beach  
Summary of all Enclosure and Buffer Requirements for all Licenses for COP/Outdoor  
Seating with Conditions, 1995-2004

1. The Applicant will enclose the outdoor seating area on the north and west sides with an 8-foot-high masonry or block wall. The first six feet of the height of the wall shall be solid (i.e., no opening unless required by development codes or ordinances), but the top two feet may incorporate a decorative design with small openings.
2. The ten-foot buffer and fence have been installed along the south property line. Owner shall install an additional twenty-six (26) trees along the south property line (as part of the Development Order issued by Lee County under the authority delegated by the Town of Fort Myers Beach pursuant to Land Development Code Chapter 10.) Owner shall install thirty (30) trees within the ten-foot buffer along the north property line. If the existing fence on the north (Ocean Harbor) property line is removed, owner shall install a fence not less than eight feet in height so that visibility through said structure is not more than 25% when viewed from right angles.
3. The applicant shall provide a vegetative buffer along the south property line within the 9 feet of open space consisting of 5 trees and 24 shrubs per 100 linear feet. The trees will be a minimum of 10 feet high at planting and the shrubs will be a minimum of 36 inches high at planting. All trees and shrubs will be native, salt tolerant vegetation.
4. Prior to the issuance of a Certificate of compliancy by the Development Services Division, the applicant must install, at a minimum, the Landscape Buffer depicted in Exhibit E of the staff report dated May 7, 2001, which is attached hereto and incorporated herein by reference. Any additional landscaping required by the limited review development order (LDO2000-00166) must also be installed. This Landscape Buffer must be installed prior to the mono background system on the elevated deck becoming operational.
5. The service area located adjacent to the bridge structure and First Street shall be screened off by the use of an appropriate fence. Staff recommended a 6 foot white pvc fence. The FPL box will also be screened with plantings made up of silver/green buttonwoods that are at least 36 inches tall.

Town of Fort Myers Beach  
Summary of all Lighting Requirements for all Licenses for COP/Outdoor Seating with  
Conditions, 1995-2004

1. Lighting on the deck will be shuttered and shielded from the surrounding properties.
2. Lighting on the deck will be shuttered and shielded from the surrounding properties.
3. Lighting on the deck will be shuttered and shielded from the surrounding properties.
4. Lighting on the deck will be shuttered and shielded from the surrounding properties.
5. Lighting on the deck will be shuttered and shielded from the surrounding properties.

RESOLUTION OF THE LOCAL PLANNING AGENCY  
TOWN OF FORT MYERS BEACH, FLORIDA  
RESOLUTION NUMBER 2008-43 **A**

WHEREAS, the existence of the Town of Fort Myers Beach Local Planning Agency (LPA) is mandated by Florida Statute 163.3174 and the LPA utilizes the services of Town staff to facilitate its fulfillment of its obligations and duties pursuant to the requirements of the Town of Fort Myers Beach Land Development Code (LDC) and Florida Statute; and

WHEREAS, Gerald E. "Jerry" Murphy, AICP, CFM, has been the Director of the Department of Community Development for the Town for the past four (4) years, commencing in August, 2004 and has recently resigned to pursue other professional interests; and

WHEREAS, Jerry Murphy and the staff of the Department of Community Development under his direct supervision have been the primary Town staff members assisting the LPA in fulfilling its duties and obligations during that time period; and

WHEREAS, the LPA recognizes that Jerry Murphy's duties have been many and varied and have required him to have a broad spectrum of knowledge of Community Development, disaster preparedness, long-range and short-range community planning and other matters and have further required his dedication of long hours of work to the greater good of the Town; and

WHEREAS, the LPA recognizes Jerry Murphy for the consistently outstanding quality and professionalism of the work he has performed for the LPA and for the Town of Fort Myers Beach, his dedication to the best interests of the Town, his mentorship of junior staff members, his ability to liaise effectively with other governments and third parties to further the Town's business and his courteous, competent and cooperative attitude towards the LPA, Town Council, and Town citizens.

IT IS HEREBY RESOLVED BY THE LPA OF THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:

1. The LPA hereby expresses its gratitude and appreciation to Jerry Murphy for his dedication and excellent service to the LPA, the Town Council and the citizens of the Town of Fort Myers Beach over the past four (4) years.
2. The LPA also includes within this resolution a strong vote of confidence in and to Jerry Murphy and wishes him well in all his future endeavors.
3. The LPA also recommends that the Town Council of the Town of Fort Myers Beach issue a similar resolution of recognition and appreciation with regard to the competence and professionalism of Jerry Murphy and his outstanding service to the Town over the past four (4) years.

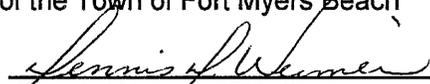
The foregoing Resolution was adopted by the LPA upon a motion by LPA Member Kay and seconded by LPA Member Van Duzer and upon being put to a vote, the result was as follows:

Dennis Weimer, Chair aye  
Evie Barnes absent  
Joanne Shamp aye  
Joe Yerkes aye

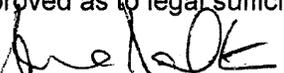
Alan Mandel, Vice Chair aye  
Rochelle Kay aye  
Bill Van Duzer aye

DULY PASSED AND ADOPTED THIS 14<sup>th</sup> day of October, 2008.

LPA of the Town of Fort Myers Beach

By:   
Dennis Weimer, LPA Chair

Approved as to legal sufficiency:

By:   
Anne Dalton, Esquire  
LPA Attorney

ATTEST:

By:   
Michelle Mayher, Town Clerk

**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, November 18, 2008**

- I. CALL TO ORDER:** The meeting of the Local Planning Agency (LPA) was called to order on Tuesday November 18, 2008, at approximately 10:35 am by Chairman Dennis Weimer. All members were present at the meeting:

Rochelle Kay  
Bill Van Duzer  
Joe Yerkes  
Joanne Shamp  
Alan Mandel  
Evie Barnes

Staff present at the meeting: Dr. Frank Shockey, Interim Director Community Development  
Anne Dalton, LPA Attorney  
Members of the public

- II. PLEDGE OF ALLEGIANCE:** The Pledge of Allegiance was lead by Mr. Weimer and recited by all present.

- III. INVOCATION**  
Also by Mr. Weimer

**Off Agenda Item:** LPA and HPA assignment of a volunteer to create a Christmas Tree ornament for the Town Christmas Tree. Ms. Shamp volunteered to do one for each the LPA and the HPA.

**IV. TOWN CAPITAL IMPROVEMENT PROGRAM (CIP) ITEMS**

Mr. Weimer noted that the LPA has requested Town Council to hold a workshop together and to schedule an opportunity to discuss the CIP process, but nothing has been done so far. He expressed his concerns regarding the issues to be addressed and the fact that, after several months, there is still nothing scheduled to get these things moving. Mr. Yerkes also expressed his concerns that LPA is not being included in the capital funding and future planning discussions, etc., and agreed with the Chair that a formal request is appropriate at this time. Ms. Shamp added that she is aware of a restroom going in at Newton Park and the LPA had specifically discussed this in the CIP that restrooms were not in the Comp Plan.

Discussion ensued regarding toilets and the Comp Plan and the proper protocol for interaction between the Town Council and the LPA. Ms. Dalton stated that it is the LPA's responsibility to review the CIP and that it doesn't actually go through the Council at that point, but comes through the Town Manager and staff, and then the document goes up to Town Council. Mr. Van Duzer feels that the problem is that the form in which this was presented to LPA was seriously lacking in accompanying documentation and information for an educated decision to be then forwarded to the Town Council. Mr. Yerkes pointed out that he feels that this is actually a function of Town staff to develop the CIP and present it to the LPA in a manner easy for easy consideration. Ms. Kay felt that the wait was due to the lack of a Town manager, but pointed out that now this Town manager has been in place for several months but nothing has happened. Mr. Mandel suggested that the LPA present an agenda of topics to the Council but Mr. Weimer stated that this was done already, in the past, and there has still been no response. Ms. Shamp asked the Town attorney if it is appropriate to ask the Town manager to be at the next LPA meeting to discuss the problems. Mr. Yerkes again stated that both Town staff and Town Council have ignored the LPA's requests to have a workshop to discuss this CIP issue as well as others. Much discussion ensued regarding what steps were taken and what to do about the lack of response between the Council and the LPA. The final consensus was that the attorney prepare a resolution to formally request the Town manager and the Town Council to set aside a time for CIP process discussion. Mr. Yerkes suggested two separate resolutions to deal with the Town manager and one to deal with Council, requesting a meeting in response for monthly meetings, and said that either they will hold these meetings or not, but they need to respond to the LPA. Ms. Kay agreed that it is time for some action.

## **V. PUBLIC HEARINGS**

These are legislative hearings and, according to the attorney, the LPA can choose to have one hearing on all six issues or have six separate hearings. Mr. Weimer polled the LPA members as to their decision. Mr. Yerkes suggested doing all together.

### **A. Comprehensive Plan Amendments**

#### **1. 2008-06 TEXT (Lodging Establishments)**

Mr. Spikowski, planning consultant to the Town, addressed the meeting and stated that this is the third and final set of hearings to this year's amendments to the Comprehensive Plan, with prior hearings having taken place in March and May 2008. The amendments from those hearings went before Town Council last night (Nov. 17). Two of the amendments were updated from the original consideration, one was the Capital Improvements with the new budget figures, and the public schools element has been adjusted, too. Many of the changes included reflect changes in the state laws.

The first amendment is 2008-06, the desirability of continuing hotels and motel and recognizing their relationship with the economy of the Town of Ft. Myers Beach. There is a page of discussion taken from the Evaluation and Appraisal Report that will go into the narrative part of the plan, in addition to three new policies that will be included into the legally adopted part of the plan; one acknowledges the importance of the hotels and motels, one that addresses the "special incentives" in the plan don't apply when

converting hotels to residential, and, third, a clear statement that it is okay to have hotels/resorts owned condo type as long as they continue to operate as hotels and motels. **Mr. Weimer asked for public comment. There was no public comment; public comment closed.**

**LPA comments and/or discussion:**

Ms. Kay pointed questioned an item (#23) on page 4 and Mr. Spikowski clarified the item. Mr. Yerkes referred to a statement that relates to hotels/motels being converted to condo ownership but still must remain hotels or motels, and stated that he didn't understand the logic there. Mr. Spikowski pointed out the reference on the fourth page, in the lower left corner and attempted to clarify that there must be a front desk and business must be conducted as a hotel/motel; if the desk area was to be shut down, that would be a violation now because it is now in the LDC.

Mr. Van Duzer stated that he felt the whole thing is ready to go and was most impressed by page 1 of the discussion and the EA report, at the end of the paragraph it says "while the Town hesitates to encourage new hotels and motels...the loss of the Town's active and healthy lodging industry would change the character of Ft. Myers Beach forever." He agrees with all of that wholeheartedly.

Ms. Dalton said that, after Mr. Spikowski left the Council meeting last night, there was an interest in having the parcelization ordinance return to the Town Council for "crisp direction." The request was for the LPA version that would go to the Council for review and then return through the process of the LPA and Council so, Ms. Dalton asked if anything contained in 07-04, the parcelization ordinance, affect anything that is in this proposed Comp Plan amendment. Mr. Spikowski replied that he didn't know of anything but that there would be an opportunity to do make any changes between now and when it is adopted, probably February 2009, and he saw no reason not to proceed. Mr. Van Duzer moved to send this on with a recommendation of the changes as written and was seconded by Ms. Shamp. The motion was carried 7-0.

**2. 2008-10 TEXT (Stormwater Plan)**

Mr. Spikowski stated that when the plan was adopted in 1998, there were three additional planning efforts that the Town was going to act on immediately; two were done, the streetscape plan and the old San Carlos area plan, but the stormwater plan was not done. The amendment is basically to reflect the change in the dates to reflect that this is something being started now and will be completed in the following year. Mr. Van Duzer asked if the staff would be agreeable to the deadline dates. Mr. Spikowski agreed that they were and that, should there be a problem, they can be flexible.

**Mr. Weimer asked for public comment. There was no public comment; public comment closed.**

Mr. Van Duzer moved to accept the changes and was seconded by Ms. Barnes. The motion was carried 7-0.

**3. 2008-11 TEXT (Utilities Element Cleanup) and 2008-12 (Water Supply Plan)**

Mr. Spikowski recommended that the LPA discuss this item and the next (2008-12) together since they are closely related and they should be combined in the motion. 2008-11 was to reflect that since this was written, the Town has acquired the water distribution system from the county and the changes reflect the turnover of that system.

The more complex part of the amendment is in 2008-12. One of the state legislative Mr. regional water supply plans created by the water management districts. The regional does their ten year plan setting broad policy, which in SWFL is that we cannot keep relying on the shallow aquifers to provide the drinking water as we have in the past, and instead need to go to other alternatives. That plan was adopted in 2006 and Lee County was required to update their plan, which the Town is a part of, to show conversion to alternative sources. This was done and included in the LPA's packet of information to be reviewed. The Town is required to amend its plan to be consistent with the county and regional plans, and there are some minor technical requirements which the consultant has attempted to condense and simplify for the sake of LPA review. He did point out, however, that although he did not see the need to make all of the specific changes, the plan may be turned back for minor, technical language by the DCA, in which case he would make the necessary adjustments. Basically, there is a number of text which is to be added or changed, and the DCA also requires some changes to the conservation element in the CIP element, which are detailed in Mr. Spikowski's report. There is no real policy change noted in this area. Mr. Yerkes moved to accept both 2008-11 and 2008-12, as written. Ms. Shamp seconded. Ms. Kay asked how ASR works and Mr. Spikowski gave an explanation.

**Opened public comment; no comments. Public comment closed.**

Mr. Weimer referred to the Water Supply Facilities Work Plan, and noted that page 16 under paragraph 3.3.2, in "existing population," he noted that it says "dwelling unit information is maintained by the Lee County Planning Division staff" and "for the unincorporated areas of Lee County, Ft. Myers Beach, Bonita Springs.." His point is that they are issuing the building permits and queried, if the county is issuing the building permits, do we need to include something in the Comp Plan that recognizes that there will ultimately be a responsibility to the Town to supply that information back to Lee County Utility for their planning purposes? Mr. Spikowski stated that this is basically being done and gave further information to address Mr. Weimer's question. On page 35 of 42, in paragraph 5.5, referring to water supply facilities and captured storm water, Mr. Weimer asked is the consultant in the storm water issue aware of and coordinating information with LCU regarding the possible infusion of Ft. Myers Beach future storm water management into the LCU system? Ms. Dalton asked Kathy Lewis to address the question. Ms. Lewis stated that our consultant is not doing that because of the position of Ft. Myers Beach being the end of the line to transport storm water generated on this island back to a county facility, would be beyond the Town's financial means. More discussion ensued regarding the storm water management on the island. Ms. Kay asked what is the enterprise fund? Mr. Spikowski explained. Vote called and motion was carried 7-0. Mr. Spikowski asked if the LPA was agreeable to keeping these two items together, as he suggested. Mr. Yerkes moved to clarify the motion and moved that both sections be combined into one, and seconded by Ms. Shamp; carried 7-0.

**4. 2008-13 (Coastal High Hazard Area Text)**

Mr. Spikowski stated that this one and the next one, 2008-14, are very similar. This is a late addition since the legislature found that their own rules were causing confusion. The Coastal High Hazard area has different meanings, two in state law and one in federal law, and they were all different so the two state laws would become just one

meaning. The amendment gives no change in policy but only simple clarification of the meaning as discussed. Mr. Spikowski is suggesting that there be one new set of wording added to policy 4b1 that says "*the entire Town is located within the Coastal High Hazard Area.*" If a map becomes necessary, that will be provided by Mr. Spikowski does not see the need at this time.

He did add that these two amendments, although very similar, should be kept separate because the consultant doesn't feel a change is needed, but if they do need to change it, it will already be in the system.

**Public comment opened; no comment. Public comment closed.**

Mr. Van Duzer moved to adopt 2008-13, with the minor change in policy 4b1, as suggested by Mr. Spikowski. Second was by Mr. Yerkes. Motion was carried 7-0.

**5. 2008-14 (Coastal High Hazard Area Map)**

Mr. Yerkes moved to accept this as written; seconded by Ms. Barnes.

**Public comment opened; no comment. Public comment closed.**

Motion carried 7-0.

The LPA recognized the extensive report and the exceptional job that Mr. Spikowski did in preparing and presenting the report.

**LUNCH BREAK**

**Reconvened at 12:40 PM**

**VI. ADMINISTRATIVE AGENDA**

**Proposed Language For LDC Section 34-219**

Dr. Shockey summarized that the wording of the section that the Director has to find that something is not going to be controversial in order to approve a change, is very hard to predict, so there was a suggestion that the assumption that it was not going to be controversial was implied as an absolute finding. He noted another item in this section, that it would provide the Director with the authority to establish a fee, where all other fees in that section are to be established by Town Council through resolution, etc. Some discussion ensued regarding fee schedules. The proposed changes are in section B, sub-paragraph 1b, and changes to B2a that listed additional clarifications on additional land use or variance or deviation from the code.

Mr. Weimer deferred to Ms. Kay, who asked about this being subject to the Sunshine Rules, and she thought that this should be addressed in the language. Discussion ensued about whether or not administrative changes needed to go to the public for comment or be reviewed by neighbors. Ms. Kay explained that the intent was that if something went before the Director for a minimal change, because it could be perceived as something that was just between the builder and the Director, it should be something that should let the public know that it was happening. Mr. Yerkes said that policy would throw the issue back into the public arena, LPA level, rather than being an administrative change, and that this would contradict the reason for the change in the first place. Mr. Weimer asked if there is a documented trail, open to the public, when there is an administrative decision made on a zoning issue. Dr. Shockey explained the process of keeping the records, etc. and members were satisfied that this was a proper decision, but continued to discuss it.

Mr. Weimer asked the LPA attorney what their options and purpose is today with this matter.

Ms. Kay asked if someone could print out a copy of the original request from the LPA. Mr. Van Duzer recommended moving this forward to the next meeting so that all of the records would be available to help clear the issues up. Mr. Yerkes asked to move the issue to a hearing so that they can discuss it in a hearing. Mr. VanDuzer made a motion to move this forward to a hearing and was seconded by Ms. Shamp. The motion was carried 7-0. The item was moved forward to the next meeting.

#### **B. LDC 34-2022 Seasonal Parking Report (Mandel/Barnes)**

Mr. Mandel said that they have now polled three different citizens involved in seasonal parking and referred to a packet of information given to each member. There seems to be agreement with all those polled that there is a need for a parking garage on the island. In addition, there is a consensus about a need for signage and there is still some concern for enforcement. Mr. Mandel suggested that more citizens and staff should be involved in the decisions for parking since he has only gotten opinions from three property owners in town. Mr. Barnes added that she, too, felt that only talking to the current parking area owners did not give enough information and input into this project to make a good decision. Discussion ensued about the available parking around the Lani Kai and enforcement. Mr. Weimer recalled that this whole issue started because there was a question as to whether or not to extend the times available for seasonal parking, and now there is an evaluation of the types of parking lots. According to the codes, seasonal parking lots are something that are temporary and only lasting for three years but many of these lots have been doing this for years and continue to exist as available parking all year; Mr. Weimer felt that the problem is enforcement but also feels that the problem is getting out of hand as far as making this a total island parking issue. Mr. Yerkes agreed with Mr. Mandel that there may be a need for a study on parking for the island before they can make fair and just decisions. Dr. Shockey stated that the parking lot provisions suggest that you can have a temporary lot in a commercial zoning district, and those include seasonal parking lots as a use that can be permitted by temporary permit. He suggested that part of their analysis be to determine where parking is needed. Discussion continued about parking and lots, etc. Ms. Shamp added that if the Town goes ahead with beach nourishment and there are federal funds, they will be required to have more parking spaces available. Mr. VanDuzer feels that the time limits should be extended because there needs to be more parking in the busy times. He feels that those people who wish to use their properties for parking should make application the same way they are now and the times should be regulated more by the lot owners. Mr. Yerkes is still concerned that the LPA would consider extending the rights of a temporary lot operator to affectively be a permanent lot operator and yet not have to meet the requirements that the permanent operator must meet. He was adamant that this is unreasonable and unfair. He pointed out that a "temporary" lot now cannot operate more than three years but that is too long when they are not required to meet standards, like ADA rules, like the permanent owners. Mr. Mandel summarized by saying that there are two things to be considered: one, is there a need for parking and what is it; and two, to have the appropriate group look at this and do a study as to what is the best solution to the parking issue. More discussion about a study to be done. Ms. Shamp stated that she would not recommend any drastic decisions at this point because there are several large projects forthcoming which will impact parking so the LPA should just make a decision to address the seasonal parking problem and make all of the seasonal lots who are in violation, switch to permanent lots or stay seasonal within the guidelines. Ms. Barnes said that there is not

enough parking but the Town should not act to eliminate what parking is available now. Mr. Weimer attempted to draw the discussion to a point and said that there may be three different areas to be addressed. He felt that the consensus is that the time that seasonal parking could be open could be extended to perhaps an eight month period; also a re-affirmation that the code sets the time limit as three years so if they operate longer, they need to stop being a parking lot or convert to the rules, and it should be enforced. Lastly, was whether or not the LPA recommends a study be done for future planning of this issue. Mr. Yerkes expressed a desire to rewrite the LDC and abolish the temporary parking process, except for one time events, and see all the requirements of the temporary guy the same as the permanent guy for the sake of fairness. He again pointed out that it is inherently unfair to allow a guy to operate for three years and not have to fulfill the same requirements as the permanent lot owner. Mr. VanDuzer clarified that he would suggest that the time period problem be extended for a year just until the Town can come up with a solution so that the temporary lot owners existing now don't just close up shop and leave the Town with even less space for parking in the middle of season. Mr. Mandel asked how many seasonal lots are actually properly permitted. Dr. Shockey replied and stated that this is unclear due to the nature of the lots, etc. More long discussion regarding this and what locations are involved and, finally, it was determined that only one property on the beach is actually permitted to be a seasonal, temporary lot. Ms. Dalton stated that Mr. Yerkes is suggesting that the LPA pass a resolution saying that there isn't a problem and Code Enforcement needs to enforce the regulation. Mr. Yerkes corrected her, saying that the LDC needs to be changed to reflect that seasonal lots are no different than permanent lots in their requirements to meet ADA and safety regulations, with the exception of special event permits for weekends. Dr. Shockey then asked if the LPA was developing new parking lot standards. Mr. Weimer than clarified and said that the recommendation would be that in the future, going forward eliminates seasonal; parking on Ft. Myers Beach; it doesn't mean the Town doesn't want parking lots, it just means that if someone wants to run a parking lot, they must run one that meets the codes that would be applicable to a permanent parking lot. There was more discussion regarding paving parking lots and what constitutes high and low turnover parking, as well as the material to be used for the paving, in accordance with the storm water issue. Mr. Weimer addressed Ms. Dalton and asked "If coming out of this is a recommendation by the LPA that there be a change in the LDC, what would be the process?" Ms. Dalton said that this item was brought forward by Town staff so there have been some informal fact-finding discussions and therefore the LPA can say "yes, we want to move forward with an ordinance" and the ordinance would be prepared and returned to the LPA, not to the Council at that point. She was not clear as to the order, if the resolution goes to Council first or to the LPA first for a hearing. Dr. Shockey, in an attempt to clarify the issues, began another long discussion about the differences in the types of parking lots. Ms. Dalton suggested an alternative in re-crafting the language of the code to address temporary lots. Mr. Weimer asked the LPA again, if the consensus was to re-craft the seasonal parking or eliminate it from LDC. Mr. Yerkes chose to re-craft; Mr. Van Duzer agreed; Ms. Shamp opts for re-crafting; Ms. Barnes agreed with Ms. Shamp; Mr. Mandel opted for re-crafting, as did Ms. Kay. Mr. Weimer also agreed to the re-crafting of the ordinance and there was some discussion about what things would need to be addressed. Mr. Weimer then asked if Ms. Barnes and Mr. Yerkes would take a charter to re-craft and bring that forward to the LPA. A re-crafting of the seasonal parking that would identify times of year, if it is applicable or not, the types of public safety that need to be addressed

Mandel

and the number of renewals allowed before it must go through a permanent zoning process. Ms. Dalton added that it should be keyed to location. Ms. Barnes and Mr. ~~Yerkes~~ <sup>Mandel</sup> agreed to draft that and bring it before the LPA for review at January 6, 2009 meeting. John Richard, from Ship Wreck addressed the meeting regarding the parking issue. He said he has a special exception for a parking lot on Third and feels that a main point for parking is the location, to get the cars off Estero Blvd. as quickly as possible. He added that he has no problem with the temporary lots because he believes just getting visitors parked and walking around the beach is good for all. Long discussion continued about what should be in the ordinance regarding signs and if a study is needed, etc. Mr. Mandel suggested two resolutions: one that Council look at signage that indicates to people coming to the beach, where the parking is; the other should encourage the Town to do what it can to augment the parking on the project in that area. Mr. Weimer suggested that he draft it and bring it to the LPA. Mr. Weimer polled the members again to see if the members agreed that Mr. Mandel propose a resolution involving the Town for signs for parking. Ms. Kay agreed; Ms. Barnes agreed; Mr. VanDuzer agreed; Ms. Shamp was undecided; Mr. Yerkes abstained (too much background discussion, other members were inaudible). Then Mr. Weimer polled the members to see who is supportive of augmenting the existing projects in some form. Ms. Dalton was concerned about the appropriateness of discussion at this point, after there was already a hearing regarding this. Mr. VanDuzer suggested that Mr. Mandel go to the Town Council as a citizen and make the suggestion. After that, it was decided that the two resolutions would not be necessary after all.

Ms. Barnes interrupted the meeting to request that the LPA go off the agenda because she had to leave early. Ms. Dalton had some resolutions and paperwork that needed to be addressed while Ms. Barnes was still present so these items were moved up. The members were given the minutes from September 9 and copies of Resolution 2008-43 and 2008-44. Mr. Yerkes moved that the LPA accept Resolution 2008-43 and was seconded by Ms. Kay. The motion was carried 7-0.

Mr. Yerkes moved to adopt Resolution to adopt 2008-44 as written. The motion was seconded by Ms. Kay. (Note: Mr. VanDuzer objected to the word "unanimously" referring to a vote to have a workshop with the Council because he did not vote for the meeting.) Mr. Weimer pointed out that the sentence wherein it says "the LPA instructed to request a joint workshop" was incorrect and the word "instructed" should be changed to "approved." Mr. Yerkes amended his motion to adopt the Resolution with the change to read that the LPA "approved a request." Again, the motion was seconded by Ms. Kay; motion carried 7-0.

### **C. Long-term Animal Control Ordinance Revisions report (Yerkes)**

Mr. Yerkes was not prepared to present this and will have it all completed at the December 9<sup>th</sup> meeting. Mr. Weimer asked for some discussion on this subject and Ms. Dalton offered that there has been ongoing thread regarding this dangerous dog incident. She said that there was no connection made between the dog in one hearing to the dog in the other hearing, because the officer was not present. So, the connection wasn't made as it being the same, dangerous dog. Discussion ensued regarding the chaos at the county level and how their ordinance is failing. Mr. Yerkes expressed his feeling that the county will vehemently resist whatever the Town comes up with because the ordinance is totally different than the county's ordinance. More discussion took place about the differences. Mr. Yerkes opined

that the LPA should have their idea of the ordinance drafted and meet with the county to discuss it before going to a public hearing.

The next meeting will have a discussion regarding the issue, not a hearing.

#### **VII. ADJOURNAS LPA; CONVENE AS HPB**

Mr. Weimer asked for a motion to adjourn and the LPA and reconvene as the HPB. Mr. Yerkes made the motion and Mr. Mandel seconded; motion passed 7-0.

**Ms. Shamp requested a 5 minute recess and Ms. Barnes left the meeting.**

Ms. Shamp called the meeting to order with six members present, Ms. Barnes being absent.

##### **A. Administrative Agenda**

###### **1. Update on historic property plaques:**

Ms. Barnes spoke with Ms. Bassett who sent the design to Dr. Shockey and Art-Type; Ms. Shamp asked Dr. Shockey for his update. Dr. Shockey stated that it is being approved for payment and he needs a list of the properties where these are going. Mr. Weimer asked if there was a problem with having the funds for the payment and he answered that he believed the budget was there for this. Ms. Shamp asked when the budget would be approved.

Having no further discussion, Ms. Shamp called for a motion to adjourn. Mr. Weimer made the motion and was seconded by Mr. VanDuzer; motion carried 6-0, with Ms. Barnes absent.

#### **VIII. ADJOURNAS HPB; RECONVENE AS LPA (3:12 pm)**

#### **IX. LPA MEMBER ITEMS AND REPORTS**

Mr. Yerkes had nothing to report.

Ms. Shamp reported that the Town Council did have the first hearing on the fertilizer ordinance and it is passing to a second hearing on Dec. 15, 2008, at which Ms. Shamp will again represent the LPA with Mr. Hester and Mr. Rodwell. She reported that there were some minor changes in wording. One change was to add "no maintenance zones." They agreed with the 3 ft. buffer that the LPA recommended, they are doing what the LPA requested as far as the education portion was concerned, etc. Ms. Dalton added that there was some direction to the staff to check into possible grants for that.

Mr. Van Duzer had nothing; Mr. Mandel and Ms. Kay had nothing to report.

Mr. Weimer recognized Ms. Shamp for her highly professional analysis of the Sierra Club comments to the proposed fertilizer ordinance and the presentation to the Town Council. He commented on each of Ms. Shamp's excellent points which she had obviously researched and presented in an exemplary manner. Mr. Weimer had filled in for Mr. Van Duzer and Ms. Barnes at the Town Council meeting wherein they discussed changes to the Comp Plan. On the refuse containers issue, Mr. Weimer presented the LPA's resolution and they accepted it temporarily. However, there was much discussion in recycling and its impact on the whole issue and the subject of zoning variances, etc.

Mr. Weimer also gave a report about Mr. Spikowski's presentation to the Council and the issues.

#### **X. LPA ATTORNEY ITEMS**

Nothing to report.

**XI. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Dr. Shockey said there were more hearings coming up.

**XII. LPA ACTION ITEMS LIST REVIEW**

- Lani Kai signappeal-1/17/09 at 6:30 PM
- Fertilizer Ordinance-Ms. Shamp 12/15/08; to a second hearing
- Rights-of-Way-TBD; Mr. Weimer asked that staff be asked to get this moving as it keeps getting pushed back off the meeting agendas.
- 135 Gulfview-TBD (based on above issue).
- Sea wall discussion and beach vegetation-Dr. Shockey reported that the Council was not sure yet which way they are going on this. Ms. Dalton added that they determined that they are going to schedule an additional workshop on the issue of the scope of the project, which is delineated in the Army Corps of Engineers permit, which is a county permit; therefore they felt the county needs to be present at the workshop.
- Commercial rights-of way-TBD
- Storm water-Feb. 2009
- Seasonal parking-Jan. 13, 2009
- Animal control-12/9/08
- Alcoholic beverages-Dr. Shockey reported that he hasn't heard from Mr. Murphy when this may have some update.
- Comp Plan amendments
- Calendar 2009-12/9/08

**XIII. ADJOURNMENT**

Mr. Yerkes moved to adjourn; seconded by (inaudible). Motion carried 6-0. Meeting adjourned at 3:38 PM.

Adopted 12/9/08 (Date) With Without Changes. Motion by Shamp, Second by Van Duzer

Vote: 6-0  
Yerkes absent (excused) Dennis Weimer  
Dennis Weimer, LPA Chair

- End of document

FORT MYERS BEACH  
**LOCAL PLANNING AGENCY (LPA)**  
Town Hall – Council Chambers  
2523 Estero Boulevard  
Fort Myers Beach, Florida  
**December 9, 2008**

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**AGENDA**

[all time frames are informational and approximate]

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**10:30 AM**

- I. Call to Order**
- II. Pledge of Allegiance**
- III. Invocation**
- IV. Town Capital Improvement Program (CIP) Items** **5 minutes**
  
- V. Public Hearings**
  - A. Ordinance 09-xx Amending LDC Section 34-219** **15 minutes**
  
- VI. Administrative Agenda**
  - A. Discussion of LDC Chapter 34, Article IV, Division 5 (COP)** **60 minutes**
  - B. Long-term Animal Control ordinance revisions report (Yerkes)** **30 minutes**
  - C. Scheduling of LPA meetings for Q1 and Q2 of 2009** **10 minutes**

LPA Holiday Lunch Break (FOOD to arrive 12:30 PM)

- VII. Adjourn as LPA; Convene as HPB**
- VIII. Adjourn as HPB; Reconvene as LPA**
- IX. LPA Member Items and Reports** **5 minutes**
- X. LPA Attorney Items** **5 minutes**
- XI. Community Development Director Items** **5 minutes**
- XII. LPA Action Item List Review** **5 minutes**
- XIII. Public Comment**

**Adjourn no later than 4:00 P.M.**

**Next Meeting:** January 6, 2008 at 10:30 am

**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, December 9, 2008**

- I. CALL TO ORDER:** The meeting of the Local Planning Agency (LPA) was called to order on Tuesday December 9, 2008, at approximately 10:40 am by Chairman Dennis Weimer. Members present at the meeting were:

Rochelle Kay  
Bill Van Duzer  
Joanne Shamp  
Alan Mandel  
Evie Barnes

Joe Yerkes was on an excused absence.

Staff present at the meeting: Dr. Frank Shockey, Interim Director Community Development  
Anne Dalton, LPA Attorney  
Consultant, Murphy Planning Inc.  
Town Manager Scott Janke  
Members of the Public

- II. PLEDGE OF ALLEGIANCE:** The Pledge of Allegiance was lead by Mr. Weimer and recited by all present.

- III. INVOCATION**  
Also by Mr. Weimer

**Off Agenda Item:** Acceptance of November 18, 2008 LPA minutes. Ms. Shamp moved to accept the minutes. Mr. Weimer made a modification on pages 7 & 8, regarding the ordinance on short term parking, changing the name of Mr. Yerkes to Mr. Mandel. Ms. Shamp made the motion to accept as amended and Mr. Van Duzer seconded. Motion carried 6-0.

- IV. TOWN CAPITAL IMPROVEMENT PROGRAM (CIP) ITEMS**  
Mr. Janke was welcomed to the meeting and Mr. Weimer explained that the LPA requested his presence due to a concern regarding the lack of feedback about the LPA recommendations. Mr. Janke stated that his opinion is that the LPA is charged with the CIP

functions and therefore should be involved in the budgeting. He added that is the job of the LPA to come up with the CIP project suggestions and formulate budgets for them. Mr. Janke explained how the budgeting is regulated and grant process is handled for these projects. He did, however, caution the LPA that, in these economic times, there is not too much funding available for projects and so there is not too much that the LPA can actually do in that regard at this time.

Mr. Weimer asked how to add large budget items to the plan and actually go about applying for the appropriate grants to handle those projects. Mr. Janke explained how that funding is spread out in a long-range plan and the restriction dealing with the utilization of those funds within the first three years. Mr. Weimer asked for clarification regarding who should be the responsible party for bringing forward suggestions for Town projects, Town staff or the LPA. Mr. Janke feels that the LPA should control the process, even though the staff will bring some suggestions to them.

Mr. Mandel asked if there are any rules that regulate having just five years on the planning board and could they actually go to seven or eight years CIPs. Mr. Janke agreed.

Ms. Shamp was in favor of the workshops and would like to see them become a permanent part of the process. She noted that the Town's Comp Plan, it is stated "the proposed CIP shall be developed by the Town manager" and that the "proposed CIP shall be reviewed by the LPA." Mr. Janke is aware of the stated procedure in the Comp Plan but also feels that the LPA should have more input, especially in the Spring. Ms. Shamp commented on the expertise of the Town staff and recommends using them more to help formulate these projects with their experience and input.

Mr. Weimer reiterated that Town staff and the Town manager are in a better position to make these recommendations than the LPA and supports their developing the projects, bringing them to the LPA and helping all to understand and plan them. He suggested that the Town manager is asking for the LPA to appoint a liaison to work with both groups and formulate recommendations for CIPs. Mr. Janke agreed.

Mr. Van Duzer stated that he strongly recommends a liaison to meet monthly with Town staff to work on bringing these CIPs to the LPA for review. Discussion ensued regarding the liaison and the organization of that.

Mr. Weimer opened public comment. Ms. Dalton pointed out the requirements of the LPA in regards to finding CIP items compliant or non-compliant but it does not need to be the end of the LPA involvement. Ms. Barnes questioned that, if the general feeling is that the staff bring suggestions to the LPA, is a liaison person really needed to attend the Town staff meetings. More discussion ensued about the liaison position and how that should work.

Mr. Weimer asked that Mr. Janke include a copy of his SOP in the next meeting packet; Ms. Dalton agreed and also requested a copy of the Comp Plan provision that would be addressed in that. Mr. Weimer summarized that there be a liaison appointed to attend a monthly meeting, outside of a staff meeting, with certain staff to discuss the CIP suggestions, and recommended Ms. Shamp for that task. She agreed, asking that the meeting dates be picked in advance so the packets can be complete and sent for preview. Mr. Weimer appointed Ms. Shamp to the position for the fiscal year 2008-2009.

## V. PUBLIC HEARINGS

### A. Discussion of LDC Chapter 34, Article IV, Division 5 (COP); Ordinance 08-XX

Ms. Dalton read the ordinance option: *"An ordinance of the town of Ft. Myers Beach*

*amending Chapter 34 of the Town of Ft. Myers Beach Land Development Code providing authority; amendments to Chapter 34-Zoning Districts, Design Standards and Non-conformities; Article 2-Zoning Procedures; Division 4-Applications and Procedures; Sub-division 2, Additional Procedures for LDC Zoning Districts; Sec. 34.219, Sub-paragraph B, entitled 'Administrative Amendments to Approved Master Concept Plan' providing for elimination of non-controversial criterion for staff to consider; administrative amendments to approved master concept Plans under certain circumstances providing for fee to be in accordance with LDC Sec. 34-53, rather than set by Town staff; severability, effective ordinance and effective date."* Companion resolution is Resolution #2008-45, an LPA resolution.

**Public comment opened; closed with no comments.**

Mr. Van Duzer pointed out a small typo in the ordinance and then made a motion to move this forward. Ms. Barnes seconded the motion. The motion was carried 6-0; Mr. Yerkes being (excused) absent.

Hearing closed for Resolution 2008-45 and 08-XX.

## VI. ADMINISTRATIVE AGENDA

### A. LDC 34-Article IV, Division 5 (COP)

Report by Murphy Planning: *"Policy Considerations and Options-Consumption of Alcoholic Beverages"*

**Opened public comment; closed, with no comments.**

Mr. Murphy addressed the LPA and referred to his report, summarizing the contents. Dr. Shockey suggested either keeping the two parts of the report together or treating them as separate for consideration of alcoholic beverage licensing. Mr. Weimer decided that the two items would be considered separately; the discussion of moving consumption of alcoholic beverages onto the beach versus things like hours of operation, etc. Discussion ensued regarding whether the LPA is being asked to review the Comp Plan with regards to COP extension onto the beaches. Ms. Dalton replied that requests can come from Town manager or Council and therefore the LPA may take this into consideration. Discussion continued as to what direction the LPA would take in the matter of COP extensions onto the beach.

Ms. Kay stated that she is confused about the whole issue and not sure the LPA should be ready to take this on without further research as to what exactly is being proposed. Ms. Shamp stated that the Comp Plan, policy 4B8, is clear in that those parts of the gulf beaches that lie seaward of the 1978 Coastal Construction Line *are* for recreation, and recreation uses are parks, schools, libraries, bathing beaches, beach access points and related public facilities. She added that there may be a situation in this review where it says that the FLUM Category doesn't provide for this expansion, but it also doesn't prohibit it, then the LPA needs to close the loopholes to protecting the public interests. Mr. Mandel still wasn't sure that the LPA was actually being asked to review this. He questioned how it got to this point and who was responsible for the request. Dr. Shockey responded that the Town manager initiated the part about the gulf beaches alcohol aspect. The part about consistency with the state law, etc., was actually from the last Town Council Hall meeting hearing of a COP special exception and a result of everyone asking why there are conflicting rules regarding music, hours of operation, etc.

Ms. Shamp asked, if there were inconsistencies in the way that businesses currently

operate with the alcohol and COP licenses, what is the process of the LPA then, specifically in the case of “grandfathering?” Dr. Shockey answered most things that are non-conforming according to Chapter 34, may continue to be maintained without a problem unless they are governed by some other law, for instance a state law wherein there is no “grandfathering.” Ms. Dalton explained options for addressing these issues and suggested that the LPA ask the question of the consultant, Mr. Murphy.

Mr. Murphy stated that the way it has been done in the past has been to amortize, giving a period for people to come into compliance. Mr. Weimer asked for an explanation of “beach” being the actual sandy beach or Ft. Myers Beach. Mr. Weimer asked a question regarding COP on the beach and the “special exception” licenses. Mr. Murphy asked for clarification of the question, which was: “Have you been asked to look at the general use of alcohol on the beach itself, but someone who has a COP permit, would they be allowed to extend beyond their premises and onto the sandy beach?” (Still not exactly a clear question). Mr. Murphy responded that his charge was only to look at the expansion of that use from commercial beachfront property onto the sandy beach. More discussion to clarify the question.

Ms. Shamp asked, in the definition of “public beach” and the fact that the Town has considered beach nourishment, would be any implication on beachfront that may become “public access” in the future? Mr. Murphy answered “theoretically,” but it will be different in different areas of the beach and pointed out that the report deals with the environmentally critical zoning district which is everything that is sandy beach seaward of the Coastal Construction Line (CCL), and that runs into the end of the private property lines. Ms. Shamp asked how many establishments currently serve alcohol seaward of the 1978 CCL because they own that property privately and Mr. Murphy opined that there are three.

Mr. Weimer asked for any further LPA opinion about whether the extension of the COP onto the sandy beaches was appropriate under the Comp Plan. Ms. Kay pointed out that the report summary states that “*the Plan does not clearly provide for an expansion of COP onto the gulf beaches, nor does it clearly prohibit it...*” and stated that the LPA needs to work on clarifying that. Ms. Barnes asked if there have actually been any specific requests to do this and Dr. Shockey admitted that he could not recall any specifics but that there have been some inquiries. Ms. Dalton added that she has had questions about this from several Town Council members, but no one could recall any actual, formal requests for this expansion. Mr. Weimer summarized his thoughts regarding the whole issue about expansion of COP onto the sandy beaches, pointing out that there are ordinances in place which address and prohibit alcohol on the public beaches and he is in favor of keeping within the goals of the community remaining a “family” community. He said that, although the Comp Plan maybe silent on the issue, it is not promoting behaviors that are abusive of other people’s rights to enjoy that property. Mr. Van Duzer agreed, adding that this is a family island and it ought to remain that way. He suggested sending forward the LPA’s feeling that there should not be any additional COP on the beach side, other than the three grandfathered items, without going through the lengthy process of the “special exception.” Ms. Kay agreed as well. Ms. Shamp also agrees and said that the LPA needs to close loopholes to control the process. She added that the LPA is consistently fair in its decisions and the issue of non-conformity needs to be addressed, keeping the whole process fair and concise. Ms. Barnes agreed with the others. Discussion ensued about the Comp Plan

changes, in general, and the “grandfathered” establishments.

Mr. Weimer brought the discussion to a conclusion and asked if the LPA feels that there should be a specific statement in the Comp Plan to address this. Ms. Shamp still felt that there are a few areas where the regulations should be tightened up so that there is no question as to the regulation. Mr. Murphy stated that his report has suggested several options for the LPA to address this. Ms. Shamp then said that she supported doing a finding of consistency within the LDC to make sure that they have expressed that there be no expansion of COP.

Ms. Kay referred to the report under “on-Premises Consumption” on pg. 39, wherein the report sounds pro-expansion, and suggested that the LPA just add *“in order to best make the findings and conclusion necessary to support the NON-permanent expansion of COP uses only onto the gulf beaches of the Town may wish to amend the LDC to indicate that this expansion is NOT consistent with the Plan.”* She suggested just making that statement negative rather than positive. Dr. Shockey pointed out that he, Mr. Murphy and Ms. Dalton believe that this change would not be necessary at this time as long as the LPA is not considering approval of the expansion.

Mr. Weimer stated that the LPA finds that the expansion of COP onto gulf beaches is inconsistent with the Comp Plan’s vision of the future of the Town but it is not necessary, at this time, to make a specific Comp Plan amendment. Ms. Dalton interjected and asked what part of the beaches he is referring to, public areas or private. Mr. Weimer clarified that it means external to people’s property, as already granted.

#### **LPA Holiday Lunch Break at 12:19 PM**

Reconvene at 1:20 PM and continue discussion of LDC 34-Article IV, Division 5 (COP): The first portion regarding expansion COP onto the gulf beaches was concluded. This portion deals with potential modification of the Town’s LDC. Mr. Weimer referred to section IV of the consultant’s report which summarized the issues and some of the alternatives that are available. Dr. Shockey requested that the LPA give staff some direction as to what kind of alternatives they would like to see in the future. Ms. Kay asked Mr. Murphy to briefly discuss the Florida regulatory laws would be which would affect this. Mr. Murphy stated that it starts on page 7, section 3; the time of service is a concern in that if the Town LPA does not provide otherwise, the state does not allow service between the hours of midnight and 7:00 AM. The Town now prohibits service from 2:00 to 7:00 AM; however, those hours are curtailed by certain other regulations so the LPA may wish to make that rule town-wide and let the proprietors decide whether or not to stay open and serve later. On the next page is laid out the key areas that are prescribed to the Town, besides the hours of business the place of the business may be regulated, the 500 ft. regulation is already in place, and the sanitary regulations is also addressed. Also on the page, the type of entertainment and conduct permitted in an establishment that is licensed for COP is addressed. There is an ordinance addressing who can show what, and when and where, etc. Restrictions are discussed regarding persons under twenty-one and a provision for bottle clubs. There is no use called “bottle clubs” in the LDC now so that may be something the LPA may want to define. Mr. Murphy suggested that this is the time to address things like the hours of operation to be fair and consistent.

Mr. Mandel stated that there are things in the report that need to be discussed, for

instance, in section IV regarding noise. Mr. Mandel wanted to be sure that the LPA look at indoor and outdoor noise. Ms. Barnes wanted to clarify a point made by Mr. Murphy. She asked if he reported that Lee County prohibits the bottle clubs and Mr. Murphy stated that they do, but only in the unincorporated county so they do not have jurisdiction in the individual towns. Mr. Van Duzer asked if this is the conclusion of Mr. Murphy's report or will he move forward from the LPA to further address these issues. Mr. Weimer agreed that this is the conclusion of this task for Mr. Murphy. Mr. Van Duzer feels that he is ready to move this on because the LPA needs to clean up the present code, in all aspects, to provide a more consistent LDC in regards to COP. Ms. Dalton attempted to clarify by saying that one of the origins of this was when a COP came before the LPA, the question arose "how much of these conditions need to be standardized in the LDC and how much need to continue as a special condition or as a condition in an individual COP?" She feels that there is still a question about to what extent does the LPA wants to keep these in individual COPs or standardize. Mr. Van Duzer agreed that Ms. Dalton's point was exactly what he was referring to and that he feels that the LDC needs to be cleaned up and make it a standard code that covers all conditions necessary. He recommended that it move forward immediately and have any recommendations for changes brought back to the LPA to be considered. Mr. Weimer agreed that the recommendation is to go forward and craft all of these into a revision to the LDC. He feels that they should come up with a list of alternatives for consideration and he would like to put a time limit on when all of the regulations need to come into compliance. Discussion ensued regarding the time restrictions, etc., and what the alternatives are for changes and approval processes. Mr. Weimer inquired whether the LPA has a budget for hiring a consultant to give further guidance in this matter. Mr. Van Duzer summarized his opinion that he believes the LPA has accepted this report, feels it is very complete and would like some professional guidance to move forward with it, if that is the wish, and then let the Council decide. He feels that the LPA should recommend that the Town manager consider getting the LPA some professional assistance to move forward and gain clarity in the LDC and they do not want to address the issue of consumption on the beach. (Mr. Janke joined the meeting). Mr. Weimer told the Town manager the feeling of the LPA in needing some professional guidance and asked for his opinion. Mr. Janke stated that he did, in fact, ask Mr. Murphy to look at the on the beach consumption for commercial places that have liquor licenses and asked for a summary of just that issue to take to Council first because that would bog down the changes the LPA needs to make. He was also in agreement with separating the two issues and getting the bigger clarification things done to make it easier for the majority of the license holders. Mr. Weimer asked how the LPA can hire a consultant and Mr. Janke stated that he would engage Mr. Murphy to follow through to move this along. Mr. Van Duzer moved to accept the report and request the Town manager to go forward to have a redraft of the LDC that combines the issues, with a consultant to give recommendations as to the changes needed to be made to the LDC to make it more concise. The motion was seconded by Mr. Weimer. Discussion ensued about what the process would be as far as an ordinance or recommendation, etc. Motion was carried 6-0, with Mr. Yerkes on an excused absence. Discussion closed.

## **B. Long-term Animal Control Ordinance Revisions report (Yerkes)**

Mr. Weimer stated that there was no report received by the LPA. Ms. Dalton reported on a hearing that took place regarding this issue (opinion included in the LPA packet). She stated that there were several areas where enforcement of the ordinance failed and in addressing a future ordinance perhaps the Town would put in more safeguards. No one had been notified of a hearing that day so no one attended; therefore there should be something to provide how the process should flow and how to notify required parties. Mr. Weimer asked Ms. Dalton to be sure that she advise Mr. Yerkes of this problem and the suggestions as to how this be rectified in future hearings, etc.  
Discussion closed.

**C. Scheduling of LPA Meetings for Q1 and Q2 2009**

Mr. Weimer moved to adopt this as the tentative calendar for 2009 (Second and Fourth Tuesdays at 10:30AM); Ms. Barnes seconded the motion. Mr. Weimer noted a personal conflict, for the record, of Feb. 10, 2009 and asked for an excused absence. Motion was carried 6-0, with Mr. Yerkes absent. Discussion ensued about the joint meeting with the Town Council and the topics of discussion for the meeting. The meeting will take place on January 13, 2009 at 9:00 AM to 12:00 PM, with the regular LPA meeting to follow at 1:00 PM.

**VII. ADJOURNAS LPA; CONVENE AS HPB**

Mr. Van Duzer moved to adjourn as the LPA and convene as the HPB. Mr. Weimer called the meeting to order at 2:22 PM for Ms. Shamp, who was excused. There was a meeting with the HAC to finalize details on six properties for historic plaques and the first draft of a proposed brochure was reviewed. Dr. Shockey stated that some of the property owners have completed the paperwork for the plaques and he learned that there is available funding for this project. This is now awaiting Town Council approval. Ms. Barnes reported on the election of officers, with the Roxy Smith as the chair and "AJ" as the vice chair. Mr. Van Duzer moved to adjourn as the HPB and reconvene as the LPA; seconded by Ms. Kay. The motion was carried 5-0, with Mr. Yerkes and Ms. Shamp absent. Adjourned at 2:26 PM.

**VIII. ADJOURNAS HPB; RECONVENE AS LPA**

Reconvened at 2:26 PM

**IX. LPA MEMBER ITEMS AND REPORTS**

Mr. Van Duzer has nothing to report. Ms. Barnes had nothing to report. Mr. Mandel thanked Ms. Shamp for lovely decorations and suggested they become permanent. Ms. Kay had nothing to report. Mr. Weimer had nothing.

**X. LPA ATTORNEY ITEMS**

Ms. Dalton had no report but wished all a happy and safe holiday.

**XI. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Dr. Shockey said he had nothing until the Action List.

**XII. LPA ACTION ITEMS LIST REVIEW**

Fertilizer ordinance-Dec. 15<sup>th</sup>, final hearing

Lani Kai appeal-Jan. 15, 2009 at 9:00 AM  
Right-of-Way Jan. 15, 2009  
135 Gulfview (after the petition to vacate matter)  
Resolution 34-219-TBD; Ms. Kay

**Future Work Activities:**

- Workshop with the Town Council
- Commercial rights-of-way
- LDC Section 613, 614 and 10-255
- LDC Section 34-219; Ms. Kay
- LDC Section 34-20-22; Mr. Mandel and Ms. Barnes-Jan. 27, 2009
- Animal Control-Jan. 13, 2009; Administrative meeting
- LDC Section 34-12-61-Feb. 10, 2009
- Policies and Procedures Manual regarding CIP Liaison-Mr. Weimer; Jan. 27, 2009

**XIII. PUBLIC COMMENT**

Mr. Lee Melsek of the Ft. Myers Beach Civic Association. He was interested in the COP onto the beaches issue and was there to listen and voice the opinion of the Civic Association, saying that they are adamantly opposed to extending drinking onto the beaches. He commented that he and the Civic Association are thrilled that the LPA seems to have the same opinion and commended them for taking that position. He also brought up the noise ordinance and how it goes along with the alcohol issue and asked the LPA to also consider the residents and not just the businesses when reviewing those ordinances. Lastly, Mr. Melsek talked about the historic properties and asked that the LPA and the HPB also remember the historical points on the island and what these places mean to the community. He asked that the Town consider perhaps appointing a location to move all of the truly historic sites, etc. rather than demolish them in the future.

**XIV. ADJOURNMENT**

Mr. Van Duzer moved to adjourn; seconded by Mr. Mandel. Motion carried 5-0. Meeting adjourned at 2:56 PM.

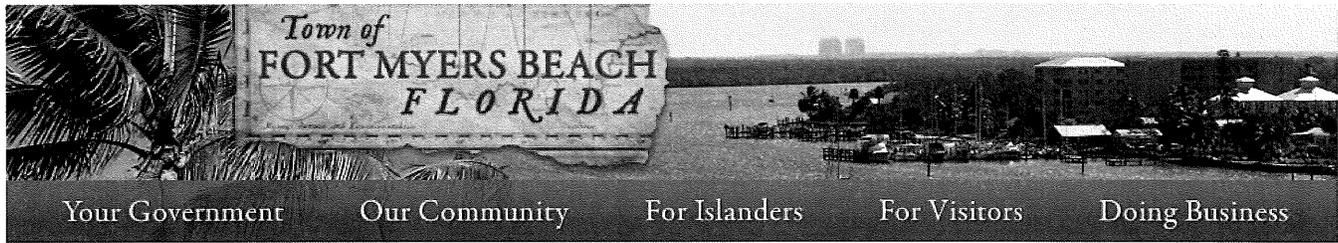
Adopted \_\_\_\_\_ With/Without Changes. Motion by \_\_\_\_\_  
(Date)

Vote: \_\_\_\_\_

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Dennis Weimer, LPA Chair

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**April 28, 2009**

**FORT MYERS BEACH  
LOCAL PLANNING AGENCY (LPA)**  
Town Hall – Council Chambers  
2523 Estero Boulevard  
Fort Myers Beach, Florida  
**April 28, 2009**

- Contact Us
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**AGENDA** [all time frames are informational and approximate]

**10:30 AM**

- I. **Call to Order**
- II. **Pledge of Allegiance**
- III. **Invocation**
- IV. **Minutes**
  - A. Minutes of April 14, 2009 **5 minutes**
- V. **Town Capital Improvement Program (CIP) Items** **5 minutes**
  - A. Report from Joanne Shamp
- VI. **Public Hearings**
  - A. DCI2006-0001 and DCI 2006-0002 White Sands, Captiva Villas, and Bayside CPD zoning amendments (continuance requested) **10 minutes**
- VII. **Administrative Agenda**
  - A. Discussion of LDC amendment language for Alcoholic Beverages and for Sexually Oriented Businesses (LDC Chapter 34, Article IV, Divisions 3 and Division 5)
    - 1. Discussion of S.O. Business Ordinance language
    - 2. Discussion of Liquor License Restriction language **90 minutes**
  - B. Discussion of alcoholic beverages--open container ordinance **30 minutes**
  - C. Discussion of revisions to noise ordinance (Current Ord. 96-24) **60 minutes**
- VIII. **Adjourn as LPA, reconvene as HPB**
- IX. **Administrative Agenda**
  - A. Report from Historic Vistas Ad Hoc Committee **10 minutes**
  - B. Report on National Register Nomination **10 minutes**
- X. **Adjourn as HPB, reconvene as LPA**
- XI. **LPA Member Items and Reports** **15 minutes**
- XII. **LPA Attorney Items** **5 minutes**
- XIII. **Community Development Director Items** **5 minutes**
- XIV. **LPA Action Item List Review** **10 minutes**
- XV. **Public Comment**

**Adjourn no later than 4:00 P.M.**

**Next Meeting:** May 12, 2009, 10:30 AM

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**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, April 28, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 10:37 AM by Mr. Mandel, Vice Chair, in absence of Chair Dennis Weimer. Five members present:

Rochelle Kay  
Alan Mandel  
Bill Van Duzer  
Joanne Shamp  
Joe Yerkes  
Evie Barnes-absent for family emergency  
Dennis Weimer-absent with excuse

Staff present: LPA Attorney Ann Dalton; Community Development Director Dr. Frank Shockey.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION-Mr. Van Duzer**

**IV. MINUTES**

**Motion by Ms. Shamp to adopt the minutes as recorded;**

**Second: Mr. Van Duzer**

**Vote: 5-0**

**Off Agenda note:** Mr. Mandel commented that there was a question by the Town Manager whether the LPA wished to start its meetings earlier and said it is possible to do so since the Town Manager offered to move the staff meetings to another time; he polled the members and all agreed to keep LPA meetings at 10:30 AM.

**V. TOWN CAPITAL IMPROVEMENT PROGRAM (CIP) ITEMS**

Ms. Shamp reported that she did have a meeting with Mr. Janke on April 23, 2009, and referred to the report in the packets. She said there is an updated CIP element table, a 5 year plan. She summarized the budget issues and the pending

projects needing attention, adding that there is just not enough funding to address all of these. She said that there was much conversation regarding ways to provide funding, including special assessments, increased ad valorem taxes etc. She referred to the earlier discussions about a workshop on May 12<sup>th</sup> and Mr. Janke suggested that Dr. Shockey, Evelyn Wickes and Jack Green be involved and dates are being worked out for that.

She also said that the CIP nomination form previously presented to the LPA has been put into the Town Manager's directive as standard operating procedures for staff, and that there is no need to codify that. The North Estero Blvd. project will go to bid in 30-60 days and the Estero Blvd. Right-of-Way Surveying mapping completion is still about a year out. The Town did negotiate a settlement with Lee County to receive gas tax revenues that had been held in reserve by the county, in the amount of \$1.6 million, which is restricted to only be used for certain things. There was discussion about the date for the proposed workshop. In addition, Dr. Shockey and Ms. Dalton commented about the state and other governmental agency mandates for CIP improvements and how that will determine what must be done in terms of planning, regardless of funding. More discussion ensued about proposed possible projects, etc. Mr. Mandel asked that Ms. Shamp follow up and get back to staff for the meeting to take place from 2-4:00 PM on May 26<sup>th</sup>.

## **VI. PUBLIC HEARING**

### **A. DCI2006-0001 and DCI 2006-0002-White Sands, Captiva Villas and Bayside CPD Zoning Amendments**

Mr. Mandel polled the members for any ex-parte communications: Mr. Van Duzer said he received a phone call but has not arranged a meeting yet; no other communications.

Ms. Dalton swore in possible witnesses. Peggy Scarpetti addressed the meeting, representing Bill Waichulis on behalf of the applicant, to ask for a continuance. Dr. Shockey added that he had a letter from the applicant, as well, requesting the hearing be continued to the next meeting, which would be May 12<sup>th</sup>.

Mr. Mandel called for a motion to continue to the May 12<sup>th</sup> meeting at 10:30 AM.

**Ms. Kay moved to grant the continuance;**

**Mr. Van Duzer seconded.**

**Vote: 5-0**

## **VII. ADMINISTRATIVE AGENDA**

### **A. Discussion of LDC Amendment Language for Alcoholic Beverages and for Sexually Oriented Businesses (LDC Chpt. 34, Article IV, Div. 3 and 5)**

Mostly, this is a review of the work Mr. Murphy has been doing on these items and Mr. Mandel opined that there could be some preliminary editing today but that the items should come back in June when all members are present, and then schedule a public hearing, likely in July.

Mr. Murphy addressed the meeting, saying that they are back now with what was discussed in February, regarding an initial review of the alcoholic beverage ordinances and then expanded to include SO businesses.

Mr. Murphy referred to the first item, under section A, is a discussion of the LDC amendment language for SO businesses and alcoholic beverages. He continued to refer to the packet information and the stand-alone SO ordinance revisions, which have been proposed to conform to constitutionality. He also pointed out that some of the proposed language in the liquor license restriction ordinance is the same as the language in the LDC and that the reason for keeping the “stand alone” ordinances is because of the enforcement issues; Code Enforcement deals with the LDC whereas the Sheriff’s office can also enforce other ordinances. Another item for discussion in this packet is the open container ordinance and the noise ordinance. Mr. Murphy suggested review of the proposals, page by page and began with items he has highlighted, beginning with page 1 of 26, revisions to the table of contents. Several errors were pointed out and will be changed, these were all mostly typing errors but Mr. Yerkes asked if they would be actually discussing the content and the revisions. He asked if there are any SO businesses on the beach and Dr. Shockey stated that he didn’t think so. Mr. Yerkes asked if the Town really wants this type of business and/or needs the ordinance, but Mr. Murphy stated that the courts have deemed this protected speech and therefore restricting this by banning it completely would be considered unconstitutional. Mr. Yerkes pointed out that the ordinance already prohibits it by virtue of the language and the consensus was that it is probably illegal to make these businesses absolutely impossible. His main concern is not creating an illegal document. Discussion ensued regarding the legality of this ordinance and these businesses. Most of the discussion involved the distance in the ordinance for the SO businesses to be established in the Town, currently requiring the proposed location to be 1000 feet from certain other uses including dwellings, or changing this distance to a larger or smaller distance such as 500 feet or 2000 feet.

On pg. 6 of 26 in the definition section, Mr. Murphy noted the definition of “night club” and that the LPA hadn’t recommended that additional use. Mr. Murphy continued to point out certain edits in the draft including pg. 9, the revision of the service hours and the consumption on premises hours to reflect what the LPA had suggested to Town Council. Ms. Shamp was concerned about this point and wanted to be on record as feeling that restricting the hours of service, or “last call,” for the bars to 11:30 PM, was not a good idea and would seem to keep some business from the beach. She feels strongly that the younger people and people coming to the beach for vacation are not ready to leave an establishment, especially with entertainment, that early in the night. She agrees that enforcement and the noise issues are always concerns but this type of restriction will send

nightlife business away from the beach. She would like to see midnight on weekdays and at least 1:00 AM on weekends.

Mr. Yerkes agreed that this is bad for businesses but that there are too many establishments that are close to residences and they disturb the residents. He also pointed out that it is too difficult to draw boundaries in location regarding the time limits and who can continue to serve, depending on where they are on the beach.

Ms. Kay agreed with Mr. Yerkes in that there needs to be a cut-off time for the sake of the residents, especially in view of the image of the beach as being a family place. More discussion ensued about times and hours for sale, service and consumption. Mr. Van Duzer suggested abolishing the restrictions on sales and service and simply mandate a closing time, not consuming alcohol after a certain time. More discussion ensued about the difficulties if businesses sell and serve right up until closing time.

The next item reviewed pertained to a 50 guest unit hotel, as opposed to a 100 unit one, and this was drafted with options for the LPA's further review. Mr. Yerkes was still not satisfied with the 50 units and wanted to see a smaller number so as not to exclude smaller operations; the amount now is 100 units to have an alcoholic beverage establishment under the same roof. Mr. Murphy explained this item and there was some discussion.

Pg. 17 of 26 was the discussion about bottle clubs and the LPA recommendation (not allowing bottle clubs) was added for Town Council. Pg. 18 deals with the discussion of open containers, and continues to the subject of license for service on boats. There was discussion about hours and distance from the beach regarding serving alcohol or consuming alcohol. Mr. Yerkes read the options for the language for the section on boats and stated that these requirements are not reasonable for the boats that now exist as "bona fide restaurants." Other options were further discussed. Mr. Yerkes was adamant that there should be minimal regulation, requiring some food served on the boats but not being too restrictive because smaller boats could not possibly qualify as restaurants under the regulations. Ms. Shamp stated that the presence of the regulation and the lack of enforcement should not preclude the LPA's responsibility to protect the public from irresponsible boating. Discussion ensued about charter licenses, boats and alcoholic beverage service on boats.

Mr. Murphy proposed: adding an additional option that would be "Option 1," and have it read "have the minimum *restaurant facilities* accommodation and seating capacity required for a *restaurant*," the current "option 2" could become "option 2" and stay as it is, which would be a *bona fide restaurant*, and then get into the percentages. Percentages could be eliminated altogether, there could then be just the two options and the LPA can recommend the option that didn't have the "bona fide" language in it.

Pg. 20 deals with outdoor seating and the process for application. The LPA could consider an option for administrative approval of outdoor seating in some

circumstances. Ms. Shamp asked for a clarification of outdoor seating. Pg. 21, Ms. Shamp asked about #8 in "Application," where it reads "parking plan drawn to scale indicating individual parking spaces" and asked if it should include handicapped access spaces.

Mr. Yerkes had a concern about a section about restaurant permitting and the need to supply a menu as a part of the process. It was suggested that the word "sample" at least be added so that there is no question that restaurants have the option to change their menus as long as they continue to comply.

Pg. 22 of 26 deals with revocation of licenses, new language and handling of new and re-licensing. Consensus was that licenses should be attached to the property and not the operator.

Next section deals with noise and this also goes with the noise ordinance being reviewed also. Mr. Van Duzer feels that 9:00 PM is too early, in general to require the end of outdoor entertainment. Some discussion about this took place and most agreed that 9:00 PM is too early. This will be changed to 10:00 PM.

Lastly, the section regarding members of the Armed Forces under age 21 to be on licensed premises; this will stay.

## **LUNCH BREAK**

### **Reconvene**

#### **1. Discussion of Sexually Oriented (SO) Business Ordinance language**

Mr. Murphy continued that the previous ordinance was 96-04 and this has been expanded to include obscenity, public nudity and SO businesses, to combine 96-03 and 96-04, to eliminate redundancy. In addition there have been several "whereas" clauses not previously included, and have added some "purpose, intent and findings" in Section 4. Basically, the intent is not to regulate things in a way contrary to the protection of the First Amendment and to eliminate anything that may be regulated by the DBPR, with regard to message. Mr. Murphy noted that a CD is available to LPA members with all the studies, etc. that pertain to this matter. Ms. Dalton recommended that all members review the studies in order to make appropriate findings.

Mr. Murphy referred to more findings on pg. 4 of 30, the model ordinance provided by the Community Defense Organization. He pointed out specific findings which need further direction from the LPA and there was discussion about the studies and findings. Ms. Shamp pointed out specific definitions and other items dealing with SO activities and establishments, including "obliquely covered buttocks." There was more discussion about this.

Pg. 11 of 30 discusses criminal activity and RICO regulations as included in the state statute. Also noted was the “forgiveness” period involved in penalty. Mr. Murphy discussed Sec. 24, onto pg. 12, which has a highlighted area which is the wording in the current ordinance. He said this language is the most restrictive of any he has found for the subject and feels that the general language is sufficient. There was more discussion regarding SO businesses, pornography and like problems as well as the licensing and permitting dealing with those.

Mr. Murphy continued to go through the highlighted items in the report, provided to LPA members, to point out areas that need more direction from the LPA. Pg. 26 of 30 spells out the hours of operation, which has not been decided yet.

Mr. Mandel reminded the members that they should review and think about this draft, noting questions, etc. before July 14<sup>th</sup> or have them ready for that day, which should be the final review. Ms. Dalton pointed out that these issues have serious First Amendment ties and asked the LPA if they want her to perform an in-depth legal review before continuing. There was discussion about the direction of this draft and need for legal review. Members discussed when it would be ready for public hearing, etc, and when the attorney should spend time on the legal aspects.

Ms. Dalton attempted to clarify for the LPA: In order to restrict SO businesses, there must be certain findings of fact regarding why the Town cares about these restrictions, and to make those findings, there must be some fact on which they are based. The studies, included on the CD for LPA members, contain some factual information that they could use as a basis for those findings; if there is a recommendation of passage from the LPA to the Council, it must be based on their certifying that they have all reviewed these studies.

Mr. Mandel proposed that the LPA postpone discussion of the matter until all members are present and have had the opportunity to review the CD, on July 14<sup>th</sup>, making a determination then. There was discussion about the urgency of bringing this to finalization now or postponing decisions until there can be more investigation by the LPA.

Mr. Van Duzer requested that the LPA now go back over the draft to record comments. He referred to pg. 4 and the highlighted items #7-14 and recommended that they be removed; Ms. Dalton suggested that they just be updated to include more recent information and all agreed. Much discussion ensued about the material being outdated. There was more review of the highlighted areas and more suggestions were made and discussed. Pg. 11- Forgiveness period, was to remain. Pg. 12- suggestion to take out highlighted area; all agreed to take this out. Pg. 13-highlighted area to be removed, all agreed it will be included in this ordinance but not repeated in the LDC. Pg. 14- regarding fingerprints, this should stay. Pg. 16-the area of “peep-show” booths, this should stay at 150 ft. Pg. 17, temporary license-consensus is that there be no

temporary license. Pg. 18-this language will be stricken. Pg. 19-fees, this area needs to be defined to state if there should be both investigation costs and a fee; Ms. Dalton suggested that this be changed by resolution. There was discussion about the fees and process. Some options were put in place for discussion on July 14<sup>th</sup>.

On pg. 21-22 language will be incorporated into the alcoholic beverage ordinance. Pg. 24-size of 150 ft. stays the same. Pg. 26-hours for "last call," will stay for now.

## **2. Discussion of Liquor License Restriction language**

Highlighted is the section on "hours for sales and service," as follows: *"the sales and service of alcoholic beverages on any licensed premises of an alcoholic beverage establishment is prohibited between the following hours..."* will stay the same. Mr. Murphy noted the elimination of the words "non-commercial" in the definition of school. He also noted the change in the definition of alcoholic beverage from the original ordinance language. Ms. Shamp was concerned about the expansion of alcohol service onto the beach and the LPA was still not clear about who can have alcoholic beverages on the beach. Mr. Murphy explained that the places that currently have alcoholic service down to the beach would become non-conforming. He said that "the open containers, in regards to a licensed premises, is only the private property; going back and forth along the beach of families and children, is on the public property." Ms. Shamp stated that there is a huge difference about how the beach is defined, being open to the public and there is too much ambiguity in the boundaries. There was much discussion about this subject, including beach re-nourishment easements and defining "beach," "public beach," etc. Mr. Mandel asked if Ms. Dalton can have a legal opinion about the inconsistencies in the rights of businesses in serving alcoholic beverages on the beach, for July 14<sup>th</sup>.

### **B. Discussion of Open Alcoholic Beverages-"Open Container" Ordinance**

This is similar to the current ordinance, with definitions updated and defined.

### **C. Discussion of Revisions to Noise Ordinance**

Mr. Murphy referred to articles and a proposed noise ordinance in the packets. The definitions have been simplified and decibels and distances were explained. Mr. Van Duzer stated that before he agrees to go on with this, he would like to see a demonstration to understand the levels and distances, etc. Mr. Mandel requested that the Sheriff be present with a decibel meter to demonstrate the noise levels outside. After much discussion regarding this, all members agreed that they do nothing with the noise ordinance issue until they have clear direction from Council.

At this point, Mr. Murphy will make changes to the other ordinance drafts as directed by LPA and Ms. Dalton will prepare a legal review of the items and proposed changes that may be constitutional issues. Long discussion ensued

regarding the expense of a legal review and the budgeting concerns. It was decided that Ms. Dalton should go forward with getting the necessary approval for the expenditure for the legal review.

**Motion by Mr. Van Duzer to adjourn as the LPA and reconvene as the HPB**  
**Second by Mr. Yerkes**  
**Vote: 5-0**

#### **VIII. ADJOURN AS LPA; RECONVENE AS HPB**

Ms. Shamp called the meeting of the HPB to order at 3:27 PM, five members present with Ms. Barnes and Mr. Weimer absent.

Report from the “historic vistas” ad hoc committee and Ms. Kay reported. She said that they did discuss the historic vistas, again stating what she saw on her trip to Boulder, CO and her idea to present some photos and information to the HPB about those things.

Ms. Shamp reported that the HAC did decide to concentrate on the Old San Carlos Blvd. as the initial site of a vista.

Follow up from the April 14<sup>th</sup> meeting when the HPB asked for Ms. Shamp to inquire about the National Register of Historic Places and she presented a report (in packets) based on her findings. She reported that there is \$10,000.00 remaining in the budget and Dr. Shockey is charged with the administering the LPA budget. The Mound House and Seven Seas would be the best locations and the best method would be extending the current consultant’s contract. Ms. Shamp said that Ms. Schober said that there is a concern in the historic element of the Comp Plan, pg. 13-6 and 13-7, in a reference to a survey that did not include any of the Town’s historic structures as “eligible”. More recent research indicates that this may not be the case now. Now Dr. Shockey would need to authorize Ms. Schober to determine how much the architectural firm contract extension would cost.

There was a consensus to ask Dr. Shockey to do this. No further discussion.

**Mr. Van Duzer moved to adjourn as HPB and reconvene as the LPA**  
**Second by Mr. Yerkes;**  
**Vote: 5-0**

#### **IX. ADJOURN AS HPB; RECONVENE AS LPA**

**X. LPA MEMBER ITEMS AND REPORTS**  
Nothing to report.

**XI. LPA ATTORNEY ITEMS**  
Nothing to report.

**XII. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Nothing to report.

**XIII. LPA ACTION ITEMS**

**Resolutions to Town Council**

- Snug Harbor-May 4, 2009
- Gulfview-TBD
- Vacation Ordinance-May 4, 2009
- Historic Plaque Program-TBD

**Continued Hearings**

- The Cottage-June 23, 2009
- Pink Shell-May 12, 2009

**Future Work Activities**

- Commercial Rights-of-Way-Mr. Van Duzer May 12, 2009
- Storm Water-TBD
- Seasonal Parking-July 14, 2009
- Animal Control-June 9, 2009
- Alcoholic Beverages-July 14, 2009
- Parcelization-TBD
- Future Review of SO Ordinance-July 14, 2009
- Noise Ordinance-eliminated; TBD
- Kiosk Project-June 9, 2009
- National Registry-TBD

**XIV. PUBLIC COMMENT**

No further comments.

**Motion to adjourn by Mr. Van Duzer;**

**Second by Ms. Kay**

**Vote: 5-0.**

**XV. ADJOURNMENT**

Adjourned at 3:45 PM.

Next meeting May 12, 2009 10:30 AM.

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Dennis Weimer, LPA Chair

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# FORT MYERS BEACH LAND DEVELOPMENT CODE

## DIVISION 1. GENERALLY

### CHAPTER 34 ZONING DISTRICTS, DESIGN STANDARDS, AND NONCONFORMITIES

#### ***Division 3. Sexually-oriented Businesses***

- Sec. 34-1201. Applicability of division.*  
*Sec. 34-1202. Definitions.*  
*Sec. 34-1203. Purpose of division.*  
*Sec. 34-1204. Prohibited locations.*  
*Secs. 34-1205–34-1230. Reserved.*

#### ***Division 4. Aircraft***

- Secs. 34-1231. Use of engine-propelled aircraft.*  
*Secs. 34-1232–34-1260. Reserved.*

#### ***Division 5. Alcoholic Beverages***

##### ***Subdivision I. Generally***

- Sec. 34-1261. Definitions Purpose and intent.*  
*Sec. 34-1262. Compliance with applicable regulations Definitions.*

##### ***Subdivision II. Hours of Business***

- Sec. 34-1263. Sale for off-premises consumption Hours of business during which sales or service, consumption, and occupancy are prohibited.*

##### ***Subdivision III. Location***

- Sec. 34-1264. Sale or service for on-premises consumption Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.*

*Sec. 34-1265. Bottle clubs.*

*Sec. 34-1266. Consumption, possession in public areas.*

*Sec. 34-1267. Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.*

##### ***Subdivision IV. Entertainment and Conduct***

- Sec. 34-1268. Hours music or disturbing noises prohibited.*

*Sec. 34-1269. Nudity, specified sexual activities, and exposure of specified anatomical areas prohibited.*

*Sec. 34-1270. Sale of food prerequisite to consumption on the premises of alcoholic beverages for bona fide restaurants and certain other alcoholic beverage establishments.*

*Sec. 34-1271. Ratio of alcoholic beverage to food sales; gross revenues; record keeping and reporting.*

*Sec. 34-1272. Package stores.*

*Sec. 34-1273. Permitting intoxicated persons to loiter about premises.*

*Sec. 34-1274. Serving of set-ups, etc., by vendors not licensed to sell for consumption on the premises.*

*Sec. 34-1275. Use of licensed premises for criminal purposes.*

#### ***Subdivision V. General Health, Safety, and Welfare.***

*Sec. 34-1276. Adequate and sanitary equipment, compliance with applicable regulations.*

#### ***Subdivision VI. Patron Age Restrictions***

*Sec. 34-1277. Patron age restrictions.*

#### ***Subdivision VII. Enforcement and Penalties***

- Sec. 34-1278. Enforcement and penalties.*  
*Secs. 34-1265 1279--34-1290. Reserved.*

## DIVISION 3. SEXUALLY-ORIENTED BUSINESSES

#### **Sec. 34-1201. Applicability of division.**

This division shall apply to all sexually-oriented businesses (as defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04).

#### **Sec. 34-1202. Definitions.**

***Sexually-oriented business*** means a sexually-oriented business as defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04.

**Sec. 34-1203. Purpose of division.**

The purpose of this division is to provide reasonable regulations to promote the health, safety, morals, and general welfare of the citizens of the town, and to establish reasonable an uniform regulations to prevent the deleterious location and concentration of sexually-oriented businesses within the town and alleviate the adverse effects of sexually-oriented businesses on adjacent and nearby uses of land. The provisions of this division have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually-oriented materials. It is neither the intent nor effect of this division to restrict or deny access by adults to sexually-oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually-oriented entertainment to their intended market. It is neither the intent nor effect of this division to condone or legitimize the distribution of obscene material.

**Sec. 34-1204. Prohibited locations.**

(a) No use of land for purposes Sexually-oriented businesses governed by this division shall must not be located closer than 1,000 feet, measured on a straight horizontal line to from the closest point on the perimeter boundary of the parcel of land on which the business is located to:  
from:

- (1) The closest wallpoint on the perimeter boundary of parcel of land of any building premises containing a similar use; or
- (2) The closest point on Any zoning district boundary line which of a zoning district that allows residential uses; or
- (3) The closest point on the perimeter boundary line of the parcel of land on which Any alcoholic beverage establishment, hotel, motel, restaurant, school (noncommercial or operated as a business), day care center (child), park, playground, place of worship, religious facility, public recreation facility, or cultural facility is located; or
- (4) The closest point on the perimeter boundary line of the parcel of land on which any membership organization, personal services, recreational facilities, retail store, or temporary use oriented primarily toward children or families is located.

(b) A person commits a violation of this code if the person operates or causes to be operated a sexually-oriented business within 1,000 feet of the prohibiting uses provided by this division.

(c) For the purposes of this section, measurement must be made in a straight line, without regard to the intervening structures or objects from the nearest point on the property line of the premises where the sexually-oriented business is conducted or proposed to the nearest property or district boundary line of the premises of a prohibiting use provided by this division. Presence of a municipal, county, or other political subdivision boundary is irrelevant for purposes of calculating and applying the distance requirements of the division.

(c) Any sexually oriented business lawfully operating on ~~the effective date of this ordinance,~~ 2009, but in violation of any provision of this division is a non-conforming use. Such nonconforming use may continue for a period not to exceed one (1) year from the effective date of this division, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming use must not be increased, enlarged, extended, or altered except that the use may be changed to a conforming use. If two (2) or more sexually-oriented businesses are within 1,000 feet of each other and otherwise in a permissible location, the sexually-oriented business that was first lawfully established and continually operated at a particular location is the conforming use and the later established business(es) (is)(are) nonconforming.

(d) A sexually-oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually-oriented business license, or a use listed in subsection (b) of this section within 1,000 feet of the sexually-oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or been revoked.

**Secs. 34-1205--34-1230. Reserved.**

**DIVISION 4.  
AIRCRAFT**

**Sec. 34-1231. [No changes].**  
**Secs. 34-1232--34-1260. Reserved.**

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## Alcoholic Beverages

### DIVISION 5. ALCOHOLIC BEVERAGES

#### Subdivision I. Generally

#### Sec. 34-1261. Definitions Purpose and intent.

For purposes of this division and when referred to elsewhere in this chapter, certain terms or phrases shall have the following meaning:

—*Alcoholic beverage* means distilled spirits and all beverages, other than medicine, intended for human consumption and containing one-half of one percent or more alcohol by volume.

—*Beer, wine, and liquor* have the same meanings as provided in F.S. chs. 563, 564, and 565, respectively.

—*Full course meals* means items on a menu at a restaurant which include soups and salads, main dishes with side orders, and desserts.

—*Kitchen, commercial* means a facility used for the preparation of food which is sold to the public and that is subject to state and local health department inspections.

—*Liquor license* means a license issued by the state for the retail sale, service, and consumption of liquor.

—*Park*, only when used in this division, means a park facility which is owned, leased, or operated by a governmental agency. It does not include beach access strips.

—*Sale of*, only when used in this division, includes the term "or service."

It is the purpose and intent of this subdivision to establish provisions for hours of operation, location of places of business, sanitary regulations, the type of entertainment and conduct permitted, patron age restrictions, provisions for enforcement, penalties

for violations, and procedures for the town to follow with regard to alcoholic beverages in commercial establishments. The procedures established by this division, in furtherance of § 34-1 of this code, are designed to promote and protect the general health, safety, and welfare of the public, and to treat all regulated establishments in a non-discriminatory manner consistent with the manner of treatment of any other lawful business transacted in the town.

#### Sec. 34-1262. Compliance with applicable regulations Definitions.

For purposes of this division and when referred to elsewhere in this chapter, the following phrases, terms or words have the following meaning, except where the context clearly indicates a different meaning:

*Alcoholic beverage* means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law.

*Alcoholic beverage establishment* means any establishment within the municipal limits of the town that meets all local zoning requirements, possesses all municipal and county permits required by law, and is currently licensed by the division of alcoholic beverages and tobacco for the sales or service of alcoholic beverages for consumption off the licensed premises, on the licensed premises, or both.

*Bar* means an operation the primary activity of which is the sales or service of alcoholic beverages for consumption on the premises.

*Beach* means the land between the mean high and mean low water lines owned by the State of Florida and the zone of unconsolidated sand extending landward from the mean high water line to the place where there is a marked change in material or physiographic form or the line of permanent vegetation, usually the effective limit of storm waves: including any beach areas owned by the town or Lee County, and any beach area that has arisen upon it a right of customary use by the public

## Alcoholic Beverages

or a public easement, prescriptive or otherwise; and the foreshore of tidal navigable waters.

**Beer** means all brewed beverages, including malt beverages, containing malt. This definition is intended to accord with the definition in the Beverage Law.

**Beverage Law** means chapters 561 through 565, 567, and 568 of the Florida Statutes.

**Bottle club** means a commercial establishment, operated for a profit, whether or not a profit is actually made, wherein patrons consume alcoholic beverages that are brought onto the premises and not sold or supplied to the patrons by the establishment, whether the patrons bring in and maintain custody of their own alcoholic beverages or surrender custody to the establishment for dispersing on the licensed premises, and which is located in a building or other enclosed permanent structure. This definition does not apply to sporting facilities where events sanctioned by nationally recognized regulatory athletic or sports associations are held, bona fide restaurants licensed by the division of hotels and restaurants of the department of business and professional regulation whose primary business is the service of full course meals, or hotels and motels licensed by the division of hotels and restaurants of the department of business and professional regulation. This definition is intended to accord with the definition in the Beverage Law.

**Cocktail bar** means an alcoholic beverage establishment licensed by the state for, and engaged primarily in, sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation not prohibited by this division.

**Consumption off the premises** means consumption of alcoholic beverages at a place different from the licensed premises where purchased.

**Consumption on the premises** means consumption of alcoholic beverages upon the premises where purchased.

**Container** means any bottle, can, cup, glass, or other receptacle.

**Customer service area** means the area of an establishment available for food or beverage service or consumption, or both, calculated by measuring all areas, including any approved outdoor seating area, covered by customer tables and counter surfaces and all floor area within five (5) feet of the edge of said tables and counter surfaces, measured in all directions where customer mobility is provided. Areas between tables or counters that overlap in measurement with another table or counter must only be included in the calculation once.

**Employee** means a person who works or performs in an alcoholic beverage establishment, irrespective of whether the person is the owner, manager, or operator of said establishment; is paid a salary or wage by the owner, manager, or operator of said establishment, or accepts gratuities or splits gratuities with the owner, manager, or operator of said establishment.

**Expansion** means the spatial enlargement of premises, the expansion of an alcoholic beverage establishment approved and licensed for the sales or service of beer and/or wine to include liquor sales or service, and the expansion to a nightclub use from another alcoholic beverage establishment.

**Floor area, gross** means the sum of the floor areas of all floors of a building or structure, measured from the face of exterior walls, or from the centerline of a wall separating a shared building wall, including any outdoor or patio area approved for use as customer service area.

**Full course meals** means food items available on a menu that include soups, salads, side orders, entrées, non-alcoholic beverages, and desserts.

**Hotel bar** means a bar operated in connection with any hotel/motel or multiple-family building with more than 100 units, operated by the same owner or management, licensed by the state as an alcoholic beverage establishment under the Beverage Law for consumption on the premises during the hours of operation of the hotel business

## Alcoholic Beverages

and hours of business not prohibited by this division.

**Hours of operation** means the posted hours that an establishment is open to the public for business within the limitations on hours of business established by this division.

**Independent contractor** means any person who, pursuant to a formal, informal, written, or verbal agreement, works, performs, or dances in an alcoholic beverage establishment.

**Licensed premises** means not only rooms where alcoholic beverages are stored or sold by the licensee, but also all other rooms in the building which are so closely connected therewith as to admit free passage from rooms where alcoholic beverages are stored or sold by the licensee to other rooms over which the licensee has some dominion or control and also includes all of the area embraced within the sketch appearing on or attached to the application for the license involved and designated as such on said sketch, in addition to that area included or designated by general law. This definition is intended to accord with the definition in the Beverage Law.

**Licensee** means a legal or business entity, person, or persons that hold a license issued by the division of alcoholic beverages and tobacco of the department of business and professional regulation and meet the qualifications of § 561.15 of the Florida Statutes. This definition is intended to accord with the definition in the Beverage Law.

**Liquor** means distilled spirits, spirituous liquors, spirituous beverages, or distilled spirituous beverages containing the substance known as ethyl alcohol, ethanol, or spirits of wine in any form, including all dilutions and mixtures thereof from whatever source by whatever process produced. This definition is intended to accord with the definition in the Beverage Law.

**Membership organization** means an organization operating with formal membership requirements with the intent to pursue common goals or activities and licensed by the state as an alcoholic beverage

establishment for sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation of the membership organization and hours of business not prohibited by this division.

**Nightclub** means an alcoholic beverage establishment licensed by the state for, and engaged in, sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation and hours of operation not prohibited by this division, and operating after 11:00 p.m. in connection with dancing, vaudeville, theatrical, or similar entertainment and where a band, orchestra, or other form of performed entertainment is provided. The LPA does not recommend this additional use.

**Nudity** is defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04.

**Open container** means any container of alcoholic beverage that has been opened, has its seal broken, had its contents partially removed, or from which consumption is capable immediately.

**Operation** means the sales or service of alcoholic beverages in the normal course of business.

**Operator** means the person or entity, or combination of persons and entities, operating an alcoholic beverage establishment on licensed premises who either holds or has applied for a license to sell or serve alcoholic beverages from the premises.

**Outdoor seating area** means a specifically delineated area within the licensed premises, not enclosed by a structure and which may or may not be roofed, and approved by a town permit for dining and consumption on the premises as a commercial accessory use to any alcoholic beverage establishment.

A bottle of wine that has been resealed and is transported pursuant to F.S. § 564.08 is not an open container under the provisions of F.S. § 316.1936.

## Alcoholic Beverages

**Owner** means any person having a legal or equitable interest in property.

**Package goods** means any container of alcoholic beverages.

**Package store** means an alcoholic beverage establishment licensed by the state where alcoholic beverages and package goods are sold, during hours of operation and during hours of business not prohibited by this division, only in sealed containers for consumption off the premises.

**Parcel of land** means real property capable of being described with such definiteness that its location and boundaries may be established, that is designated by its owner or developer as land to be used or developed as a unified whole, or that has been used as a unified whole.

**Permit** means an official document or certificate required or issued by the town authorizing performance of a specified activity.

**Person** means any individual, association, corporation, estate, firm, limited partnership, partnership, trust, or other legal entity.

**Public area** means an area open to the public, including any auditorium, beach, bridge, building, canal, causeway, dock, lake, lagoon, marina, museum, open space, park, parkway, pier, playground, pool, preserve, range, recreational facility and/or field, roadway, semi-public parking lot, sidewalk, stream, waterway, and abutting lands and adjacent littoral waters, and all rights-of-way and public service facilities located on grounds, buildings, and structures that are under the jurisdiction, control, and administration of the town, special district, county, state, or federal government, within the municipal limits of the town.

**Restaurant** means an establishment engaged primarily in the sales or service of food and beverages in a ready to consume state.

**Restaurant, bona fide** means a restaurant that is also an alcoholic beverage establishment that:

(a) is engaged primarily in the service of food and non-alcoholic beverages, where the sales or service of alcoholic beverages is incidental to the sale and service of food and non-alcoholic beverages; and

(b) meets all local zoning requirements, and possesses all municipal and county permits required by law; and

(c) is currently and lawfully licensed by the division of hotels and restaurants of the department of business and professional regulation; and

(d) offers and serves full course meals with full kitchen facilities and food preparation staff capable of preparing and serving full course meals continuously during all hours of operation; and

(e) has a customer service area consisting of tables and chairs, or customer counters, and kitchen facilities, restroom facilities, pantries, and storage room(s) that, aggregated together, comprise no less than 75 percent of the gross floor area, and that are adequate to accommodate the service of full course meals; and

(f) has a sufficient total number of seats or chairs at tables, counters, and bars within the customer service area to accommodate the full occupant load as determined by the town in accordance with the provisions of the Florida Building Code and the Florida Fire Code or successor codes.

This definition is intended to accord with the definition in the Beverage Law.

**Restaurant bar** means a bar operated in direct connection with a bona fide restaurant and by the same owner or management, licensed by the state for sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation and hours of business not prohibited by this division.

**Revenue, gross** means all money and other consideration received by or paid to the operator of a alcoholic beverage establishment from the retail sale of alcoholic beverages, food, and non-alcoholic beverages without regard to whether such receipts are

**Alcoholic Beverages**

represented by check, credit, charge account, exchange, or otherwise. Gross revenue must not include direct taxes that are passed on to and paid by the patrons (such as sales tax) or revenue generate from catering services. Gross revenue also must not include tips and gratuities paid by customers to and retained by employees, independent contractors, or the operator, for which such employees are not accountable to the operator, whether or not such gratuities are credited against wages owed by the operator to such employees. No income tax, franchise tax, tangible or intangible tax, or other tax based on the income, profits, or assets of the operator will be deducted from gross revenue. Each charge or sale on installment or credit is to be treated as a sale for the full price on the date the charge or sale is made, regardless of when the operator actually receives payment.

*Sales or service* means the distribution or transfer of any alcoholic beverage for a consideration, any gift of an alcoholic beverage in connection with, or as part of, a transfer of property other than an alcoholic beverage for a consideration, or the distribution or transfer of an alcoholic beverage by any establishment licensed under the Beverage Law. This definition is intended to accord with the definition in the Beverage Law.

*Semi-public parking lot* means any area wherein motor vehicles are parked by the public in conjunction with any business, enterprise, commercial establishment, office building, or multiple-family building.

*Sexually-oriented business* means a sexually-oriented business as defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04.

*Specified anatomical areas* means specified anatomical areas as defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04.

*Specified sexual activity* means specified sexual activity as defined in the Fort Myers Beach

Obscenity, Public Nudity, and Sexually-Oriented Business Regulation Ordinance, Ord. 96-04.

*Vendor* means any and all persons engaged in the activity of sales or service of any alcoholic beverage regulated by this division.

*Wine* means all beverages made from fresh fruits, berries, or grapes, either by natural fermentation or by natural fermentation with brandy added, in the manner required by the laws and regulations of the United States, and includes all sparkling wines, champagnes, combination of the aforesaid beverages, vermouths, and like products. Sugar, flavor, and coloring materials may be added to wine to make it conform to the consumer's taste, except that the ultimate flavor or color of the product may not be altered to imitate a beverage other than wine or to change the character of the wine. This definition is intended to accord with the definition in the Beverage Law.

No structure, building, establishment, or premises shall be occupied, used, or maintained for the purpose of the retail sale, service, or consumption of alcoholic beverages except in conformity with all applicable town regulations, including this chapter, and with the applicable state regulations:

***Subdivision II. Hours of Business***

**Sec. 34-1263. Sale for off-premises consumption Hour of business during which sales or service, consumption, and occupancy are prohibited.**

(a) Where permitted. The sale of alcoholic beverages for consumption off the premises shall be allowed in any zoning district where retail stores are a permitted use, provided that package stores must meet the additional regulations set forth in subsection (d) of this section.

(b) Sealed containers only. Only alcoholic beverages in original factory-sealed containers shall be permitted to be sold for off-premises consumption.

## Alcoholic Beverages

—(c) *State liquor laws.* Any establishment engaged in the sale of alcoholic beverages for consumption off-site shall be required to comply with all applicable state liquor laws.

—(d) *Location of package stores.* No package store or other establishment primarily engaged in the retail sale of liquor for consumption off-site shall be permitted closer than 500 feet to any place of worship, religious facility, school (noncommercial), day care center (child), park, or dwelling unit, or 500 feet from any other establishment primarily engaged in the sale of alcoholic beverages:

- (1) For purposes of this subsection, the distance shall be measured in a straight line from any public entrance or exit of the establishment to the nearest property line of the place of worship, religious facility, school (noncommercial), day care center (child), park, or dwelling unit, or any public entrance or exit of any other establishment primarily engaged in the sale of alcoholic beverages.
- (2) Where an establishment for the sale of alcoholic beverages is located in conformity with the provisions of this subsection, and a place of worship, religious facility, school (noncommercial), day care center (child), park, or dwelling unit is subsequently established in the proximity of such existing establishment, then the separation requirements shall not apply.
- (3) Notwithstanding subsection (d) (1) of this section, where a package store is located in a multiple-occupancy complex which is 25,000 square feet or greater in size, or in a retail sales establishment wherein the sale of alcoholic beverages for consumption off-site is clearly incidental to other retail sales commodities, such as in a grocery store, supermarket, or drugstore, the separation requirements from any dwelling unit shall not apply.
- (4) In any planned development zoning district where the applicant is contemplating the sale of alcoholic beverages for consumption off the premises in an establishment which cannot meet the distance requirements set forth in subsection (d) of this section, the

applicant shall request a deviation from the requirements of subsection (d).

(a) *Sales or service.* The sales or service of alcoholic beverages on any licensed premises of an alcoholic beverage establishment is prohibited between the following hours:

- (1) ~~11:30 p.m.~~ on Sunday and ~~7:00 a.m.~~ on Monday.
- (2) ~~11:30 p.m.~~ on Monday and ~~7:00 a.m.~~ on Tuesday.
- (3) ~~11:30 p.m.~~ on Tuesday and ~~7:00 a.m.~~ on Wednesday.
- (4) ~~11:30 p.m.~~ on Wednesday and ~~7:00 a.m.~~ on Thursday.
- (5) ~~11:30 p.m.~~ on Thursday and ~~7:00 a.m.~~ on Friday.
- (6) ~~1:00 a.m.~~ on Saturday and ~~7:00 a.m.~~ on Saturday.
- (7) ~~1:00 a.m.~~ on Sunday and ~~7:00 a.m.~~ on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above.

(b) *Consumption and occupation of establishments licensed for consumption on the premises.* The consumption of alcoholic beverages on and occupation of any alcoholic beverage establishment licensed for on the premises consumption is prohibited between the following hours:

- (1) ~~2:30 a.m.~~ on Monday and ~~7:00 a.m.~~ on Monday.
- (2) ~~2:30 a.m.~~ on Tuesday and ~~7:00 a.m.~~ on Tuesday.
- (3) ~~2:30 a.m.~~ on Wednesday and ~~7:00 a.m.~~ on Wednesday.

**Alcoholic Beverages**

- (4) ~~2:30 a.m.~~ on Thursday and ~~7:00 a.m.~~ on Thursday.
- (5) ~~2:30 a.m.~~ on Friday and ~~7:00 a.m.~~ on Friday.
- (6) ~~2:00 a.m.~~ on Saturday and ~~7:00 a.m.~~ on Saturday.
- (7) ~~2:00 a.m.~~ on Sunday and ~~7:00 a.m.~~ on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above.

Alcoholic beverage establishments are prohibited from opening or remaining open to the public for business or to allow patrons, customers, or persons other than employees and vendors to remain on such licensed premises during the hours specified above.

(c) **More limited hours of operation.** Owners or operators of alcoholic beverage establishments or other lawful businesses regulated by this division, for business or other reasons, may choose to restrict an operation's hours within the hours of business not prohibited by this division. Nothing in this division will be construed to prevent an alcoholic beverage establishment from posting hours of operation more restrictive than those provide herein.

**Subdivision III. Location**

**Sec. 34-1264. Sale or service for on-premises consumption** Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.

(a) **Approval required.** The sale or service of alcoholic beverages for consumption on the premises shall not be permitted until such location has been approved by the town as follows:

- (1) **Administrative approval.** The director may administratively approve the sale or service

of alcoholic beverages for consumption on the premises when in conjunction with the following uses if the proposed use satisfies the requirements set forth in this division. When circumstances so warrant the director may determine that administrative approval is not the appropriate action and that the applicant must instead apply for approval as a special exception. Such circumstances may include the previous denial of a similar use at that location; the record of public opposition to a similar use at that location; and similar circumstances. When the director has approved a request for consumption on the premises at a location where the actual building has not been constructed, the director shall not approve another request for consumption on the premises which could potentially violate the distance requirements. If the first building is completed within less than one year, and it can be shown the second use would not violate the prescribed distance requirements, the director may approve the second location subject to all other requirements contained in this division.

- ~~a. Bars or cocktail lounges located in commercial zoning districts which permit bars or cocktail lounges, provided the standards set forth in subsections (b)(1) and (3) of this section are met;~~
- ~~b. Charter, party fishing boat, or cruise ship, provided the standards of section (b)(3) are met. The COP approval is specific to the charter, party fishing boat, or cruise ship operating from a specific location and does not run with the land nor is it transferable.~~
- ~~c. Clubs and membership organizations located in commercial zoning districts, where permitted, provided the standards set forth in subsections (b)(2)d and (b)(3) of this section are met;~~
- ~~d. Cocktail lounges in golf course clubs, provided the standards set forth in subsections (b)(2)c and (b)(3) of this section are met;~~
- ~~e. Hotels/motels, provided the standards set forth in subsections (b)(2)b and (b)(3) of this section are met; and~~

## Alcoholic Beverages

- ~~f. Restaurants, provided the standards set forth in subsections (b)(2)a and (b)(3) of this section are met.~~
- ~~(2) Special exception:~~
- ~~a. A special exception for consumption on the premises shall be required for:~~
- ~~1. Any establishment not covered by subsection (a)(1) of this section; or~~
  - ~~2. Any establishment which provides outdoor seating areas for its patrons consuming alcoholic beverages, except that a restaurant may have outdoor seating approved administratively provided the outdoor seating area is not within 500 feet of a place of worship, religious facility, school (noncommercial), day care center (child), park, or dwelling unit under separate ownership.~~
- ~~b. The burden of proof that the grant of the special exception will not have an adverse effect on surrounding properties lies with the applicant.~~
- ~~c. A single special exception for consumption on the premises for a multiple-occupancy complex in a conventional zoning district shall be sufficient to permit consumption on the premises in every restaurant which exists or may be established within the multiple-occupancy complex.~~
- ~~(3) Planned developments:~~
- ~~a. No administrative approval is necessary where an individual establishment or other facility proposing consumption on the premises is explicitly designated on the master concept plan and is included on the approved schedule of uses.~~
  - ~~b. If consumption on the premises is shown as a permitted use on the approved schedule of uses for a multiple-occupancy complex, no administrative approval for consumption on the premises shall be required for restaurants within the multiple-occupancy complex.~~
  - ~~c. Consumption on the premises for other uses within planned developments~~
- ~~require administrative approval or a special exception:~~
- ~~(b) Location; parking:~~
- ~~(1) Prohibited locations:~~
- ~~a. Except as may be exempted in subsections (a)(1) or (b)(2) of this section, no establishment for the sale or service of alcoholic beverages for consumption on the premises shall be located within 500 feet of:~~
    - ~~1. A place of worship, religious facility, school (noncommercial), day care center (child), or park;~~
    - ~~2. A dwelling unit under separate ownership, except when approved as part of a planned development; or~~
    - ~~3. Another establishment primarily engaged in the sale of alcoholic beverages for consumption on the premises, excluding those uses listed under subsection (b)(2) of this section.~~

~~Distance shall be measured from any public entrance or exit of the establishment in a straight line to the nearest property line of the place of worship, religious facility, school (noncommercial), day care center (child), dwelling unit, or park, or to the closest public entrance or exit of any other establishment primarily engaged in the sale of alcoholic beverages.~~

  - ~~b. Where an establishment for the sale of alcoholic beverages is located in conformity with the provisions of this subsection, and a place of worship, religious facility, school (noncommercial), day care center (child), park or dwelling unit is subsequently established in the proximity of such existing establishment, then the separation requirements shall not apply.~~
- ~~(2) Exceptions to location standards. Exceptions to location standards are as follows:~~
- ~~a. Restaurants, provided:~~
    - ~~1. The restaurant is in full compliance with state requirements;~~

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2. The restaurant serves cooked, full-course meals, prepared daily on the premises; and
3. Only a service bar is used and the sale or service of alcoholic beverages is only to patrons ordering meals, or, if the restaurant contains a cocktail lounge for patrons waiting to be seated at dining tables, the lounge shall be located so that there is no indication from the outside of the structure that the cocktail lounge is within the building.
4. The other requirements of § 34-1264(k) shall be met.
- b. *Hotels/motels:*
1. The hotel/motel contains at least 100 guest rooms under the same roof and that bars or cocktail lounges are located within the hotel or motel and under the same roof; and
2. The exterior of the building must not have storefronts or give the appearance of commercial or mercantile activity visible from the street.
- If the use contains windows visible from the street, the windows shall be of fixed, obscure glass. Access to the cocktail lounge or bar must be through the lobby. Additional entrances are not permitted unless the additional entrance or door opens into an enclosed courtyard or patio. The additional entrance may not be visible from the street. A fire door or exit shall be permitted, provided that the door or exit is equipped with panic type hardware and is maintained in a locked position except in an emergency.
- c. *Golf course clubhouses,* provided that:
1. The golf course consists of at least nine holes a clubhouse, locker rooms, and attendant golf facilities, and comprises in all at least 35 acres of land.
2. Failure of such club to maintain the golf course, clubhouse, and golf facilities shall automatically terminate the privilege of the cocktail lounge and sale of beer from the refreshment stands.
- d. *Membership organizations,* provided that:
1. such club or organization conforms to all the requirements of F.S. ch. 561 and other applicable state laws, and
2. there are no signs or other indications visible from the exterior of the clubhouse, building, or structure that alcoholic beverages are served.
- (3) *Parking.* Restaurants providing alcoholic beverages for consumption on the premises must comply with the parking requirements set forth in § 34-2020(d)(2). Any bar or cocktail lounge must provide parking in accordance with § 34-2020(d)(2). All other uses must meet the parking requirements of the principal use.
- (c) *Procedure for approval:*
- (1) *Administrative approval:*
- a. *Application.* An applicant for a consumption on the premises permit shall submit the following information on a form provided by the town:
1. The name, address, and telephone number of the applicant.
2. The name, address, and telephone number of the owner of the premises, if not the applicant.
3. A notarized authorization from the property owner to apply for the permit.
4. Location by STRAP and street address.
5. Type of state liquor license being requested.
6. A site plan, drawn to scale, showing:
- i. The property in question, including all buildings on the property and adjacent property;
- ii. Entrances to and exits from the building to be used by the public;
- iii. A parking plan, including entrances and exits;
- iv. The floor area of the building and proposed seating capacity. If a restaurant is proposing a bar or

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lounge for patrons waiting to be seated in the restaurant, the floor area and seating area of the lounge shall be shown in addition to the restaurant seating area.

- 7. A town map marked to indicate all of the property within 500 feet of the building to be used for consumption on the premises.
- 8. An notarized affidavit executed by the applicant indicating that no place of worship, religious facilities, day care centers (child), noncommercial schools, dwelling units or parks are located within 500 feet of the building to be used:
  - b. *Findings by director.* Prior to permit approval, the director shall conclude that all applicable standards have been met. In addition, the director shall make the following findings of fact:
    - 1. There will be no apparent deleterious effect upon surrounding properties and the immediate neighborhood as represented by property owners within 500 feet of the premises.
    - 2. The premises are suitable in regard to their location, site characteristics, and intended purpose. Lighting must be shuttered and shielded from surrounding properties.
- (2) *Special exception.*
  - a. Applications for special exceptions shall be submitted on forms supplied by the town and shall contain the same information as required for administrative approval.
  - b. Advertisements and public hearings shall be conducted in accordance with the requirements set forth in article II of this chapter.
- (d) *Temporary one-day permit.*
- (1) *Intent, applicability.* It is the intent of this subsection to require that nonprofit and for-profit organizations and establishments in the town obtain a one-day temporary alcoholic beverage permit for the sale of alcoholic

beverages at the specific location where an event is held. This subsection will pertain to but not necessarily be limited to the following uses:

- a. Grand openings or open houses at residential or commercial developments;
- b. Special outdoor holiday or celebration events at bars and restaurants;
- c. Weddings and other special occasions at clubhouses;
- d. Political rallies or events;
- e. Block parties; and
- f. Carnivals.
- (2) Only twelve temporary alcoholic beverage permits may be issued per year to a specific location. If more than twelve permits are sought per year for a specific location, then the location must obtain a permanent alcoholic beverage special exception. If the event for which the temporary alcoholic beverage permit is sought continues for longer than one day, the applicant may petition the director for an extended permit. A temporary alcoholic beverage permit may not be issued for more than three days.
- (3) *Procedure for approval.*
  - a. Any owner, lessee, or tenant seeking approval for consumption on the premises for a temporary alcoholic beverage permit, must submit a written request to the director. The written request must include:
    - 1. The name and address of the applicant;
    - 2. A general description of the exact site where alcoholic beverages are to be sold and consumed;
    - 3. The type of alcoholic beverages to be sold and consumed; and
    - 4. A fee in accordance with the adopted fee schedule.
  - b. The director will make a final decision within ten working days. The decision will be in the form of approval, approval with conditions or denial. The director may forward the request to other appropriate agencies for comment.
  - c. The town council will review all requests for temporary alcoholic beverage permits where an event will run longer than three

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days. Under no circumstances will a temporary alcoholic beverage permit be issued for more than ten days.

—(e) *Expiration of approval.* After the following time periods, the administrative or special exception approval of a location for the sale and consumption of alcoholic beverages on the premises granted in accordance with this section shall expire, and become null and void:

- (1) In the case of an existing structure, the approval shall expire six months from the date of approval unless, within that period of time, operation of the alcoholic beverage establishment has commenced. For purposes of this subsection, the term “operation” shall be defined as the sale of alcoholic beverages in the normal course of business.
- (2) In the case of a new structure, the approval shall expire one year from the date of approval unless, within that period of time, operation of the alcoholic beverage establishment has commenced. The director may grant one extension of up to six months if construction is substantially complete.

—(f) *Transfer of permit.* Alcoholic beverage permits, as noted in subsection 34-1264(i), issued by virtue of this section are a privilege running with the land. Sale of the real property shall automatically vest the purchaser with all rights and obligations originally granted to or imposed on the applicant. Such privilege may not be separated from the fee simple interest in the realty.

—(g) *Expansion of area designated for permit.* The area designated for an alcoholic beverage permit cannot be expanded without filing a new application for an alcoholic beverage permit in accordance with the requirements contained in this chapter. The new application must cover both the existing designated area as well as the proposed expanded area. All areas approved must be under the same alcoholic beverage permit and subject to uniform rules and regulations:

—(h) *Nonconforming establishments:*

—(1) *Expansion.* A legally existing establishment engaged in the sale or service of alcoholic beverages which is made nonconforming by reason of new regulations contained in this chapter shall not be expanded without a special exception. The term “expansion,” as used in this subsection, shall include the enlargement of space for such use and uses incidental thereto, the expansion of a beer and wine bar to include intoxicating liquor, as that term is defined by the Florida Statutes, and the expansion of a bar use to a nightclub use. Nothing in this subsection may be construed as an attempt to modify any prohibition or diminish any requirement of the state.

—(2) *Abandonment.* An establishment engaged in the sale or service of alcoholic beverages may thereafter become a nonconforming use due to a change in regulations, as provided in division 3 of article V of this chapter. Nonconforming uses may continue until there is an abandonment of the permitted location for a continuous nine-month period. For purposes of this subsection, the term “abandonment” shall mean failure to use the location for consumption on the premises purposes as authorized by the special exception, administrative approval, or other approval. Once a nonconforming use is abandoned, it cannot be reestablished unless it conforms to the requirements of this chapter and new permits are issued.

—(i) *Revocation of permit or approval:*

- (1) The town council has the authority to revoke an alcoholic beverage special exception, administrative approval, or other approval upon any of the following grounds:
  - a. A determination that an application for special exception or administrative approval contains knowingly false or misleading information.
  - b. Violation by the permit holder of any provision of this chapter, or violation of any state statute which results in the revocation of the permit holder’s state alcoholic beverage license by the state

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- alcoholic beverage license board or any successor regulatory authority:
- ~~c. Repeated violation of any town ordinance at the location within the 12-month period preceding the revocation hearing.~~
  - ~~d. Failure to renew a state liquor license, or written declaration of abandonment by the tenant and owner of the premises if under lease, or by the owner himself if not under lease.~~
  - ~~e. Abandonment of the premises. An establishment which continually maintains (renews) its state liquor license, even though it has suspended active business with the public, shall not be deemed to have been abandoned for purposes of this subsection.~~
  - ~~f. Violation by the permit holder of any condition imposed upon the issuance of the special exception or administrative approval.~~
  - ~~g. Violation of any of the minimum standards of the special exception.~~
- ~~(2) Prior to revoking an administrative approval, special exception, or other approval for alcoholic beverages, the town council shall conduct a public hearing at which the permit holder may appear and present evidence and testimony concerning the proposed revocation. At the hearing, the town council may revoke the permit if a violation described in this subsection is established by a preponderance of the evidence. The permit holder shall be notified of the grounds upon which revocation is sought prior to any hearing, and shall be given notice of the time and place of the hearing in the same manner as set forth in article II of this chapter.~~
  - ~~(3) When an alcoholic beverage permit is revoked in accordance with the terms of this subsection, the town may not consider a petition requesting an alcoholic beverage permit on the property for a period of 12 months from the date of final action on the revocation.~~
  - ~~(4) Upon written demand of the town council, any owner or operator of an establishment with a COP license, must make, under oath, a~~
    - ~~statement itemizing the percentage of gross receipts that are from the sale of alcoholic beverages. Failure to comply with such demand within 60 days of the date of demand shall be grounds for revocation of the special exception, administrative approval, or other approval.~~
- ~~(j) Appeals. All appeals of decisions by the director shall be in accordance with procedures set forth in § 34-86 for appeals of administrative decisions.~~
  - ~~(k) Alcoholic beverages in restaurants. The sale of alcoholic beverages for on-premises consumption in restaurants (see § 34-1264(b)(2)) must conform to the following regulations:~~
    - ~~(1) The sale of alcoholic beverages must be incidental to the sale of food, and restaurants permitted to serve alcohol shall provide that food service facilities will remain open serving appropriate food items on the menu at all times coincident with the sale of alcoholic beverages.~~
    - ~~(2) The sale of alcoholic beverages shall be permitted only when it accounts for no more than 49% of the combined gross sales attributable to the sale of food and all beverages during any continuous twelve-month period.~~
    - ~~(3) Restaurants selling alcoholic beverages shall keep separate books and records reflecting the gross sales of food and nonalcoholic beverages and the gross sales of alcoholic beverages for each month. The failure to keep the books and records required herein shall be a violation of this code.~~
    - ~~(4) The town manager or designee may, during normal working hours, request to inspect and audit the books and records of the business from which alcoholic beverages sales are made wholly for the purpose of verifying that the gross sales of alcoholic beverages are no more than 49% of the gross sales of food and all beverages during any continuous twelve-month period. Refusal of an owner or operator of such business to allow said inspection shall be a violation of this code. Should the audit reveal that this requirement is not being met,~~

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the town manager shall initiate enforcement proceedings for a violation of this code:

- (5) For any restaurant which has been selling alcoholic beverages for less than twelve months, the provisions of this section shall be interpreted and applied with respect to said lesser period of time.
- (6) These regulations may be enforced through the normal code enforcement procedures of this code (for example, § 1-5, or article V of ch.2). In addition to these procedures, violations of these regulations may be restricted by injunction initiated by the Town of Fort Myers Beach, by any citizen thereof, or by any person affected by the violation of such regulations.

(a) **Prohibited locations.** Alcoholic beverage establishments are prohibited within 500 feet of:

- (1) A school (noncommercial);
- (2) A place of worship, religious facility, day care center (child), or park;
- (3) A dwelling unit under separate ownership;  
or
- (4) Another alcoholic beverage establishment.

(b) **Measuring distances.** Distances must be measured on a straight horizontal line, without regard to intervening structures, objects, or political boundaries, from the nearest point on the perimeter boundary line of the parcel of land on which the alcoholic beverage establishment is located, to the nearest point on the perimeter boundary line of the parcel of land on which the prohibiting use is located.

(c) **Exceptions.**

- (1) **Bona fide restaurants,** provided:
  - a. The bona fide restaurant is in full compliance with the requirements of the state division of hotels and restaurants of the department of business and professional regulation; and
  - b. The bona fide restaurant serves full course meals at all times during its hours of operation; and
  - c. If the licensed premises includes a bar, only a restaurant bar is used and the sales

or service of alcoholic beverages is only to patrons ordering meals or waiting to be seated at tables, and the restaurant bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The restaurant bar must be directly connected with the dining room and must be only a service bar for patrons of such restaurant. Stools are permitted at the restaurant bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package goods from a restaurant bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the restaurant is not actually engaged in and open to the public for the service of full course meals; and

- d. The bona fide restaurant continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of this code.
- (2) **Hotel/motels and resorts,** provided:
  - a. The hotel/motel or resort is not located within 500 feet of any noncommercial school.
  - b. The hotel/motel or resort contains at least ~~Option 1: 100~~ ~~Additional Option 2: 50~~ units and any alcoholic beverage establishment(s) are under the same roof or on the same premises under unified control; and
  - c. If the licensed premises includes a bar, only a hotel bar is used and the sales or service of alcoholic beverages is only to patrons of the hotel/motel or resort, and the hotel bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The hotel bar must be directly connected with the hotel/motel or resort and must be only a service bar for patrons of such hotel/motel or resort. Stools are permitted at the hotel bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package

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goods from a hotel bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the hotel/motel or resort is not actually operating and open to the public as a hotel/motel or resort; and

- d. The hotel/motel or resort and all alcoholic beverage establishment(s) continue to comply with all applicable laws, regulations, and other definitional and regulatory requirements of this code.

**(3) Membership organizations, provided:**

- a. The membership organization is not located within 500 feet of any noncommercial school;
- b. The sales or service of alcoholic beverages is only to members and member-accompanied guests of the membership organization, and there is no indication from the outside of the building and any associated structures that alcoholic beverages are served on the premises; and
- c. The membership organization continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of this code.

**(4) Nonconforming uses.** Any alcoholic beverage establishment lawfully operating on licensed premises prior to July 1, 1999 is exempt from subsection (a) of this section, but is subject to the provisions for nonconforming uses in this code, as long as it continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of this code. [See LDC Sec. 34-3241 to 3246].

**(5) Other; town council approval required.**

- a. Distance from schools. Except for a bona fide restaurant, a resolution passed by the town council in conjunction with a zoning decision approving the location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a noncommercial school will be required prior to issuance of a use permit. In addition to the considerations and findings required for rezonings by

this chapter, prior to approval the local planning agency will review and make recommendations as to whether, and the town council must find that, the location promotes the public health, safety, and general welfare of the community in accordance with § 562.45 of the Beverage Law.

- b. Distance prohibition from all other uses. Except for a bona fide restaurant, hotel/motel or resort, membership organization, or lawfully existing nonconforming use, a special exception for location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a place of worship, religious facility, day care center (child), park, dwelling unit under separate ownership, or another alcoholic beverage establishment is required prior to issuance of a use permit.

The proceedings for such special approval must be in conformance with the provisions of F.S. § 166.041(3)(c). These restrictions will not be construed to prohibit the issuance of special event permits as provided for in § 561.422 of the Beverage Law, this code, and all other applicable regulations.

**Secs. 34-1265--34-1290. Reserved. Bottle Clubs.**

**[Options]**

[1] Bottle clubs are prohibited uses in any zoning district. The LPA recommends this option.]

[2] Prior to opening any bottle club, the owner of the parcel of land on which the proposed bottle club plans to operate must apply for approval of the use through the special exception process provided in this chapter. The LPA does not recommend this option.]

[3] Bottle clubs are subject to all regulations and restrictions in this division pertaining to cocktail bars. The LPA does not recommend this option.]

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### Sec. 34-1266. Consumption, possession in public areas.

#### (a) General prohibition in public areas.

Consuming, using, or selling any alcoholic beverage, or manually possessing any unsealed or open container of any kind that contains any alcoholic beverage while on or within any public area, or while on or within any vehicle located in a public area is prohibited. It is further prohibited for any intoxicated person to enter or remain in any public area.

#### (b) Exceptions.

(1) A person under a written contract with the town to allow sales or service of beer and wine may distribute, and persons of age not prohibited by the patron age provisions of this division of the code may consume, such permitted beer and wine only within the licensed premises of events designated by the town without violating the provisions of this division.

(2) The consumption or possession of an alcoholic beverage in an open container, in a public area specifically authorized and approved by the town council for outdoor seating or a special event pursuant to this code.

(3) Notwithstanding any other provision of law, an alcoholic beverage establishment licensed to sell wine on the premises may permit a patron to remove one unsealed bottle of wine for consumption off the premises if the patron has purchased a full course meal and consumed a portion of the bottle of wine with such meal on the licensed premises. A partially consumed bottle of wine that is to be removed from the licensed premises must be securely resealed by the licensee or its employee before removal from the licensed premises. The partially consumed bottle of wine must be placed in a bag or other container that is secured in a manner such that it is visibly apparent if the bag or other container has been subsequently opened or tampered with, and a dated receipt for the bottle of wine and full course meal must be provided by the licensee and attached to the

container. If transported in a motor vehicle, the container with the resealed bottle of wine must be placed in a locked glove compartment, a locked trunk, or the area behind the last upright seat of a motor vehicle that is not equipped with a trunk or glove compartment capable of being locked.

#### (c) Resolution procedure, conditions.

Notwithstanding the prohibition in subsection (a) of this section, the town council may approve, by resolution, the sales or service and consumption on the premises of alcoholic beverages at any recreational facility for a one-time event. The entity making application for the resolution must secure a temporary permit or license authorized by § 561.422 of the Beverage Law. All beverages so approved must not be served in glass or other breakable containers and the director may place further restrictions or limitations on the special event.

### SECTION 1267. Alcoholic beverage establishments; permitted locations; approval process.

(a) Permitted locations. The following types of alcoholic beverage establishments may be permitted to operate in certain zoning districts classified according to the use group(s) and sub-group(s) employed by Tables 34-1 and 34-2 of this chapter, upon proper approval from the town and with continuous compliance to all applicable laws, regulations, and other definitional and regulatory requirements of this code.

- (1) *Bona fide restaurant.* A bona fide restaurant is allowed in any zoning district permitting the retail use group with the open sub-group, provided the bona fide restaurant complies with the distance requirements for prohibited locations.
- (2) *Cocktail bar.* A cocktail bar is allowed in any zoning district permitting the retail use group with the open sub-group, provided the cocktail bar complies with the distance requirements for prohibited locations.
- (3) *Excursion or pleasure vessels.* Owners of excursion or pleasure vessels, who are licensed under the Beverage Law to sell

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alcoholic beverages for consumption on the vessel, and their employees, may sell beer, wine, and liquor thereon, provided that such vessels [ Option 1: have the minimum restaurant facilities, accommodations, and seating capacity required for a bona fide restaurant. ] [ Option 2: prohibit the sales of alcoholic beverages for consumption on premises whenever the sale of alcoholic beverages accounts for more than 49 percent of the combined gross revenues attributable to the sale of food and non-alcoholic beverages in any 12 month period. ] [ Option 3: prohibit the sales of alcoholic beverages for consumption on premises whenever the sale of alcoholic beverages accounts for more than 74 percent of the combined gross revenues attributable to the sale of food and non-alcoholic beverages in any 12 month period. ] [ Option 4: prohibit the sales of alcoholic beverages for consumption on premises whenever the sale of alcoholic beverages accounts for more than 89 percent of the combined gross revenues attributable to the sale of food and non-alcoholic beverages in any 12 month period. ] Such vessels, however, are prohibited from operating in any canal in the town surrounded entirely by residentially zoned property but may be permitted to cruise and operate in the open waters within the municipal limits of the town, subject to regulations of any other governmental entity having jurisdiction over such waterway(s). The sales or service of alcoholic beverages or food on such boats is allowed only while such boats are underway.

- (4) **Hotel bar.** A hotel bar is allowed in any zoning district permitting the residential or lodging use groups with the open sub-group, provided the hotel bar complies with the distance requirements for prohibited locations.
- (5) **Membership organization.** A membership organization is allowed to sell or serve alcoholic beverages for consumption on the premises in any zoning district permitting the retail use group with the limited and open

sub-groups, provided the membership organization complies with the distance requirements for prohibited locations.

- (6) **Outdoor seating area.** An outdoor seating area is allowable in any zoning district permitting the retail use group with the open sub-groups, provide such outdoor seating complies with the distance requirements for prohibited locations. Before a new outdoor seating area may commence operations, the same must be approved through the special exception process provided by this chapter.
- (7) **Package store.** A package store is allowed in any zoning district permitting the retail use group with the open sub-groups, provided the package store complies with the distance requirements for prohibited locations.
- (8) **Restaurant bar.** A restaurant bar is allowed in any zoning district permitting retail use groups with the open sub-group, provided the restaurant bar complies with the distance requirements for prohibited locations.
- (9) **Nightclub.** A nightclub is allowable in any zoning district permitting the retail use group with the open sub-group, provided the nightclub complies with the distance requirements for prohibited locations. Before a nightclub may commence operations, the same must be approved through the special exception process provided by this chapter. The LPA does not recommend this additional use.

(a) **Approval required.** A vendor is prohibited from engaging in the sales or service of alcoholic beverages unless and until such time as the vendor has secured a license from the division of alcoholic beverages and tobacco of the department of business and professional regulation of the state. No alcoholic beverage establishment may open or operate and the town will not process any application to the state for an alcoholic beverage license until the use has been approved by the town through one of the following processes.

- (1) **Administrative review.** The director may administratively approve an alcoholic beverage establishment if the proposed use complies with the requirements of this

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division, current zoning, all supplemental regulations, and all other applicable regulations. However, the director may, in her sole judgment, require the applicant to apply for a special exception rather than an administrative review. When the director has approved an alcoholic beverage establishment on premises where the building proposed to house the use has not been constructed, the director will not approve through the administrative review process another request that could potentially violate the location requirements of this division. Prior to administrative approval, the director must make the following findings of fact:

- a. There will be no apparent deleterious effect on surrounding property owners and the immediate neighborhood as represented by property owners within 500 feet of the premises, measured in accordance with this division; and
- b. The premises are suitable in regard to their location, site characteristics, and intended purpose.

Prior to administrative approval, the director must conclude that the application and premises are in compliance with all applicable standards and all applicable provisions of this code.

- (2) **Special exception.** An approved special exception is required for an alcoholic beverage establishment that may not be approved through the administrative review process of that proposes to provide outdoor seating areas for consumption on the premises. The burden of proof that the approval of the special exception will not have a deleterious effect on the surrounding properties is on the applicant. A single special exception for consumption on the premises for a multiple-occupancy complex is sufficient to permit consumption on the premises in every bona fide restaurant that operates within the multiple-occupancy complex. Otherwise, request for special exceptions will be administered and decided

- in conformance with the requirements for special exceptions provided in this chapter.
- (3) **Planned development.** Unless explicitly designated on the master concept plan and included in the schedule of uses, alcoholic beverage establishment(s) may be added to a planned development by administrative or special exception approval, as provided in this code.
- (4) **Variance.** Requests for variances or deviations from the requirements of this section will be administered and decided in conformance with the requirements for variances and deviations that are provided in this chapter.
- (5) **Temporary permit.** An approved temporary permit is required for the sale or service of alcoholic beverages by non-profit organizations and for-profit establishments for any special event or at other than regularly licensed premises. A completed application for a temporary permit must be received by the director no later than 21 calendar days in advance of the beginning date of the event. The director will approve, approve with conditions, or deny the application within ten (10) working days, or require town council review and approval. The town council will review all requests for temporary permits for events proposed to run longer than three (3) days. Under no circumstances will a temporary permit be issued for more than ten (10) days.

No more than twelve (12) temporary alcoholic beverage permits will be issued each calendar year for a specific location. If more than twelve (12) temporary alcoholic beverage permits are proposed or requested, then the applicant must request appropriate permanent approvals.

- (6) **Bona fide restaurant determination.** Any alcoholic beverage establishment may apply for an administrative determination from the town that the establishment qualifies as a bona fide restaurant for purposes of this division. No establishment is required to obtain a determination, and alcoholic

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beverage establishments must continue to comply with all provisions of this division in order to maintain their exceptions. In addition to the application information required by this section, an applicant for a determination must provide a copy of a valid business tax receipt for the alcoholic beverage establishment on the property that is the subject of the application.

(b) **Application.** An application for approval of an alcoholic beverage establishment or bona fide restaurant determination must be submitted to the director on forms supplied by the town and must provide the following information:

- (1) The name, address, and telephone number of the applicant operator.
- (2) The name, address, and telephone number of the owner of the premises, if different from the applicant operator.
- (3) A notarized authorization from the owner authorizing the applicant operator to apply for the permit.
- (4) Location of the subject premises by STRAP and street address.
- (5) Type of state alcoholic beverage license for the premises.
- (6) Copy of the valid certificate of occupancy for the building that is the subject of the application.
- (7) A site plan, drawn to scale (minimum one-quarter (1/4) inch equals one (1) foot) indicating the layout and dimensions of the premises, private and public entrances to and exits from the building, locations of all tables, countertops, and chairs (including the number of tables and chairs provided), customer service areas, gross floor area; and kitchen facilities with sufficient detail to establish that it is sufficient to serve full course meals to the customer service areas of the establishment, if applicable.
- (8) A parking plan, drawn to scale, indicating individual parking spaces, total number of spaces, aisles, entrances, and exits.
- (9) A copy of the menu of food items being offered and served or to be offered and served, if applicable.

- (10) A town map marked to indicate all the property within 500 feet of the parcel of land on which the premises of the alcoholic beverage establishment will be located.
- (11) A notarized affidavit executed by the applicant indicating that no place of worship, religious facilities, child day care center, noncommercial schools, dwelling units, or parks are located within 500 feet of the parcel of land on which the premises of the alcoholic beverage establishment will be located; or an accompanying application for a variance.
- (12) Copies of any approvals, licenses, or other permits required from any other governmental agency necessary to operate the alcoholic beverage establishment.
- (13) Any additional information relevant to determination of compliance with the provisions of this division.

The town may charge a fee in accordance with the schedule of fees adopted by resolution of town council for the review and processing of an application for approval. In the absence of a resolution by the town council, the director will charge fees that are comparable to the fees charged by the board of county commissioners for similar applications.

(c) **Expiration of approval.** An administrative or special exception approval will expire and become null and void unless operation of the alcoholic beverage establishment has commenced as follows:

- (1) **Existing structure.** Within six (6) months from the date of approval.
- (2) **New structure.** Within twelve (12) months from the date of approval. The director may grant one (1) extension of up to six (6) months if construction is substantially complete and proceeding to completion with due diligence.

(d) **Transfer of approved permit or approval.** Approved alcoholic beverage establishment permits are a privilege running with the land. Sale of real property will automatically vest the purchaser with all

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rights and obligations originally granted to or imposed on the permittee. Such privilege must not be separated from the fee interest in the real property.

(e) *Expansion of premises.* The premises designated for an alcoholic beverage establishment must not be expanded prior to approval of an application in accordance with the requirements of this chapter. The new application must cover both the existing designated premises as well as the proposed expanded premises. All approved premises must be under the same alcoholic beverage permit and subject to uniform rules and regulations. Nothing in this division may be construed as an attempt to modify any prohibition or diminish any requirement of the state.

(f) *Revocation of permit or approval.*

- (1) *Grounds.* The town council may revoke an alcoholic beverage permit or approval upon any of the following grounds:
  - a. Determination that an application for approval contains knowingly false or misleading information.
  - b. Violation by the licensee of any provision of this code, any town ordinance, or any state statute that results in the revocation of the licensee's state alcoholic beverage license.
  - c. Repeated violation by the licensee of any provision of this code, or any town ordinance within the twelve (12) month period preceding the revocation hearing.
  - d. Failure to renew a state alcoholic beverage license, written declaration of abandonment, or actual abandonment of the premises by the licensee. An alcoholic beverage establishment that continually maintains and renews its state liquor license, even though it has suspended operation, will not be deemed to have been abandoned for the purposes of this section.
  - e. Violation by the licensee of any condition imposed upon the issuance of the permit or approval.

- f. Failure to comply with the reporting requirements of this division for percentage of gross revenues from the sales or service of alcoholic beverages.
- g. Violation of any of the minimum standards for a special exception.

(2) *Procedure.* Prior to revoking a permit or approval, the town council will conduct a public hearing at which the licensee may appear and present evidence and testimony concerning the subject matter of the revocation action. Prior to the hearing, the licensee will be notified of the grounds upon which revocation is sought and the time and place of the hearing in the same manner as set forth in article II of this chapter. At the conclusion of the hearing, the town council may revoke the permit if a violation described in this section is established by a preponderance of the evidence.

(3) *Subsequent permit or approval.* When a permit or approval is revoked in accordance with the provisions of this section, the town will not consider a petition ~~[Option 1] from the same operator, owner, or permittee, or [Option 2] for the same premises, requesting a permit or approval for an alcoholic beverage establishment for twelve (12) months from the date of the revocation decision of town council.~~

(g) *Appeals.* Except as otherwise provide in this division, all appeals of decisions by the director must be in accordance with procedures provided in § 34-86 for appeals of administrative decisions.

### *Subdivision IV. Entertainment and Conduct*

Sec. 34-1268. Hours music or disturbing noises prohibited.

(a) Music, singing, and other forms of entertainment, whether amplified or not, may be permitted at any time during the hours of operation of an alcoholic beverage establishment. In outdoor

## Alcoholic Beverages

seating areas, however, music, singing, and other forms of entertainment are prohibited between the following hours:

- (1) 9:00 p.m. on Monday and 12:00 noon on Tuesday.
- (2) 9:00 p.m. on Tuesday and 12:00 noon on Wednesday.
- (3) 9:00 p.m. on Wednesday and 12:00 noon on Thursday.
- (4) 9:00 p.m. on Thursday and 12:00 noon on Friday.
- (5) 10:00 p.m. on Friday and 12:00 noon on Saturday.
- (6) 10:00 p.m. on Saturday and 11:00 a.m. on Sunday.
- (7) 9:00 p.m. on Sunday and 12:00 noon on Monday.
- (8) On legal holidays established by state law, the hours of prohibition are the same as subsection (6), above.

The LPA recommended the preceding schedule of hours of prohibition.

(b) All music, singing, and other forms of entertainment during the hours not otherwise prohibited in this section must comply at all times with Ordinance 96-24. The Town may wish to revise the Noise Ordinance to be more effective for enforcement. The LPA recommended and the Town Manager agreed to have the Consultant provide a draft revision for their consideration in conjunction with the COP Ordinance.

### **Sec. 34-1269. Nudity, specified sexual activities, and exposure of specified anatomical areas prohibited.**

(a) As provided in Ordinance 09-XX, Nudity, specified sexual activities, exposure of specified anatomical areas, and exposure of any device or

covering intended to give the appearance of or simulate specified anatomical areas to public view by any person, as those terms are defined and employed in Ordinance 09-XX, are prohibited on the premises of any alcoholic beverage establishment.

(b) Owners, operators, and vendors of alcoholic beverage establishments who permit persons to engage in conduct in violation of this prohibition may be fined in accordance with the provisions of § 1-5 of this code.

(c) It is not a violation of this division for a mother to breast-feed her infant child.

### **Sec. 34-1270. Sale of food prerequisite to consumption on the premises of alcoholic beverages for bona fide restaurants and certain other alcoholic beverage establishments.**

The sales and service of alcoholic beverages for consumption on the premises may be permitted only as an incidental use to the sale of food and nonalcoholic beverages for consumption on the premises, and bona fide restaurants and other alcoholic beverage establishments required to offer and serve food as a prerequisite to sales and service of alcoholic beverages must offer and serve full course meals on the menu at all times coincident with the sales or service of alcoholic beverages.

### **Sec. 34-1271. Ratio of alcoholic beverage to food sales; gross revenues; record keeping and reporting.**

In all bona fide restaurants and other alcoholic beverage establishments where the sales or service of alcoholic beverages is incidental to the sales or service of food and nonalcoholic beverages, the following requirements and restrictions apply:

(a) *Ratio of alcoholic beverage to food sales.* The sale of alcoholic beverages for consumption on the premises is prohibited whenever the sale of alcoholic beverages accounts for more than 49 percent of the combined gross revenues attributable to the sale of food and non-alcoholic beverages in any 12-month period.

## Alcoholic Beverages

(b) *Record keeping.* The owner or operator of an alcoholic beverage establishment must maintain separate books and records reflecting the gross revenues of food and non-alcoholic beverages and the gross revenues of alcoholic beverages for each month. The required books and records must be maintained on the premises where the alcoholic beverage establishment is located, or other designated place approved in writing by the town, and must be available for inspection by the town during normal business hours. The required books and records must be legible, clear, and available in the English language. Books and records maintained in digital or electronic formats must be promptly provided to the director in printed form at the sole expense of the operator of the alcoholic beverage establishment.

(c) The director or designee may, during normal working hours, request to inspect and audit the required books and records of the alcoholic beverage establishment maintained in accordance with this section wholly for the purpose of verifying that the combined gross revenues of the alcoholic beverage establishment are not less than 51 percent attributable to the sale of food and non-alcoholic beverages during any 12-month period to assure that the alcoholic beverage establishment continuously complies with the requirements of this division. The failure to keep the books and records required by this section or a refusal of an owner or operator of such alcoholic beverage establishment to allow such inspection will be grounds for the town council to revoke the use permit of the alcoholic beverage establishment and notify the state that prior certification of the licensed premises for the sale of alcoholic beverages is no longer valid.

(d) On an annual basis beginning ~~October 1, 2009~~ and each year thereafter, the owner or operator of an alcoholic beverage establishment in which the sales and service of alcoholic beverages are incidental to the sales and service of food and nonalcoholic beverages must file with the town an annual report and notarized affidavit attesting to the fact that the combined annual gross revenues of such alcoholic beverage establishment are not less than 51 percent attributable to the sales and service

of food and nonalcoholic beverages during the immediately preceding 12-month period.

(e) Should an inspection of the required books and records or review of the required annual report reveal that the combined annual gross revenues of such alcoholic beverage establishment are less than 51 percent attributable to the sale of food and non-alcoholic beverages during any 12-month period, the director will notify the owner or operator of the alcoholic beverage establishment that the property upon which the alcoholic beverage establishment operates is in violation of the code and notify the state that the town's prior certification of the licensed premises for the sale of alcoholic beverages is no longer valid. The sales or service of alcoholic beverages by the owner or operator of such business is prohibited for a period of one year from the date of such notice.

(f) The provisions of this section will be interpreted and applied with respect to a lesser period of time for any alcoholic beverage establishment that has been in operation for a period of time less than 12 months.

(g) The owner or operator of an alcoholic beverage establishment may appeal the town's determination of a violation of the gross sales percentage requirement of this division only to the special magistrate for code enforcement, pursuant to the chapter 2, article V, division 2 of this code. While the special magistrate hearing is pending, the town may continue to enforce the provisions of this section by all legal means. After hearing evidence presented by both the town and the owner or operator of an alcoholic beverage establishment, the special magistrate is limited to a determination of whether or not the alcoholic beverage establishment complies with the gross sales percentage requirement in accordance with this division.

### Sec. 34-1272. Package stores.

(a) *Consumption on the premises prohibited.* Consumption of any alcoholic beverage is prohibited on or within any parcel of land that is licensed to sell alcoholic beverages for consumption off the

## Alcoholic Beverages

premises. The sealed package must not be broken, and the contents must not be consumed in or on the premises under such a license.

(b) *Exception for wine tasting.* A distributor of vinous beverages licensed in accordance with the Beverage Law, or any vendor, is authorized to conduct wine tasting upon any licensed premises authorized to sell wine or liquor as package goods for consumption off the premises, provided the wine tasting is limited to and directed toward the general public of the age of legal consumption, in accordance with the provisions of § 564.08 of the Beverage Law.

### **Sec. 34-1273. Permitting intoxicated persons to loiter about premises.**

(a) Intoxicated persons are prohibited from loitering in and about the licensed premises of alcoholic beverages establishments, and the operator of such premises is prohibited from allowing such intoxicated persons to remain on such licensed premises.

(b) Owners, operators, and vendors of alcoholic beverage establishments who permit persons to engage in conduct in violation of this prohibition may be fined in accordance with the provisions of § 1-5 of this code.

### **Sec. 34-1274. Serving of set-ups, etc., by vendors not licensed to sell for consumption on the premises.**

The sales or service of any glasses, set-ups, or other service to any person for the purpose of consuming liquor is prohibited by any vendor licensed under the Beverage Law who is not licensed to sell liquor to be consumed on the licensed premises.

### **Sec. 34-1275. Use of licensed premises for immoral or criminal purposes.**

The use of the licensed premises of any alcoholic beverage establishment for any criminal purposes is prohibited, and persons of known criminal habits

are prohibited from frequenting, loitering, or assembling on such premises or the entrance thereto.

### ***Subdivision V. General Health, Safety, and Welfare***

### **Sec. 34-1276. Adequate and sanitary equipment, compliance with applicable regulations.**

All alcoholic beverages establishments must be maintained in a sanitary manner in compliance with all health codes and other rules established by the state, county, and town. The retail sale, service, or consumption of alcoholic beverages is prohibited in any structure, building, establishment, or premises that does not have adequate and sanitary equipment to accomplish such sale, service, or consumption or that does not conform to all applicable state and local regulations.

### ***Subdivision VI. Patron Age Restrictions***

### **Sec. 34-1277. Patron age restrictions.**

(a) *General age prohibition.* It is unlawful for persons under the age of 21 years to enter or remain in any alcoholic beverage establishment, or to be permitted to do so by owners, operators, employees, or independent contractors or alcoholic beverage establishments.

(b) *Exceptions.* This restriction will not apply to:

- (1) Persons lawfully employed by or at the alcoholic beverage establishment;
- (2) Persons accompanied by either of their parents (natural, adoptive, step-parent, or legal guardian) or a responsible adult;
- (3) A bona fide restaurant;

**Alcoholic Beverages**

(4) An alcoholic beverage establishment during any time period outside the hours of operation for the sales or service of alcoholic beverages provided that before anyone under the age of 21 years is admitted into the establishment all alcoholic beverages previously sold or served are consumed, or otherwise discarded, and the establishment's entire inventory of alcoholic beverages is properly secured from public access. The sales or service and consumption of alcoholic beverages must not resume until all persons under the age of 21 have vacated the licensed premises; and

Sec. 34-1278–34-1290. Reserved.

(6) ~~Optional. Members of the military or armed forces with proper military identification to show they are currently on active military duty with a branch of the United States military.~~

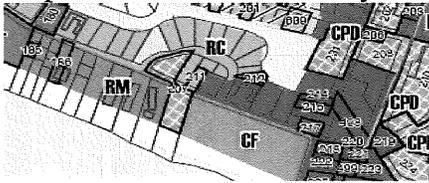
(c) It may be a defense to alleged violations of this section that the person under the age of 21 obtained access through a fraudulent identification, and the business used reasonable efforts to prevent the use of fraudulent identification(s). Under these circumstances, only the persons who gained access to the alcoholic beverage establishment by presenting fraudulent identification will be considered in violation of this section.

**Subdivision VII. Enforcement and Penalties**

**Sec. 34-1278. Enforcement and penalties.**

These regulations may be enforced by the sheriff and in accordance with code enforcement procedures provided in article V, chapter 2 of this code. Violations of these regulations may also be restricted by injunction initiated by the town, any citizen thereof, or by any person affected by the violation of the regulation(s). Penalties for violations of these regulations will be in accordance with § 1-5 of this code as applicable and appropriate.

**Town of Fort Myers Beach  
Department of Community Development**



**MEMORANDUM**

To: Local Planning Agency

From: Frank Shockey, Interim Community Development Director

Date: April 22, 2009

RE: Regulation of sexually oriented businesses

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At LPA request, the Town Manager authorized Jerry Murphy of Murphy Planning to study the practices of other communities in regulating sexually oriented businesses and prepare updates to the Town's ordinance addressing the subject, which is somewhat aged. In addition to the draft ordinance containing suggestions for possible Town policy, Mr. Murphy has provided voluminous background material which has been encoded onto data discs for your reference. The locations of these various examples and studies included are cataloged in relation to their file names in the attached table of contents, for ease of retrieval when using the disc.

## **SECONDARY EFFECTS STUDIES**

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### **GENERAL**

Environmental Research Group 1996 PDF (822KB)

### **ARIZONA**

Phoenix, AZ 1984 PDF (272KB)

Phoenix, AZ Factual Record (1995-1998)

Cabarets, Part 1 PDF (968 KB)

Cabarets, Part 2 PDF (841 KB)

Cabarets, Part 3 PDF (1.34 MB)

In-Call Nude Studios PDF (1.59 MB)

Sex Clubs, Part 1 PDF (1.02 MB)

Sex Clubs, Part 2 PDF (1.10 MB)

SOB Supplement, Part 1 PDF (1.18 MB)

SOB Supplement, Part 2 PDF (1.54 MB)

Topless Bars, Part 1 PDF (1.09 MB)

Topless Bars, Part 2 PDF (1.08 MB)

Tucson, AZ 1990 PDF (184KB)

### **CALIFORNIA**

Garden Grove, CA 1991 PDF (1919KB)

Los Angeles, CA 1977 PDF (3059KB)

Whittier, CA 1978 PDF (529KB)

### **COLORADO**

Adams County, CO 1990 PDF (381KB)

Denver, CO 1998 PDF(2963KB)

### **CONNECTICUT**

Milford, CT 2004

### **FLORIDA**

Manatee County, FL 1987 PDF (733KB)

Daytona Beach, FL 2004

Ybor City, FL 2003

## **GEORGIA**

St. Mary's, GA 1996 PDF(90KB)

Rome, GA 1995 PDF(331KB)

## **INDIANA**

Indianapolis, IN 1984 PDF (2099KB)

Indianapolis, IN and Los Angeles, CA 1984 PDF (345KB)

## **MINNESOTA**

Minneapolis, MN 1980 PDF (2301KB)

Minnesota Attorney General's Report 1989 PDF (1401KB)

St. Paul, MN 1983 PDF (427KB)

## **MISSOURI**

Kansas City, MO 1998-1999

Part 1 PDF(2775KB)

Part 2 PDF(7784KB)

Part 3 PDF(1626KB)

Part 4 PDF(2176KB)

## **NORTH CAROLINA**

New Hanover County, NC 1989 PDF (600KB)

## **NEVADA**

Las Vegas, NV 1978 PDF (971KB)

## **NEW YORK**

Cattaraugus County, NY 1998 PDF (1089KB)

Islip, NY 1980 PDF (3491KB)

New York City, NY 1994 PDF (3515KB)

New York Times Square 1994 (Word)

## **OHIO**

Cleveland, OH 1977 PDF (95KB)

## **OKLAHOMA**

Oklahoma City, OK 1986 PDF (131KB)

Oklahoma City, OK 1989 report on SOB abatement PDF (271KB)

## **TEXAS**

Amarillo, TX 1977 PDF (593KB)

Austin, TX 1986 PDF (1726KB)

Beaumont, TX 1982 PDF (264KB)

Cleburne, TX 1997 PDF (600KB)

Dallas, TX 1997 PDF (867KB)

El Paso, TX 1986 PDF (1359KB)

Houston, TX 1997 PDF (709KB)

## **VIRGINIA**

Newport News, VA 1996 PDF (2171KB)

## **WASHINGTON**

Bellevue, WA 1998 PDF (2841KB)

DesMoines, WA 1984 PDF (2759KB)

Seattle, WA 1989 PDF (1137KB)

## **WISCONSIN**

St. Croix County, WI 1993 PDF (500KB)

ORDINANCE 09-\_\_

AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH OBSCENITY, PUBLIC NUDITY, AND SEXUALLY-ORIENTED BUSINESSES REGULATION ORDINANCE; REPEALING ORDINANCES 96-03 AND 96-04; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; PURPOSE, INTENT, AND FINDINGS; DEFINITIONS; CLASSIFICATIONS; REQUIRING LICENSES; INVESTIGATION OF APPLICATIONS AND ISSUANCE OF LICENSES; FEES; INSPECTIONS; EXPIRATION OF LICENSES; SUSPENSION OF LICENSES; REVOCATION OF LICENSES; PROHIBITING TRANSFER OF LICENSES; PROVIDING LOCATION OF SEXUALLY-ORIENTED BUSINESSES; REGULATIONS PERTAINING TO EMPLOYEE RECORDS; ADDITION REGULATIONS FOR ADULT MOTELS; ADDITIONAL REGULATIONS FOR EXHIBITION OF SEXUALLY-EXPLICIT LIVE ENTERTAINMENT OR MEDIA IN VIEWING ROOMS; ADDITIONAL REGULATIONS FOR ESCORT AGENCIES; ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS; ADDITIONAL REGULATIONS FOR PUBLIC CONDUCT; PATRON AGE RESTRICTIONS; HOURS OF OPERATION; ADDITIONAL CRIMINAL PROHIBITIONS; ADDITIONAL OPERATIONAL PROVISIONS FOR SEXUALLY-ORIENTED BUSINESSES; EXEMPTIONS; ENFORCEMENT AND PENALTIES; INJUNCTION; JUDICIAL REVIEW; IMMUNITY FROM PROSECUTION; NOTICE; SEVERABILITY; CONFLICTING ORDINANCE PROVISIONS; AND EFFECTIVE DATE.

**RECITALS:**

**WHEREAS**, sexually-oriented businesses require special supervision from the public safety agencies of the Town in order to protect and preserve the health, safety, morals and welfare of the patrons of such businesses as well as the citizens of the Town; and

**WHEREAS**, the Town Council finds that sexually-oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

**WHEREAS**, the concern over sexually transmitted diseases is a legitimate health concern of the Town that demands reasonable regulation of sexually-oriented businesses in order to protect the health and well-being of the citizens; and

**WHEREAS**, licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually-oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

**WHEREAS**, there is convincing documented evidence that sexually-oriented businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and

**WHEREAS**, it is recognized that sexually-oriented businesses, due to their nature, have serious objectionable operational characteristics, particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and

**WHEREAS**, the Town Council desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight; and

**WHEREAS**, the Town Council has determined that locational criteria alone do not adequately protect the health, safety, and general welfare of the citizens and visitors of the Town; and

**WHEREAS**, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance that addresses the secondary effects of sexually-oriented businesses; and

**WHEREAS**, it is not the intent of the Town Council to condone or legitimize the distribution of obscene material, and the Town Council recognizes that state and federal law prohibits the distribution of obscene materials and expects and encourages state law enforcement officials to enforce state obscenity statutes against any such illegal activities in the Town.

Pursuant to the authority granted by the Constitution and the legislature of the State of

**IT IS HEREBY ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA** as follows:

**SECTION 1: Authority.**

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law.

**SECTION 2: Title and Citation.**

This Ordinance will be known and cited as the "TOWN OF FORT MYERS BEACH OBSCENITY, PUBLIC NUDITY, AND SEXUALLY-ORIENTED BUSINESSES REGULATION ORDINANCE."

### **SECTION 3. Finding of Necessity.**

The Town Council finds that the passage of regulations and restrictions regarding obscenity, public nudity, and sexually-oriented businesses within the Town as set forth elsewhere in this Ordinance is necessary for the effective administration and operation of the Town and the health, safety, security, and welfare of the residents, business owners, and others within the Town.

### **SECTION 4. Purpose, Intent, and Findings.**

A. Purpose and Intent. It is the purpose of this ordinance to reasonably regulate sexually-oriented businesses in order to promote the health, safety, morals, and general welfare of the citizens of the Town, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of sexually-oriented businesses within the Town and alleviate the adverse secondary effects of sexually-oriented businesses on adjacent and nearby uses of land. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually-oriented materials. It is neither the intent nor effect of this ordinance to restrict or deny access by adults to sexually-oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually-oriented entertainment to their intended market. It is neither the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material. It is neither the intent nor effect of this ordinance to regulate matters of massage establishments licensed and regulated by the Department of Professional Regulation, Board of Massage, pursuant to Chapter 480, Florida Statutes.

B. Findings. Based on evidence concerning the adverse secondary effects of adult uses on the community presented in hearings and in reports made available to the Council, and on findings incorporated in the cases of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres*, 426 U.S. 50 (1976), *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *City of Erie v. Pap's A.M.*, TDA "Kandyland", 529 U.S. 277 (2000), and *City of Los Angeles v. Alameda Books, Inc.* 121 S. Ct. 1223 (2001) and on studies in other communities including, but not limited to, Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont, Texas; and also on findings from the Report of the Attorney General's Working Group On The Regulation Of Sexually-oriented Businesses,

(June 6, 1989, State of Minnesota), the Council finds:

- (1) Sexually-oriented businesses lend themselves to ancillary unlawful and unhealthy activities that are regularly uncontrolled by the operators of the establishments. Further, there is presently no effective mechanism to make the owners of these establishments responsible for the activities that occur on their premises.
- (2) Certain employees of sexually-oriented businesses defined in this ordinance as adult theatres and adult cabarets engage in higher incidences of certain types of illicit sexual behavior than employees of other establishments.
- (3) Sexual acts, including masturbation, and oral and anal sex, occur at sexually-oriented businesses, especially those that provide private or semi-private booths or cubicles for viewing films, videos, or live sex shows.
- (4) Offering and providing such space encourages such activities, that creates unhealthy conditions.
- (5) Persons frequent certain adult theatres, adult arcades, and other sexually-oriented businesses for the purpose of engaging in sex within the premises of such sexually-oriented businesses.
- (6) At least 50 communicable diseases may be spread by activities occurring in sexually-oriented businesses including, but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIV-AIDS), genital herpes, hepatitis B, Non A, Non B amebiasis, salmonella infections and shigella infections.
- (7) Since 1981 and to the present, there has been an increasing cumulative number of reported cases of AIDS caused by the human immunodeficiency virus (HIV) in the United States—600 in 1982, 2,200 in 1983, 4,600 in 1984, 8,555 in 1985 and 253,448 through December 31, 1992.
- (8) As of 2009, there have been reported cases of AIDS in the State of Florida.
- (9) Since 1981 and to the present, there have been an increasing cumulative number of persons testing positive for the HIV antibody test in the State of Florida.
- (10) The number of cases of early (less than one year) syphilis in the United States reported annually has risen, with 33,613 cases reported in 1982.

and 45,200 through November of 1990.

- (11) The number of cases of gonorrhea in the United States reported annually remains at a high level, with over one-half million cases being reported in 1990.
- (12) The surgeon general of the United States in his report of October 22, 1986, has advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug abuse, exposure to infected blood and blood components, and from an infected mother to her newborn.
- (13) According to the best scientific evidence, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts.
- (14) Sanitary conditions in some sexually-oriented businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the unregulated nature of the activities and the failure of the owners and the operators of the facilities to self-regulate those activities and maintain those facilities.
- (15) Numerous studies and reports have determined that semen is found in the areas of sexually-oriented businesses where persons view "adult" oriented films.
- (16) The findings noted in paragraphs number 1 through 15 raise substantial governmental concerns.
- (17) Sexually-oriented businesses have operational characteristics that should be reasonably regulated in order to protect those substantial governmental concerns.
- (18) A reasonable licensing procedure is an appropriate mechanism to place the burden of that reasonable regulation on the owners and the operators of the sexually-oriented businesses. Further, such a licensing procedure will place a heretofore nonexistent incentive on the operators to see that the sexually-oriented business is run in a manner consistent with the health, safety and welfare of its patrons and employees, as well as the citizens of the Town. It is appropriate to require reasonable assurances that the licensee is the actual operator of the sexually-oriented business, fully in possession and control of the premises and activities occurring therein.
- (19) Removal of doors on adult booths and requiring sufficient lighting on premises with adult booths advances a substantial governmental interest in curbing the illegal and unsanitary sexual activity occurring in adult

theatres.

- (20) Requiring licensees of sexually-oriented businesses to keep information regarding current employees and certain past employees will help reduce the incidence of certain types of criminal behavior by facilitating the identification of potential witnesses or suspects and by preventing minors from working in such establishments.
- (21) The disclosure of certain information by those persons ultimately responsible for the day-to-day operation and maintenance of the sexually-oriented business, where such information is substantially related to the significant governmental interest in the operation of such uses, will aid in preventing the spread of sexually transmitted diseases.
- (22) It is desirable in the prevention of the spread of communicable diseases to obtain a limited amount of information regarding certain employees who may engage in the conduct that this ordinance is designed to prevent or who are likely to be witnesses to such activity.
- (23) The fact that an applicant for an adult use license has been convicted of a sexually related crime leads to the rational assumption that the applicant may engage in that conduct in contravention of this ordinance.
- (24) The barring of such individuals from the management of adult uses for a period of years serves as a deterrent to and prevents conduct that leads to the transmission of sexually transmitted diseases.
- (25) The general health, safety, security, and welfare of the residents, business owners, and others within the Town will be promoted by the enactment of this Ordinance.

#### **SECTION 5. Definitions.**

- (1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated, slug-operated, or for any form of consideration, or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, video or laser disc players, or other image-producing devices are maintained to show graphic media to five (5) or fewer persons per machine at any given time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."
- (2) ADULT BOOKSTORE, ADULT NOVELTY STORE OR ADULT VIDEO STORE means a commercial establishment that, as one (1) of its principal purposes, offers for sale or rental for any form of consideration any one (1) or more of the following:

- (a) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other graphic media that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; or
- (b) instruments, devices, or paraphernalia that are designed for use in connection with "specified sexual activities."

A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material depicting or describing "specified sexual activities" or "specified anatomical areas" and still be categorized as ADULT BOOKSTORE, ADULT NOVELTY STORE, or ADULT VIDEO STORE. Such other business purposes will not serve to exempt such commercial establishments from being categorized as an ADULT BOOKSTORE, ADULT NOVELTY STORE or ADULT VIDEO STORE so long as one (1) of its principal business purposes is the offering for sale or rental for consideration the specified materials or other media that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

- (3) ADULT CABARET means a restaurant, or similar commercial establishment that regularly features:
  - (a) persons who appear in a state of nudity or semi-nude condition; or
  - (b) live performances that are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
  - (c) films, motion pictures, video cassettes, slides or other graphic media that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."
- (4) ADULT MOTEL means a hotel, motel or similar commercial establishment that:
  - (a) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other graphic media that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right-of-way that indicates the availability of this adult type of graphic media; or
  - (b) offers a sleeping room for rent for a period of time that is less than

ten (10) hours; or

- (c) allows a tenant or occupant of a sleeping room to sub-rent the room for a period of time that is less than ten (10) hours.
- (5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar graphic media are regularly shown that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."
  - (6) ADULT PHYSICAL CULTURE ESTABLISHMENT means a commercial establishment that advertises, offers, or provides for any form of consideration body rubs or physical contact with "specified anatomical areas". Establishments that routinely provide medical services by State licensed medical practitioners, electrolysis treatment by licensed operators of electrolysis equipment, and massage by licensed massage therapists are excluded from this definition.
  - (7) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment that for any form of consideration regularly features persons who appear in a state of nudity or semi-nude condition, or live performances that are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."
  - (8) EMPLOYEE means a person who performs any service on the premises of a sexually-oriented business on a full-time, part-time or contract basis, whether or not the person is denominated an employee, independent contractor, agent, or otherwise and whether or not said person is paid a salary, wage, or other compensation by the operator of said business. Employee does not include a person exclusively on the premises for repair or maintenance of the premises or equipment on the premises, or for the delivery of goods to the premises.
  - (9) ESCORT means a person who, for any form of consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to appear in a state of nudity or semi-nude condition.
  - (10) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one (1) of its primary business purposes for any form of consideration.
  - (11) ESTABLISHMENT means and includes any of the following:
    - (a) the opening or commencement of any sexually-oriented business

- as a new business;
- (b) the conversion of an existing business, whether or not a sexually-oriented business, to any sexually-oriented business;
  - (c) the addition(s) of any sexually-oriented business to any other existing business, whether or not a sexually-oriented business; or
  - (d) the relocation of any sexually-oriented business.
- (12) LICENSEE means a person in whose name a license to operate a sexually-oriented business has been issued, as well as the individual listed as an applicant on the application for a license; and in the case of an employee, a person in whose name a license has been issued authorizing employment in a sexually-oriented business.
- (13) LINGERIE MODELING BUSINESS means an establishment where a person, who appears in a state of nudity, semi-nude condition, or in lingerie, is available to be observed by a person or persons for any form of consideration.
- (14) NUDE MODEL STUDIO means any place where a person who appears semi-nude, in a state of nudity, or who displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration. Nude Model Studio does not include a proprietary school licensed by the State of Florida, or a college, junior college or university supported entirely or in part by public taxation; a private college or university that maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or in a structure:
- (a) that has no sign visible from the exterior of the structure and no other advertising that indicates a nude or semi-nude person is available for viewing; and
  - (b) where, in order to participate in a class, a student must enroll at least three (3) days in advance of the class; and
  - (c) where no more than one (1) nude or semi-nude model is on the premises at any given time.
- (15) NUDITY or a STATE OF NUDITY means the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the areola, or the showing of the covered male genitals in a discernibly turgid state.
- (16) OPERATOR means and includes the owner, licensee, custodian, manager, and person in charge of any licensed premises.

- (17) LICENSED PREMISES means any premises that is classified as a sexually-oriented business and requires a license under this Ordinance.
- (18) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.
- (19) SEMI-NUDE or in a SEMI-NUDE CONDITION means the exposure of the female breast with less than fully opaque covering below a horizontal line across the top of the areola at its highest point or the showing of the male or female buttocks. This definition includes the entire lower portion of the human female breast, but does not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areola is not exposed in whole or in part.
- (20) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one (1) of its principal business purposes, offers for any form of consideration:
- (a) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
  - (b) activities between male and female persons and/or persons of the same sex when one (1) or more of the persons is in a state of nudity or semi-nude condition.
- (21) SEXUALLY-ORIENTED BUSINESS means a business fitting the definition of adult arcade, adult bookstore, adult novelty store, adult physical culture establishment, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, lingerie modeling business, nude model studio, or sexual encounter center, regardless of whether or not said establishment has received a sexually-oriented business license under this Ordinance.
- (22) SPECIFIED ANATOMICAL AREAS means:
- (a) the human male genitals in a discernibly turgid state, even if completely and opaquely covered; or
  - (b) less than fully and opaquely covered human genitals, pubic area, buttocks, anus, anal cleft or cleavage, or a female breast below a horizontal line across the top of the areola at its highest point.

This definition includes the entire lower portion of the human female breast, but does not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areola is not exposed in whole or in

part.

(23) SPECIFIED CRIMINAL ACTIVITY means any of the following offenses:

(a) prostitution or promotion of prostitution; dissemination of obscenity; sale, distribution or display of harmful material to a minor; sexual performance by a child; possession or distribution of child pornography; public lewdness; indecent exposure; indecency with a child; engaging in organized criminal activity; sexual assault; molestation of a child; gambling; or distribution of a controlled substance; or any similar offenses to those described above under the criminal or penal code of other states or countries; [Town Ordinance references specific Chapters of the Florida Statutes— 794, 796, 800, 826, 827.04, 837, 847, 893, and "An offense under either the Florida or Federal Racketeer Influenced and Corrupt Organization (RICO) Act—but provides no lapse times as the Model does below]

(b) for which:

(1) less than two (2) years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(2) less than five (5) years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(3) less than five (5) years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two (2) or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(c) The fact that a conviction is being appealed has no effect on the disqualification of the applicant or a person residing with the applicant.

(24) SPECIFIED SEXUAL ACTIVITIES means any of the following:

- (a) human genitals in a state of sexual stimulation, arousal, or tumescence;
- (b) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, anal cleft or cleavage, or female breasts;
- (c) sex acts, normal or perverted, actual or simulated, including

intercourse, oral copulation, masturbation, or sodomy and also including as examples, but not limited to, any of the following: acts of human anilingus, bestiality, buggery, cunnilingus, coprophagy, coprophilia, fellatio, flagellation, masochism, necrophilia, pederasty, pedophilia, sadism, sado-masochism, sapphism, urolagnia, or zoerasty; or

- (d) excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.
  
- (25) SUBSTANTIAL ENLARGEMENT of a sexually-oriented business means the increase in floor areas occupied by the business by more than twenty-five percent (25%), as the floor areas exist on the date this ordinance takes effect.
  
- (26) TOWN MANAGER means the Town Manager of the Town of Fort Myers Beach or designee.
  
- (27) TRANSFER OF OWNERSHIP OR CONTROL of a sexually-oriented business means and includes any of the following:
  - (a) the sale, lease, or sublease of the business;
  - (b) the transfer of securities that constitute a controlling interest in the business, whether by sale, exchange, or similar means; or
  - (c) the establishment of a trust, gift, or other similar legal device that transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

**SECTION 6. Obscenity, Public Nudity, Semi-Nude Condition; Regulations for Public Conduct.**

- (A) It is a misdemeanor for a person to knowingly and intentionally appear in any public place, including a sexually-oriented business, in a state of nudity, exposing specified anatomical areas, or depicting specified sexual activities.
  
- (B) It is a misdemeanor for a person who knowingly or intentionally appears in any public place, including a sexually-oriented business, in a semi-nude condition unless the person is a licensed sexually-oriented business employee who, while semi-nude, is no closer than ten (10) feet to any patron or customer and on a stage at least two (2) feet above the floor area designated for patrons within a licensed sexually-oriented business.
  
- (C) It is a misdemeanor for an employee, while semi-nude in a sexually-oriented business, to solicit any pay or gratuity from any patron or customer or for any patron or customer to pay or give any gratuity to any employee, while said employee is semi-nude in a sexually-oriented business.

(D) It is a misdemeanor for an employee, while semi-nude in a sexually-oriented business, to touch a customer or the clothing of a customer.

**SECTION 7. Classification of Sexually-Oriented Businesses; Prohibition Against Possession, Sales, or Service of Alcoholic Beverages at Sexually-Oriented Businesses.**

(A) Sexually-oriented businesses are classified as follows:

- (1) adult arcades;
- (2) adult bookstores, adult novelty stores, or adult video stores;
- (3) adult cabarets;
- (4) adult motels;
- (5) adult motion picture theaters;
- (6) adult physical culture establishment;
- (7) adult theaters;
- (8) escort agencies;
- (9) lingerie modeling business;
- (10) nude model studios; and
- (11) sexual encounter centers.

(B) The possession, sales, or service of alcoholic beverages is prohibited on the premises of any sexually-oriented business, whether or not licensed under this Ordinance. It is a misdemeanor for a person to possess, sell, or serve alcoholic beverages on the premises of any sexually-oriented business.

(C) It is a misdemeanor for any person maintaining, owning, or operating an alcoholic beverage establishment to knowingly and intentionally allow any person to appear in a state of nudity, in a semi-nude condition, exposing specified anatomical areas, or depicting specified sexual activities.

(D) It is a misdemeanor for a person to knowingly and intentionally appear in an alcoholic beverage establishment in a state of nudity, semi-nude condition, exposing specified anatomical areas, or depicting specified sexual activities. [Is it desirable to repeal these provisions in the LDC for SOB/COP?]

**SECTION 8. Sexually-Oriented Business and Employee Licenses Required.**

(A) Prohibitions:

- (1) A sexually-oriented business must not operate without a valid license issued by the Town Manager for the particular classification of sexually-oriented business.
- (2) Any person who operates a sexually-oriented business must not employ

any person to work for the sexually-oriented business who is not licensed as a sexually-oriented business employee by the Town pursuant to this ordinance.

- (3) A person must not obtain employment with a sexually-oriented business without having first secured a sexually-oriented business employee license pursuant to this ordinance.

It is unlawful, and a person commits a misdemeanor by violating a prohibition of paragraph (A) of this Section.

(B) All applicants must submit an original and three (3) copies of the sworn application for a license to the Town Manager on a form provided by the Town.

(C) All applicants must be qualified according to the provisions of this Ordinance. The application may request and the applicant must provide such information (including fingerprints) as required for the Town to determine whether the applicant meets the qualifications established in this Ordinance.

(D) A person who wishes to operate a sexually-oriented business must sign the application for a license as an applicant. If a person other than an individual wishes to operate a sexually-oriented business, all persons legally responsible for the operations of the sexually-oriented business or who have power to control or direct its operations must sign the application for a license as applicant(s). Such persons include, but are not limited to, general partners, corporate officers, corporate directors, and controlling shareholder(s). Each applicant must be qualified according to the provisions of this Ordinance and each applicant is considered a licensee if a license is granted.

(E) Sexually-oriented business license. The completed application for a sexually-oriented business license must contain the following information and must be accompanied by the following documents:

- (1) If the applicant is
  - (a) an individual, the individual must state their legal name and any aliases and submit proof that they are 18 years of age;
  - (b) a partnership, the partnership must state its complete name, and the names of all partners, whether the partnership is general or limited, and a copy of any partnership agreement;
  - (c) a corporation, the corporation must state its complete name, the date of its incorporation, evidence that the corporation is in good standing under the laws of its state of incorporation and the State of Florida, the names and capacity of all officers, directors, and controlling stockholders, and the name of the registered corporate agent and the address of the registered office for service of process.

- (2) If the applicant intends to operate the sexually-oriented business under a name other than that of the applicant; he or she must state
  - (a) the sexually-oriented business's fictitious name, and
  - (b) submit the registration documents required under § 865.09, Florida Statutes.
- (3) Whether any applicant(s), or any person(s) residing with any applicant(s), has been convicted of a specified criminal activity as defined in this ordinance, and, if so, the specified criminal activity involved, the date, place, and jurisdiction of each.
- (4) Whether any applicant(s), or any person(s) residing with any applicant(s), has had a previous license under this ordinance, or other similar sexually-oriented business ordinances from another municipality or county denied, suspended, or revoked, including the name and location of the sexually-oriented business for which the permit was denied, suspended, or revoked, as well as the date of the denial, suspension or revocation, and whether any applicant(s) or any person(s) residing with any applicant(s) has been a partner in a partnership or an officer, director, or principal stockholder of a corporation that is licensed under this ordinance, or other similar sexually-oriented business ordinances from another municipality or county, which license was previously denied, suspended, or revoked, including the name and location of the sexually-oriented business for which the permit was denied, suspended, or revoked as well as the date of denial, suspension or revocation.
- (5) Whether any applicant(s) or any person(s) residing with any applicant(s) holds any other license(s) under this ordinance or other similar sexually-oriented business ordinance from another municipality or county and, if so, the names and locations of such other licensed businesses.
- (6) The single classification of license for which the applicant is filing.
- (7) The location of the proposed sexually-oriented business, including a legal description of the property, street address, and telephone number(s), if any. The application must include a copy of the plat or plats, if any, and the correct STRAP number(s). If the application includes multiple abutting parcels or consists of other than one or more undivided platted lots, the legal description must specifically describe the perimeter boundary of the total property, by metes and bounds with accurate bearings and distances for every line, but need not describe each individual parcel. However, the application must provide the STRAP number for every parcel. The Town Manager has the right to reject any legal description that is not sufficiently detailed to locate the property on official digitally-generated maps.

- (8) Mailing address(es) and residential address(es) for the applicant(s).
- (9) A recent photograph of the applicant(s).
- (10) Driver's license number(s) for the applicant(s).
- (11) A sketch or diagram showing the configuration of the premises, including a statement of total floor area occupied by the business. The sketch or diagram need not be professionally prepared, but it must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six (6) inches. The sketch or diagram must designate any areas in which patrons will not be allowed.
- (12) A current certificate and straight-line drawing prepared by a registered land surveyor within thirty (30) days prior to the date the application is submitted depicting:
  - (a) the property lines and the structures containing any existing sexually-oriented businesses, and
  - (b) any zoning district that allows residential uses, and
  - (c) the property lines of any established hotel, motel, restaurant, school (noncommercial), day care center (child), park, playground, place of worship, religious facility, public recreation facility, or cultural facility, as defined in the Land Development Code

within 1000 feet of the property to be certified. For purposes of this Ordinance, a use will be considered existing or established if it is in existence at the time an application is submitted.

- (13) If an applicant wishes to operate a sexually-oriented business, other than an adult motel, that proposes to exhibit on the premises, in a viewing room or booth of less than 150 square feet of floor area, films, video cassettes, other graphic media, or live entertainment that depict specified sexual activities or specified anatomical areas, then the applicant must comply with the application requirements set forth in Section 19 of this Ordinance.
- (14) The names of all employees of a sexually-oriented business, the known employees of a proposed sexually-oriented business, and if the names of such employees are presently unknown, a statement to that effect and date and time certain, acceptable to the Town Manager, by which such information will be supplied to the Town.

(F) Sexually-oriented Business Employee License. The completed application for a sexually-oriented business employee license must contain the following information and must be accompanied by the following documents:

- (1) The applicant's name or any other name (including "stage" names) or aliases used by the individual;
- (2) Age, date, and place of birth;
- (3) Height, weight, hair and eye color;
- (4) Present residence address and telephone number;
- (5) Present business address and telephone number;
- (6) Date, issuing state and number of driver's permit or other identification card information; and
- (7) Proof that the individual is at least 18 years of age.

(G) The following documents must be attached to the application form for a sexually-oriented business employee license as provided above:

- (1) A color photograph of the applicant clearly showing the applicant's face, and the applicant's fingerprints on a form provided by the police department. Any fees for the photographs and fingerprints must be paid by the applicant.
- (2) A statement detailing the license history of the applicant for the five (5) years immediately preceding the date of the filing of the application, including whether such applicant previously operated or is seeking to operate, in this or any other county, municipality, state, or country has ever had a license, permit, or authorization to do business denied, revoked, or suspended, or had any professional or vocational license or permit denied, revoked, or suspended. In the event of any such denial, revocation, or suspension, state the name, the name of the issuing or denying jurisdiction, and describe in full the reason for the denial, revocation, or suspension. A copy of any order of denial, revocation, or suspension must be attached to the application.
- (3) A statement whether the applicant has been convicted of a specified criminal activity as defined in this ordinance and, if so, the specified criminal activity involved, the date, place and jurisdiction of each.

(H) Applicant(s) for any license under this Ordinance ha(s)(ve) a continuing affirmative duty to promptly supplement by certified mail all information required by this Ordinance in the event such information changes in any way from what is stated or included in the application. The failure to comply with this duty within 30 days from the date of such change by supplementing the application on file with the Town and the Lee County Sheriff's Office is grounds for suspension of a license.

**SECTION 9. Investigation of Application and Issuance of Licenses.**

(A) Employee License Application. Upon the filing of a complete application for a sexually-oriented business employee license, ~~alternative one: the Town will issue a temporary license to said applicant. [ ] alternative two: [the~~

application will be referred to the appropriate Town departments and agents for investigation of the information contained on the application and compliance with applicable comprehensive plan provisions, code requirements, and other applicable laws and regulations. The Lee County Sheriff's Office is responsible for providing information to the Town Manager on whether an applicant has been convicted of a specified criminal act during the time period set forth in this Ordinance by performing an FCIC/NCIC records request check. The Town Manager will complete the application investigation process within thirty (30) days from the date the completed application is filed. After the completed investigation, the Town will issue a license unless the Town determines by a preponderance of the evidence to make one (1) or more of the following factual findings:

- (1) The application is incomplete. If the Town Manager determines or learns at any time prior to a final determination on the license application that the applicant has not properly completed the application for a license under this Ordinance, the Town Manager will promptly notify the applicant of such fact and allow the applicant ten (10) days to properly complete the application. The time period for granting or denying the application for a license will begin again upon resubmission of a completed application.
- (2) The applicant failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.
- (3) The applicant is under the age of 18 years;
- (4) The applicant has been convicted of a "specified criminal activity" as defined in this ordinance;
- (5) The sexually-oriented business employee license is to be used for employment in a business prohibited by local or state law, statute, rule or regulation, or prohibited by a particular provision of this ordinance; or
- (6) The applicant has had a sexually-oriented business employee license revoked by the Town within two (2) years of the date of the current application. If the sexually-oriented business employee license is denied, the temporary license previously issued is immediately deemed null and void. Denial, suspension, or revocation of a license issued pursuant to this Ordinance is subject to judicial review as set forth in Section 29 of this Ordinance.

(B) Renewal. A license granted pursuant to this Ordinance is subject to annual renewal by the operator(s) filing a complete application and a factual finding by the Town that the applicant has not been convicted of any specified criminal activity as defined in this ordinance or committed any act during the existence of the previous license, that would be grounds to deny the initial license application. The renewal of the license is subject to the payment of the fee as set forth in Section 10 of this Ordinance.

(C) Business License Application. Within 30 days after receipt of a completed

sexually-oriented business application, the Town will approve or deny the issuance of a license to an applicant. The Town will approve the issuance of a license to an applicant unless it is determined by a preponderance of the evidence that one (1) or more of the following findings is true:

- (1) An applicant is under eighteen (18) years of age.
- (2) An applicant or any person(s) with whom an applicant is residing is overdue in payment to the Town, Lee County, or any special district within the municipal limits of the Town of any taxes, fees, fines, or penalties assessed against or imposed in relation to any business.
- (3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or provided information with the application.
- (4) An applicant or a person(s) with whom the applicant is residing has been denied a license by the Town to operate a sexually-oriented business within the preceding 12 months or whose license to operate a sexually-oriented business has been revoked within the preceding 12 months.
- (5) An applicant or a person(s) with whom the applicant is residing has been convicted of a specified criminal activity defined in this ordinance.
- (6) The premises to be used for the sexually-oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.
- (7) The license fee required by this ordinance has not been paid.
- (8) An applicant of the proposed establishment is in violation of or is not in compliance with any of the provisions of this ordinance.

(D) The license, if granted will state on its face the name of the person or persons to whom it is granted, the expiration date, the address of the sexually-oriented business and the classification for which the license is issued pursuant to Section 7 of this Ordinance. All licenses must be posted in a conspicuous place at or near the entrance to the sexually-oriented business so that they may be easily read at any time.

(E) The health department, fire department, and the building official will complete their certification that the premises is in compliance or not in compliance within twenty (20) days of receipt of the application by the Town.

(F) A sexually-oriented business license will issue for only one (1) classification as found in Section 7 of this Ordinance.

#### **SECTION 10. Investigation and License Fees.**

(A) Every application for a sexually-oriented business license (whether for a new license or for renewal of an existing license) must be accompanied by a \$ \_\_\_\_\_ non-refundable application and investigation fee **OPTIONI**

(B) [In addition to the application and investigation fee required above, e] [E]very sexually-oriented business license (whether for a new license or for renewal of an existing license) must be accompanied by an annual \$1000.00 [current] non-refundable application, [investigation,] and license fee.

(C) Every application for a sexually-oriented business employee license (whether for a new license or for renewal of an existing license) must be accompanied by an annual \$250.00 [current] non-refundable application, investigation, and license fee.

(D) All license applications and fees must be submitted to the Town Manager.

(E) All application, investigation, and license fees are subject to modification by resolution of the Town Council.

### **SECTION 11. Inspection of Premises.**

(A) An applicant or licensee must permit representatives of the Sheriff's Office, Health Department, Fire Department, Department of Community Development, or other Town departments and agencies to inspect the premises of a new or proposed sexually-oriented business for the purpose of insuring compliance with the law, at any time it is, or is proposed to be, occupied or open for business.

(B) A person who operates a sexually-oriented business or his agent or employee commits a misdemeanor if he refuses to permit such lawful inspection of the premises, regardless of whether or not a permit has been issued for the premises, at any time it is open for business.

### **SECTION 12. Expiration of License.**

(A) Each annual license will expire one (1) year from the date of issuance and may be renewed only by making application as provided in Section 8 of this Ordinance. Application for renewal of an annual license must be made at least thirty (30) days before the expiration date, and when made less than thirty (30) days before the expiration date, the license will expire.

(B) When a license expires or the Town denies renewal of a license, the applicant will not be issued a license for one (1) year from the date of expiration or denial. If, subsequent to denial, the Town finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license only after at least ninety (90) days have elapsed since the date denial became final.

### **SECTION 13. Suspension of License.**

The Town will suspend a license for a period not to exceed thirty (30) days if it determines by a preponderance of evidence that a licensee or an employee if a licensee has:

- (A) violated or is not in compliance with any provision or requirement of this ordinance;
- (B) refused to allow an inspection of the sexually-oriented business premises as authorized by this chapter.

#### **SECTION 14. Revocation of License.**

(A) The Town will revoke a license if it determines by a preponderance of evidence that:

- (1) a cause of suspension in Section 13 of this Ordinance occurs and the license has been previously suspended within the preceding twelve (12) months;
- (2) a licensee gave false or misleading information in the material submitted during the application process;
- (3) a licensee knowingly allowed possession, use, or sale of any controlled substance on the premises;
- (4) a licensee knowingly allowed prostitution on the premises;
- (5) a licensee knowingly operated the sexually-oriented business during a period of time when the licensee's license was suspended;
- (6) a licensee has been convicted of a specified criminal act for which the time period required by this Ordinance has not elapsed;
- (7) on two (2) or more occasions within a twelve (12) month period, a person committed an offence, occurring on the licensed premises, constituting a specified criminal act for which a conviction is obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed. The fact that a conviction is being appealed will have no effect on the revocation of the license;
- (8) except in the case of an adult motel, a licensee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or other sex act to occur in or on the licensed premises;
- (9) a licensee knowingly allowed the possession, sales, or service of alcoholic beverages on the premises; or
- (9) a licensee is delinquent in payment to the Town, County, any special district within the municipal limits of the Town, or State for any taxes or fees past due.

(C) When the Town revokes a license, the revocation will continue for one (1) year, and the former licensee will not be issued a sexually-oriented business license for one (1) year from the date the revocation became effective. If, subsequent to revocation, the Town finds that the basis for the revocation has

been corrected or abated, the former licensee may be granted a license no sooner than ninety (90) days since the date the revocation became effective.

#### **SECTION 15. Transfer of License Prohibited.**

A licensee must not transfer a license to another person, and a licensee must not operate a sexually-oriented business under the authority of a license at any place other than the address of the sexually-oriented business designated in the application.

#### **SECTION 16. Location of Sexually-Oriented Businesses.**

(A) A person commits a misdemeanor if that person operates, causes, or allows the operation of a sexually-oriented business in a location prohibited by this Ordinance or Chapter 34 of the Town of Fort Myers Beach Land Development Code, as amended.

(B) A person commits a misdemeanor if that person operates, causes, or allows the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually-oriented business within 1000 feet of another sexually-oriented business. Presence of a city, county, or other political subdivision boundary is irrelevant for purposes of calculating the distance requirements of this Ordinance.

(C) A person commits a misdemeanor if that person operates, causes, or allows the operation, establishment, or maintenance of more than one (1) sexually-oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually-oriented business in any building, structure, or portion thereof containing another sexually-oriented business.

(D) For purposes of this Ordinance, the distance between any two (2) sexually-oriented businesses is measured on a straight horizontal line, without regard to the intervening structures, objects, or political boundaries, from the closest point on the perimeter boundary lines of each parcel of land on which each business is located.

(E) Any sexually-oriented business lawfully operating on effective date, 2009, but in violation of any provision of subsections (A) through (D) of this Section is deemed a nonconforming use. The nonconforming use may continue for a period not to exceed one (1) year from the effective date of this Ordinance, unless sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such nonconforming uses must not be increased, enlarged, extended, or altered except that the use may be changed to a conforming use. If two (2) or more sexually-oriented businesses are within 1000 feet of each other and otherwise in a permissible location, the sexually-oriented business that was first established and continually operating at a particular

location is the conforming use and the later established business(es) (is/are) nonconforming.

(F) A sexually-oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually-oriented business license, of a use listed in subsection B of this Section within 1000 feet of the sexually-oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or been revoked.

#### **SECTION 17. Regulations Pertaining to Employee Records.**

(A) The licensee of a sexually-oriented business is responsible for keeping a record of all employees who are currently employed by the establishment and of all former employees who were employed by the establishment during the preceding one (1) year period. The record must contain the current or former employees full legal names, including any aliases, and dates of birth.

(B) The original records required by Section 8 of this Ordinance, or true and exact copies thereof, must be kept at the sexually-oriented business at all times and copies provided by certified mail to the Town Manager within 30 days of any change in required information.

(C) Any operator of a sexually-oriented business is responsible for knowing the location of the original records or the true and exact copies thereof.

(D) Any operator of the sexually-oriented business must, upon request by the Town Manager, an authorized Town employee, or a law enforcement officer acting under this Ordinance or otherwise pursuant to law, make available for inspection the original records or the true and exact copies thereof, during normal working hours and during the hours of operation of the sexually-oriented business.

#### **SECTION 18. Additional Regulations for Adult Motels.**

(A) Evidence that a guest unit in a hotel, motel, resort, or a similar commercial establishment has been rented and vacated two (2) or more times in a period of time that is less than ten (10) hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this ordinance.

(B) A person in control of a guest unit in a hotel, motel, resort, or similar commercial establishment that does not have a sexually-oriented business license commits a misdemeanor by allowing a guest unit to be occupied for any form of consideration by a person and, within ten (10) hours from the time the room is rented, by allowing the same guest unit to again be occupied for any form of consideration.

**SECTION 19. Additional Regulations for Exhibition of Sexually-Explicit Live Entertainment or Graphic Media in Viewing Rooms.**

(A) A person who operates or causes to be operated a sexually-oriented business, other than an adult motel, that exhibits on the premises in a viewing room of less than one hundred fifty (150) square feet of floor space, a film, video cassette, live entertainment, or other media that depicts specified sexual activities or specified anatomical areas, must comply with the following requirements:

- (1) Upon application for a sexually-oriented business license, the application must be accompanied by a diagram of the premises showing a plan thereof specifying the location of one (1) or more manager's stations and the location of all overhead lighting fixtures and designating any portion(s) of the premises in which patrons will not be allowed. A manager's station may not exceed thirty-two (32) square feet of floor area. The diagram must also designate the place at which the license will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint will not be required; however, each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six (6) inches. The Town may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.
- (2) The application must be sworn to be true and correct by the applicant.
- (3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the Town.
- (4) It is the duty of the licensee of the premises to ensure that at least one (1) licensed employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.
- (5) The interior of the premises must be configured in such a manner that there is a direct, unobstructed line-of-sight view of every area of the premises to which any patron is allowed access for any purpose, excluding restrooms, from a manager's station. If the premises has two (2) or more manager's stations designated, then the interior of the premises must be configured in such a manner that there is at all times a direct, unobstructed line-of-sight view of every area of the premises to which any patron is allowed access for any purpose, except restrooms, from at least one (1) of the manager's stations. Restrooms must not contain any equipment for viewing any graphic media that depicts specified sexual activities or specified anatomical areas.
- (6) It is the duty of the licensee to ensure that the direct line-of-sight view

specified in subsection (5) remains unobstructed by any doors, curtains, partitions, walls, merchandise, display racks or other materials and, at all times, to ensure that no patron is permitted access to any area of the premises that has been designated as an area in which patrons will not be allowed in the application filed pursuant to subsection (1) of this Section.

- (7) No viewing room may be occupied by more than one (1) person at any given time.
- (8) The premises must be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five (5.0) foot-candles as measured at the floor level.
- (9) It is the duty of the licensee to ensure that the illumination described above is maintained at all times when any patron is present on the premises.
- (10) The licensee must not allow openings of any kind to exist between viewing rooms or booths.
- (11) A person must not make or attempt to make an opening of any kind between viewing booths or rooms.
- (12) The licensee must, during each business day, regularly inspect the walls between the viewing booths to determine if any openings or holes exist.
- (13) The licensee must cause all floor coverings in viewing booths to be nonporous, easily cleanable surfaces, with no rugs or carpeting.
- (14) The licensee must cause all wall surfaces and ceiling surfaces in viewing booths to be constructed of, or permanently covered by, nonporous, easily cleanable material. No wood, plywood, composition board or other porous material must be used within forty eight (48") inches of the floor.

(B) A person having a duty under Subsection (1) through (14) of Subsection (A) of this Section commits a misdemeanor if he knowingly fails to fulfill that duty.

#### **SECTION 20. Additional Regulations for Escort Agencies.**

- (A) An escort agency must not employ any person under the age of 18 years.
- (B) A person commits a violation if the person acts as an escort or agrees to act as an escort for any person under the age of 18 years.

#### **SECTION 21. Additional Regulations for Nude Model Studios.**

- (A) A nude model studio must not employ any person under the age of 18 years.
- (B) A person under the age of 18 years commits a violation if the person appears semi-nude or in a state of nudity in or on the premises of a nude model studio.

(C) A person commits a violation if the person appears in a state of nudity, or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises that can be viewed from the public right of way.

(D) A nude model studio must not place or permit a bed, sofa, or mattress in any room on the premises except that a sofa may be placed in a reception room open to the public.

## **SECTION 22. Patron Age Restrictions at a Sexually-Oriented Business.**

A person commits a misdemeanor if the person knowingly allows a person under the age of 18 years on the premises of a sexually-oriented business.

## **SECTION 23. Hours of Operation.**

(A) The opening or operation of a sexually-oriented business, except for an adult motel, is prohibited at any time between the following hours:

(1) 12 midnight on Monday and 9:00 a.m. on Monday.

(2) 12 midnight on Tuesday and 9:00 a.m. on Tuesday.

(3) 12 midnight on Wednesday and 9:00 a.m. on Wednesday.

(4) 12 midnight on Thursday and 9:00 a.m. on Thursday.

(5) 12 midnight on Friday and 9:00 a.m. on Friday.

(6) 1:00 a.m. on Saturday and 9:00 a.m. on Saturday.

(7) 1:00 a.m. on Sunday and 12 noon on Sunday.

(8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above.

(B) It is unlawful and a person commits a misdemeanor by operating or causing the opening or operation of a sexually-oriented business, regardless of whether or not a license has been issued under this ordinance for said business, during the hours of prohibition provided in subsection (A) of this Section.

(C) It is unlawful and a person commits a misdemeanor if, by working as an employee of a sexually-oriented business, regardless of whether or not a license has been issued under this ordinance for said business, said employee engages in any performance, solicits any performance, makes any sale, solicits any sale, provides any service or solicits any service

associated with the sexually-oriented business during the hours of prohibition provided in subsection (A) of this Section.

#### **SECTION 24. Additional Criminal Prohibitions.**

In addition to the criminal provisions found at other sections of this Ordinance, the following criminal provisions also apply to sexually-oriented businesses:

- (A) It is unlawful and a misdemeanor for a licensee or operator to operate or for any person to be an operator or employee of a sexually-oriented business where the licensee, operator, or employee knows or should know any of the following:
- (1) That the sexually-oriented business does not have a sexually-oriented business license issued under this Ordinance; or
  - (2) That the sexually-oriented business has a license that is cancelled, expired, revoked, or suspended.
- (B) It is unlawful and a person commits a misdemeanor by altering or otherwise changing the contents of a sexually-oriented business or employee license.

#### **SECTION 25. Additional Operational Provisions for Sexually-Oriented Businesses.**

- (A) Every sexually-oriented business must, regardless of whether or not said business is licensed under this Ordinance, observe the following general requirements:
- (1) Maintain the premises in a sanitary manner. A sexually-oriented business is prohibited in any structure, building, establishment, or premises that does not have adequate and sanitary equipment or that does not conform to all applicable local and state regulations.
  - (2) Conform to all applicable:
    - (a) federal, State, or local building, fire, and health statutes, codes, ordinances, and regulations;
    - (b) State and local zoning and land use laws and regulations; and
  - (3) Maintain a continuously updated compilation of the records required by this Ordinance and, on the first Monday of every month, provide the Town Manager or designee with an update of those records for all persons who are, or have been, employees at the business since the first Monday of the previous month, and their positions.

(B) No licensee or operator may change the name of a sexually-oriented business unless and until the licensee or operator satisfies each of the following requirements:

- (1) Provide the Town Manager or designee 30 days notice in writing of the proposed name change; and
- (2) Pays the Town Manager or designee a three dollar (\$3.00) change of name fee; and
- (3) Complies with Fictitious Name Act codified in § 865.09, Florida Statutes.

#### **SECTION 26. Exemptions.**

(A) It is a defense to prosecution under Section 6 of this Ordinance that a person appearing in a state of nudity did so in a modeling class operated:

- (1) by a proprietary school, licensed by the State of Florida, a college, junior college, or university supported entirely or partly by taxation;
- (2) by a private college or university that maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or
- (3) in a structure:
  - (a) that has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and
  - (b) where, in order to participate in a class a student must enroll at least three (3) days in advance of the class; and
  - (c) where no more than one (1) nude model is on the premises at any given time.

(B) It is a defense to prosecution for a violation of Section 6 of this Ordinance that a person exposed any specified anatomical area during the person's bona fide use of a rest room or dressing room. If the dressing room is on the premises of a sexually-oriented business, the dressing room must be accessible only to employees.

#### **SECTION 27. Enforcement and Penalties.**

(A) If any person fails or refuses to obey or comply with or violates any of the criminal provisions of this Ordinance, such person upon conviction of such offense, is guilty of a misdemeanor and will be punished by a fine not to exceed \$500.00 or by imprisonment not to exceed 60 days in the County jail, or both, in the discretion of the court. Each non-compliance or violation will constitute a separate offense.

(B) Nothing herein contained will prevent or restrict the Town from taking any other lawful action in any court of competent jurisdiction necessary to prevent or remedy any non-compliance or violation. Such other lawful actions will include, but will not be limited to, an equitable action for injunctive relief or an action at law for damages.

(C) Further, nothing in this Section will be construed to prohibit the Town from prosecuting any violation of this Ordinance by means of the code enforcement system established pursuant to the authority of Chapter 162, Florida Statutes.

(D) All remedies and penalties provided for in this Section are cumulative and independently available to the Town and the Town is authorized to pursue any and all remedies set forth in this Section to the full extent allowed by law.

#### **SECTION 28. Injunction.**

A person who operates or causes to be operated a sexually-oriented business without a valid license or in violation of Section 13 of this ordinance is subject to a suit for injunction as well as prosecution for criminal violations. Such violations are punishable by a fine of \$200.00 or thirty (30) days imprisonment. Each day a sexually-oriented business so operates is a separate offense or violation.

#### **SECTION 29. Judicial Review.**

After denial of an application, denial of a renewal of an application, suspension of any license, or revocation of any license, the applicant or licensee may seek prompt judicial review of such administrative action in any court of competent jurisdiction. The administrative action will be promptly reviewed by the court.

#### **SECTION 30. Immunity from Prosecution.**

Town of Fort Myers Beach employees, the Town Council, the Lee County Sheriff's Office, all other Town agencies and agents, and all other County officers, agents and employees, charged with enforcement of the State and local laws and codes are immune from prosecution, civil or criminal, for reasonable, good faith trespass upon a sexually-oriented business while acting within the scope of authority conferred by this Ordinance.

#### **SECTION 31. Notice**

Any notice required or furnished by the Town under this Ordinance may be accomplished by sending written notification by certified mail to the mailing address provided on the license application. The Town will consider said mailing address the correct mailing address unless the Town Manager is otherwise

notified in writing by certified mail .

**SECTION 32. Severability.**

If any section, subsection, or clause of this ordinance is deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections, and clauses will not be affected.

**SECTION 33. Conflicting Ordinance Provisions.**

All ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

**SECTION 34. Effective Date.**

This ordinance will become effective \_\_\_\_\_ 2009.

The foregoing ordinance was enacted by Town Council upon a motion by Council Member \_\_\_\_\_, and seconded by Council Member \_\_\_\_\_ and, upon being put to a vote, the result was as follows:

- Larry Kiker, Mayor \_\_\_\_\_
- Herb Acken, Vice Mayor \_\_\_\_\_
- Tom Babcock \_\_\_\_\_
- Jo List \_\_\_\_\_
- Bob Raymond \_\_\_\_\_

DULY PASSED AND ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

ATTEST: TOWN OF FORT MYERS BEACH,  
FLORIDA

By: \_\_\_\_\_ By: \_\_\_\_\_  
Michelle Mayor, Town Clerk Larry Kiker, Mayor

Approved as to form by:

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

**TOWN OF FORT MYERS BEACH  
ORDINANCE NO. 09-\_\_**

**AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH LIQUOR LICENSE RESTRICTION ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; DEFINITIONS; HOURS OF BUSINESS DURING WHICH SALES OR SERVICE, CONSUMPTION, AND OCCUPANCY ARE PROHIBITED; ALCOHOLIC BEVERAGE ESTABLISHMENTS; PROHIBITED LOCATIONS; MEASURING DISTANCES; EXCEPTIONS; PENALTIES; SEVERABILITY; REPEALING CLAUSE AND REPEALING ORDINANCE NO. 96-06; AND PROVIDING EFFECTIVE DATE.**

**IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:**

**SECTION 1: Authority.**

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law.

**SECTION 2: Title and Citation.**

This Ordinance will be known and cited as the "TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE."

**SECTION 3. Finding of Necessity.**

The Town Council finds that the revision and repeal of provisions of Ordinance 96-05 relating to open alcoholic beverage containers as set forth elsewhere in this Ordinance is necessary for the effective administration and operation of the Town.

**SECTION 4. Definitions.**

For the purpose of this Ordinance the following terms, phrases, words, and their derivations have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural.

**Alcoholic beverage** means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law.

**Alcoholic beverage establishment** means any establishment within the municipal limits of the Town that meets all local zoning requirements, possesses all municipal and county permits required by law, and is currently licensed by the division of alcoholic beverages and tobacco for the sales or service of alcoholic beverages for consumption off the licensed premises, on the licensed premises, or both.

**Bar** means an operation the primary activity of which is the sales or service of alcoholic beverages for consumption on the premises.

**Beverage Law** means chapters 561 through 565, 567, and 568 of the Florida Statutes.

**Day care center, child** means a facility or establishment that provides care, protection, and supervision for six or more children unrelated to the operator and that receives consideration for any of the children receiving care, whether or not operated for profit. This definition does not include public or nonpublic schools that are in compliance with the Compulsory School Attendance Law, Ch. 322 Florida Statutes. The term "child day care center" is synonymous with the terms "preschool" and "nursery school."

**Dwelling unit** means a room or rooms connected together that could constitute a separate, independent housekeeping establishment for a family, for owner occupancy, or for rental or lease on a weekly, monthly, or longer basis as specified in the Land Development Code for various zoning districts, and is physically separated from any other rooms or dwelling units that may be in the same structure, and that contains sleeping and sanitary facilities and a kitchen.

**Full course meals** means food items available on a menu that include soups, salads, side orders, entrées, non-alcoholic beverages, and desserts.

**Hotel/motel** means a building, or group of buildings on the same premises and under single control, that are kept, used, maintained, or advertised as, or held out to the public to be, a place where sleeping accommodations are supplied for consideration to transient guests for periods of one day or longer.

**Hotel bar** means a bar operated in connection with any hotel/motel or multiple-family building with more than 100 units, operated by the same owner or management, licensed by the state for, and engaged primarily in, sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation of the hotel business not prohibited by this Ordinance.

**Hours of operation** means the posted hours that an establishment is open to the public for business within the limitations on hours of business established by this Ordinance.

**Licensed premises** means not only rooms where alcoholic beverages are stored or sold by the licensee, but also all other rooms in the building which are so closely connected therewith as to admit free passage from rooms where alcoholic beverages are stored or sold by the licensee to other rooms over which the licensee has some dominion or control and also includes all of the area embraced within the sketch appearing on or attached to the application for the license involved and designated as such on said sketch, in addition to that area included or designated by general law. This definition is intended to accord with the definition in the Beverage Law.

**Membership organization** means an organization operating with formal membership requirements with the intent to pursue common goals or activities.

**Package goods** means any container of alcoholic beverages.

**Package store** means an alcoholic beverage establishment licensed by the state where alcoholic beverages and package goods are sold only in sealed containers for consumption off the premises.

**Parcel of land** means real property capable of being described with such definiteness that its location and boundaries may be established, that is designated by its owner or developer as land to be used or developed as a unified whole, or that has been used as a unified whole.

**Park** means a recreational area open to the public that serves the immediately surrounding neighborhood, entire community, or larger area, including all preserves, open spaces, playgrounds, recreation facilities and fields, museums, auditoriums, ranges and buildings, lakes, streams, canals, lagoons, waterways, pools, causeway bridges, roadways, marinas, piers, and abutting lands and adjacent littoral waters, that are used for recreational purposes, or as parks, and the pertinent rights-of-way presently under or hereafter acquired and placed under the jurisdiction, control, and administration of the Town, and all public service facilities located on grounds, buildings, and structures in the Town that are under the control of or assigned for upkeep, maintenance, or operation by the Town.

**Person** means any individual, association, corporation, estate, firm, limited partnership, partnership, trust, or other legal entity.

**Place of worship** means a structure or structures designed primarily for accommodating an assembly of people for the purpose of religious worship,

including related religious instruction, church, or synagogue ministries involving classes for 100 or less children during the week, and other church or synagogue sponsored functions that do not exceed the occupancy limits of the building.

**Premises** means any lot, area, tract, or parcel of land.

**Religious facilities** means religious-related facilities and activities that may include, but are not limited to, bus storage facilities or areas, convents, rectories, monasteries, retreats, church or synagogue ministries involving classes for more than 100 children during the week, and assisted living facilities.

**Restaurant** means an establishment engaged primarily in the sales or service of food and beverages in a ready to consume state.

**Restaurant, bona fide** means a restaurant that is also an alcoholic beverage establishment that:

(a) is engaged primarily in the service of food and non-alcoholic beverages, where the sales or service of alcoholic beverages is incidental to the sale and service of food and non-alcoholic beverages; and

(b) meets all local zoning requirements, and possesses all municipal and county permits required by law; and

(c) is currently and lawfully licensed by the division of hotels and restaurants of the department of business and professional regulation; and

(d) offers and serves full course meals with full kitchen facilities and food preparation staff capable of preparing and serving full course meals continuously during all hours of operation; and

(e) has a customer service area consisting of tables and chairs, or customer counters, and kitchen facilities, restroom facilities, pantries, and storage room(s) that, aggregated together, comprise no less than 75 percent of the gross floor area, and that are adequate to accommodate the service of full course meals; and

(f) has a sufficient total number of seats or chairs at tables, counters, and bars within the customer service area to accommodate the full occupant load as determined by the town in accordance with the provisions of the Florida Building Code and the Florida Fire Code or successor codes.

This definition is intended to accord with the definition in the Beverage Law.

**Restaurant bar** means a bar operated in direct connection with a bona fide restaurant and by the same owner or management, licensed by the state for

sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation not prohibited by this Ordinance.

**School** means an educational institution run by a public agency, a church or synagogue, or a not-for-profit organization.

**SECTION 5. Hours of business during which sales or service, consumption, and occupancy are prohibited.**

(a) **Sales or service.** The sales or service of alcoholic beverages on any licensed premises of an alcoholic beverage establishment is prohibited between the following hours:

- (1) 12 midnight on Monday and 7:00 a.m. on Monday.
- (2) 12 midnight on Tuesday and 7:00 a.m. on Tuesday.
- (3) 12 midnight on Wednesday and 7:00 a.m. on Wednesday.
- (4) 12 midnight on Thursday and 7:00 a.m. on Thursday.
- (5) 12 midnight on Friday and 7:00 a.m. on Friday.
- (6) 1:30 a.m. on Saturday and 7:00 a.m. on Saturday.
- (7) 1:30 a.m. on Sunday and 7:00 a.m. on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above.

(b) **Consumption and occupation of establishments licensed for consumption on the premises.** The consumption of alcoholic beverages on and occupation of any alcoholic beverage establishment licensed for on the premises consumption is prohibited between the following hours:

- (1) 12:30 a.m. on Monday and 7:00 a.m. on Monday.
- (2) 12:30 a.m. on Tuesday and 7:00 a.m. on Tuesday.
- (3) 12:30 a.m. on Wednesday and 7:00 a.m. on Wednesday.
- (4) 12:30 a.m. on Thursday and 7:00 a.m. on Thursday.
- (5) 12:30 a.m. on Friday and 7:00 a.m. on Friday.
- (6) 2:00 a.m. on Saturday and 7:00 a.m. on Saturday.

(7) 2:00 a.m. on Sunday and 7:00 a.m. on Sunday.

(8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above.

Alcoholic beverage establishments are prohibited from opening or remaining open to the public for business or to allow patrons, customers, or persons other than employees and vendors to remain on such licensed premises during the hours specified above.

(c) **More limited hours of operation.** Owners or operators of alcoholic beverage establishments or other lawful businesses regulated by this Ordinance, for business or other reasons, may choose to restrict an operation's hours within the hours of business not prohibited by this Ordinance. Nothing in this Ordinance will be construed to prevent an alcoholic beverage establishment from posting hours of operation more restrictive than those provide herein.

**SECTION 6. Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.**

(a) **Prohibited locations.** Alcoholic beverage establishments are prohibited within 500 feet of:

- (1) A noncommercial school;
- (2) A child day care center, park, place of worship, or religious facility;
- (2) A dwelling unit under separate ownership; or
- (3) Another alcoholic beverage establishment.

(b) **Measuring distances.** Distances must be measured from the nearest point on the perimeter boundary line of the parcel of land on which the alcoholic beverage establishment is located, in a straight horizontal line, to the nearest point on the perimeter boundary line of the parcel of land on which the prohibiting use is located.

(c) **Exceptions.**

(1) *Bona fide restaurants*, provided:

- a. The bona fide restaurant is in full compliance with the requirements of the state division of hotels and restaurants of the department of business and professional regulation; and

- b. The bona fide restaurant serves full course meals at all times during its hours of operation; and
- c. If the licensed premises includes a bar, only a restaurant bar is used and the sales or service of alcoholic beverages is only to patrons ordering meals or waiting to be seated at tables, and the restaurant bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The restaurant bar must be directly connected with the dining room and must be only a service bar for patrons of such restaurant. Stools are permitted at the restaurant bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package goods from a restaurant bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the restaurant is not actually engaged in and open to the public for the service of full course meals; and
- d. The bona fide restaurant continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(2) *Hotel/motels and resorts, provided:*

- a. The hotel/motel or resort is not located within 500 feet of any noncommercial school.
- b. The hotel/motel or resort contains at least ~~Option 1: 100~~ ~~Additional Option 2: 50~~ units and any alcoholic beverage establishment(s) are under the same roof or on the same premises under unified control; and
- c. If the licensed premises includes a bar, only a hotel bar is used and the sales or service of alcoholic beverages is only to patrons of the hotel/motel or resort, and the hotel bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The hotel bar must be directly connected with the hotel/motel or resort and must be only a service bar for patrons of such hotel/motel or resort. Stools are permitted at the hotel bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package goods from a hotel bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the hotel/motel or resort is not actually operating and open to the public as a hotel/motel or resort; and
- d. The hotel/motel or resort and all alcoholic beverage establishment(s) continue to comply with all applicable laws, regulations, and other

definitional and regulatory requirements of the Land Development Code.

(3) *Membership organizations, provided:*

- a. The membership organization is not located within 500 feet of any noncommercial school;
- b. The sales or service of alcoholic beverages is only to members and member-accompanied guests of the membership organization, and there is no indication from the outside of the building and any associated structures that alcoholic beverages are served on the premises; and
- c. The membership organization continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(4) *Nonconforming uses.* Any alcoholic beverage establishment lawfully operating on licensed premises prior to July 1, 1999 is exempt from subsection (a) of this section, but is subject to the provisions for nonconforming uses in the Land Development Code, as long as it continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(5) *Other; town council approval required.*

- a. *Distance from schools.* Except for a bona fide restaurant, an ordinance approving the location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a noncommercial school will be required prior to issuance of a use permit. In addition to the considerations and findings required for rezonings by Chapter 34 of the Land Development Code, prior to approval the local planning agency should recommend and the town council must find that the location promotes the public health, safety, and general welfare of the community in accordance with § 562.45 of the Beverage Law.
- b. *Distance prohibition from all other uses.* Except for a bona fide restaurant, hotel/motel or resort, membership organization, or lawfully existing nonconforming use complying with the requirements of this Ordinance, a special exception in accordance with the requirements of the Land Development Code for location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a place of worship, religious facility, child day care center, park, dwelling unit under separate ownership, or another alcoholic beverage establishment is required prior to issuance of a use permit.

The proceedings for such special approval must be in conformance with the provisions of Florida Statutes § 166.041(3)(c). These restrictions will not be construed to prohibit the issuance of special event permits as provided for in § 561.422 of the Beverage Law, the Land Development Code, and all other applicable regulations.

**SECTION 7. Penalties.**

Any person convicted of violation of Section 5 of this Ordinance may be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail for a period not to exceed 60 days, or both. Such fine and imprisonment will apply to each such offense. If said violation involves the operation or occupation of a motor vehicle in violation of Section 316.1936 Florida Statutes, such person will also be guilty of a non-criminal moving traffic violation, punishable as provided in Ch. 318 Florida Statutes.

**SECTION 8. Severability.**

If any one of the provisions of this Ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or should for any reason whatsoever be held invalid, then such provision will be null and void and will be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this Ordinance.

**SECTION 9. Repealing Clause.**

Ordinance 96-06 specifically and all ordinances or parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby superseded and repealed.

**SECTION 10. Effective Date.**

This Ordinance will become effective immediately upon its adoption.

The foregoing was enacted by the Town Council upon a motion of Council Member \_\_\_\_\_ and seconded by Council Member \_\_\_\_\_ and, upon being put to a vote, the result was as follows:

Larry Kiker, Mayor \_\_\_\_\_  
Herb Acken, Vice Mayor \_\_\_\_\_  
Tom Babcock \_\_\_\_\_  
Jo List \_\_\_\_\_  
Bob Raymond \_\_\_\_\_

DULY PASSED AND ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

ATTEST:  
FLORIDA

TOWN OF FORT MYERS BEACH,

By: \_\_\_\_\_

By: \_\_\_\_\_

Michelle Mayor, Town Clerk

Larry Kicker, Mayor

Approved as to form by:

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

090409 Draft

TOWN OF FORT MYERS BEACH  
ORDINANCE NO. 09-\_\_\_

AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; DEFINITIONS; CONSUMPTION OR POSSESSION OF ALCOHOLIC BEVERAGES ON A BEACH, PUBLIC AREA, OR SEMI-PUBLIC PARKING LOT; EXCEPTIONS; PENALTY; PROVIDING SEVERABILITY; REPEALING CLAUSE AND REPEALING ORDINANCE NO. 96-05; AND PROVIDING EFFECTIVE DATE.

IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:

**SECTION 1: Authority.**

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law.

**SECTION 2: Title and Citation.**

This Ordinance will be known and cited as the "TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE."

**SECTION 3: Finding of Necessity.**

The Town Council finds that the passage of this Ordinance regulating open alcoholic beverage containers is necessary for the effective administration and operation of the Town and the health, safety, security and welfare of the residents, business owners, and others within the Town.

**SECTION 4. Definitions.**

For the purpose of this Ordinance the following terms, phrases, words, and their derivations have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural.

***Alcoholic beverage*** means distilled spirits and all beverages containing one-

half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law, Chapters 561 through 565, 567, and 568, Florida Statutes.

**Beach** means the land between the mean high and mean low water lines owned by the State of Florida and the zone of unconsolidated sand extending landward from the mean high water line to the place where there is a marked change in material or physiographic form or the line of permanent vegetation, usually the effective limit of storm waves; including any beach areas owned by the town or Lee County, and any beach area that has arisen upon it a right of customary use by the public or a public easement, prescriptive or otherwise; and the foreshore of tidal navigable waters.

**Container** means any bottle, can, cup, glass, or other receptacle.

**Open container** means any container of alcoholic beverage that has been opened, has its seal broken, had its contents partially removed, and is not located in the locked glove compartment, locked trunk, or other locked non-passenger area of a vehicle, or from which consumption is capable immediately.<sup>1</sup> This definition is intended to accord with the definition in Section 316.1936 Florida Statutes.

**Public area** means an area open to the public, including any auditorium, beach, bridge, building, canal, causeway, dock, lake, lagoon, marina, museum, open space, park, parkway, pier, playground, pool, preserve, range, recreational facility and/or field, roadway, semi-public parking lot, sidewalk, stream, waterway, and abutting lands and adjacent littoral waters, and all rights-of-way and public service facilities located on grounds, buildings, and structures that are under the jurisdiction, control, and administration of the town, special district, county, state, or federal government, within the municipal limits of the town.

**Semi-public parking lot** means any area wherein motor vehicles are parked by the public in conjunction with any business, enterprise, commercial establishment, office building, or multiple-family building.

## **SECTION 5. Consumption or Possession of Alcoholic Beverages on a Beach, Public Area, or Semi-Public Parking Lot; Exemptions.**

(a) **General prohibition in public areas.** Consuming, using, or selling any alcoholic beverage, or manually possessing any open container of any kind that contains any alcoholic beverage while on or within any public area, or while on or within any vehicle located in a public area is prohibited. It is further prohibited for any intoxicated person to enter or remain in any public area.

---

<sup>1</sup> A bottle of wine that has been resealed and is transported pursuant to F.S. § 564.08 is not an open container under the provisions of F.S. § 316.1936.

(b) **Exceptions.** The following activities are not subject to the prohibitions of subsection (a) of this Section:

- (1) A person under a written contract with the town to allow sales and service of beer and wine may distribute, and persons of age not prohibited by the patron age provisions of Division 5, Article IV, Chapter 34 of the Land Development Code or other Town ordinance or state law, may consume such permitted beer and wine only within the licensed premises designated by the town without violating the provisions of this Ordinance.
- (2) The consumption or possession of an alcoholic beverage in an open container, in a public area specifically authorized and approved by the town for outdoor seating or a special event pursuant to the Land Development Code or other Town ordinance or state law.
- (3) Notwithstanding any other provision of law, an alcoholic beverage establishment licensed to sell wine on the premises may permit a patron to remove one unsealed bottle of wine for consumption off the premises if the patron has purchased a full course meal and consumed a portion of the bottle of wine with such meal on the licensed premises. A partially consumed bottle of wine that is to be removed from the licensed premises must be securely resealed by the licensee or its employee before removal from the licensed premises. The partially consumed bottle of wine must be placed in a bag or other container that is secured in a manner such that it is visibly apparent if the bag or other container has been subsequently opened or tampered with, and a dated receipt for the bottle of wine and full course meal must be provided by the licensee and attached to the container. If transported in a motor vehicle, the container with the resealed bottle of wine must be placed in a locked glove compartment, a locked trunk, or the area behind the last upright seat of a motor vehicle that is not equipped with a trunk or glove compartment capable of being locked.
- (4) A person engaged only in picking up empty beverage containers for purpose of collecting the value of the empty containers or litter control.
- (5) A passenger of a:
  - a. vehicle in which the driver is operating the vehicle pursuant to a contract to provide transportation for passengers and such driver holds a valid commercial driver's license with a passenger endorsement issued in accordance with the requirements of Ch. 322 Florida Statutes; or
  - b. bus in which the driver holds a valid commercial driver's license with a passenger endorsement issued in accordance with the requirements of Ch. 322 Florida Statutes; or

- c. self-contained motor home that is in excess of 21 feet in length.
- (6) Any wine in the possession of a minister, pastor, priest, rabbi or other official of a religious organization that is to be used solely during religious services.
- (c) **Resolution procedure, conditions.** Notwithstanding the prohibition in subsection (a) of this section, the town council may approve, by resolution, the sales or service and consumption on the premises of alcoholic beverages at any recreational facility for a one-time event. The entity making application for the resolution must secure a temporary permit or license authorized by Florida Statutes § 561.422. **All beverages so approved must be served only in plastic containers and the director may place further restrictions or limitations on the special event.**

#### **SECTION 6. Penalty.**

Any person convicted of violation of Section 5 of this Ordinance may be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail for a period not to exceed 60 days, or both. Such fine and imprisonment will apply to each such offense. If said violation involves the operation or occupation of a motor vehicle in violation of Section 316.1936 Florida Statutes, such person will also be guilty of a non-criminal moving traffic violation, punishable as provided in Ch. 318 Florida Statutes.

#### **SECTION 7. Severability.**

If any one of the provisions of this Ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or should for any reason whatsoever be held invalid, then such provision will be null and void and will be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this Ordinance.

#### **SECTION 8. Repealing Clause.**

Ordinance 96-05 specifically and all other town ordinances or parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby superseded and repealed.

#### **SECTION 9. Effective Date.**

This Ordinance will become effective immediately upon its adoption.

The foregoing was enacted by the Town Council upon a motion of Council Member \_\_\_\_\_ and seconded by Council Member \_\_\_\_\_ and, upon being put to a vote, the result was as follows:

Larry Kiker, Mayor \_\_\_\_\_  
Herb Acken, Vice Mayor \_\_\_\_\_  
Tom Babcock \_\_\_\_\_  
Jo List \_\_\_\_\_  
Bob Raymond \_\_\_\_\_

DULY PASSED AND ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

ATTEST:  
FLORIDA

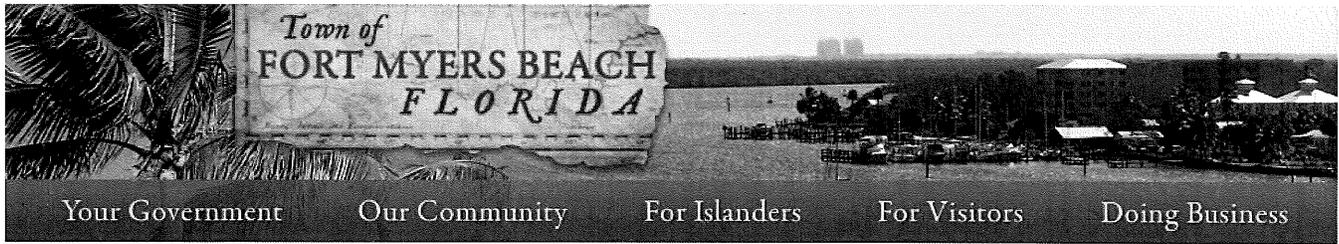
TOWN OF FORT MYERS BEACH,

By: \_\_\_\_\_  
Michelle Mayor, Town Clerk

By: \_\_\_\_\_  
Larry Kiker, Mayor

Approved as to form by:

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



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**May 12, 2009**

FORT MYERS BEACH  
 LOCAL PLANNING AGENCY (LPA)  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
 May 12, 2009

- Contact Us
- Request for Action
- Bay Oaks
- How Do I...?
- Notify Me
- Weather & Tidal Info
- Emergency Prep

AGENDA [all time frames are informational and approximate]

10:30 AM

- I. Call to Order
- II. Pledge of Allegiance
- III. Invocation

IV. Town Capital Improvement Program (CIP) Items 5 minutes

V. Public Hearings

A. DCI2006-0001 and DCI 2006-0002 White Sands, Captiva Villas, and Bayside CPD zoning amendments  
 (continuance requested) 15 minutes

VI. Administrative Agenda

- A. Update on Commercial ROW usage issues (Shamp/Van Duzer) 15 minutes
- B. Discussion of proposed LDC amendment to add Section 14-12 "beach furniture and equipment licenses" 30 minutes

VII. Adjourn as LPA, reconvene as HPB

VIII. Administrative Agenda

- A. Update on National Historic Register Application process 10 minutes
- IX. Adjourn as HPB, reconvene as LPA

X. LPA Member Items and Reports 15 minutes

XI. LPA Attorney Items 5 minutes

XII. Community Development Director Items 30 minutes

A. Proposed amendments to LDC Section 6-11 and 34-1744 (refuse containers)

XIII. LPA Action Item List Review 10 minutes

XIV. Public Comment

Adjourn no later than 4:00 P.M.

Next Meeting: May 26, 2009, 10:30 AM

**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, May 12, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 10:43 AM by Chairperson Weimer. Five members present:

Dennis Weimer  
Rochelle Kay  
Bill Van Duzer  
Joanne Shamp  
Joe Yerkes  
Evie Barnes- absent with excuse  
Alan Mandel- absent with excuse

Staff present: LPA Attorney Ann Dalton; Community Development Director Dr. Frank Shockey. Members of the public were also present.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION-Mr. Dennis Weimer**

**IV. TOWN CAPITAL IMPROVEMENT PROGRAM (CIP) ITEMS**

Ms. Shamp reported that she has communicated with Scott Janke, Evelyn, Dr. Shockey and Jack Green regarding the workshop scheduled for May 26<sup>th</sup> (following the LPA meeting), and all are available. Evelyn will prepare the information packet in advance and they asked if it is required for the LPA attorney to attend. Dr. Shockey feels that Evelyn is capable of handling questions on funding issues that day. Ms. Dalton added that she will be on the premises that day in the event she is needed, but there should be no Sunshine or legal issues to address for such a workshop.

**V. PUBLIC HEARING**

**A. DCI2006-0001 and DCI 2006-0002-White Sands, Captiva Villas and Bayside CPD Zoning Amendments—Continued hearing**

Ms. Dalton swore witnesses. Mr. Weimer polled members as to any ex-parte communications regarding this matter. Mr. Van Duzer had a “lengthy discussion” with Peter Lisich, a neighbor. No others had any communications.

Mr. Weimer stated that Town staff asked for a continuance due to the receipt of a large amount of paperwork for the subject. Dr. Shockey reported that the Town was given this paperwork on the afternoon of May 1 and haven’t had the time to review the information fully, which appears to include changes to the requested action.

On behalf of the applicant, Bill Waichulis addressed the meeting and acknowledged receiving the notice and commented that they only had two changes, which they felt did not require any action but were added for clarity.

Mr. Weimer asked for public comment. Carlton Ryffel asked the LPA to take the proper time to research this issue and still give the public the opportunity to see it and comment. Mr. Van Duzer requested that, before the hearing, LPA members be furnished with a copy of the original CPD resolution and the agreement made at that time. Mr. Weimer asked for a motion to continue the hearing to **June 9<sup>th</sup> at 10:30 AM.**

**Ms. Shamp moved to grant the continuance;**

**Ms. Kay seconded.**

**Vote: 5-0**

## **VI. ADMINISTRATIVE AGENDA**

### **A. Update on Commercial ROW Usage Issues**

Mr. Van Duzer stated that he prepared a report, each member has a copy, which outlines four major issues and he suggested that it should be discussed at a future meeting. He added that he feels there should be an addition to this issue regarding pervious and impervious surfaces, although they may not seem to be directly related to ROW, but are certain connected to it. He gave a summary of the few other items that should be discussed and worked out before finalizing any ROW issues. Ms. Shamp asked if there should be a ban on impervious surfaces altogether. There was discussion about this and the possibility of expanding the research project to include expert input, workshop, etc. Mr. Weimer agreed with Mr. Van Duzer’s opinion that some LPA members take part in responsibility for further investigation into the four main items and asked which Mr. Van Duzer will take. Mr. Van Duzer felt that there were two “most serious” issues: maximum impervious surface allowance on residential properties and the connection of private property to the ROW. There was more discussion about which items were to be taken by whom and how. It was decided that the “impervious surface connection to the ROW” issue will be the first item to be addressed by the LPA and that all of the items will be handled separately.

**B. Discussion of the Proposed LDC amendment to add Section 14-12 “Beach furniture and equipment licenses”**

Dr. Shockey addressed the LPA and referred to a “blue sheet” that went to Council on April 20<sup>th</sup>, transmitting MRTF’s resolution recommending an LDC amendment to add a proposed section 14-12 requiring licensing of beach furniture and equipment vendors. Council agreed to initiate the LDC amendment process and the language is now before the LPA for consideration, though this is not a hearing. Mr. Weimer advised the LPA that this is proposed change to the LDC that MRTF had previously suggested to Council and this part of it (labeled “Exhibit C”) had been rejected. However, today this is a new ordinance MRTF has suggested be adopted. Mr. Weimer asked why this was rejected before and Dr. Shockey recalled that Council members expressed discomfort with more restrictions and additional licensing requirements, and disliked the idea of a cap on the number of licenses; Ms. Dalton added that specific concerns with the insurance requirement and taking in garbage receptacles each evening had precluded this from passing.

Mr. Yerkes was disappointed that it was rejected before, considering the amount of work he and MRTF put into this previously and feels that it is ridiculous to start this over again. Ms. Shamp said she had been present at the Council meeting when this was decided and there was discussion here by LPA members and the attorney regarding why the number “14” was picked as the cap on the number of licenses. Mr. Yerkes added that there was another part of the original draft that is still absent, that being the danger to children in the stacking of chairs, etc. Ms. Shamp asked about how this item would affect beach renourishment and there was more discussion about this.

It was decided that there should be more research and information gathered and reviewed before this item moves forward on this; specifically, the number of current licenses that are there, the number of beachfront resorts that supply furniture and equipment, etc. Mr. Weimer also wants to have information in the packet regarding what the prior recommendation from MRTF was and the revisions made to Chapter 14 that affect this. A MRTF representative and the MRTF staff liaison, Keith Laakonen, may also be requested at meeting at which this is next considered.

**Motion made by Ms. Kay to bring this forward to a public hearing;  
Second by Mr. Van Duzer.**

Mr. Yerkes commented that he’d like more background to review and discuss this first, before going to a public hearing. Ms. Shamp agreed.

**The motion was withdrawn and the item was rescheduled to be an agenda item, tentatively for June 23, 2009.**

**Motion by Mr. Van Duzer to adjourn as the LPA and reconvene as the HPB  
Second by Mr. Yerkes**

**Vote: 5-0**

**VII. ADJOURN AS LPA; RECONVENE AS HPB**

Ms. Shamp called the meeting of the HPB to order at 11:42 AM, five members present with Evie Barnes and Alan Mandel- absent with excuse.

**VIII. ADMINISTRATIVE AGENDA**

**A. Update-National Historic Register Application process**

At the April 28<sup>th</sup> meeting the HPB requested the register process to begin, which was to be authorized by the Town Manager and Dr. Shockey. Ms. Shamp passed around the letter requesting those funds, which she is asking HPB to approve for her to submit to the Town Council. There was discussion about the funding and releasing of those funds. The Town Manager had asked that the HPB specifically request the Town Council to allow some of the funds that were set aside for the plaque/brochure/website programs to be used for this purpose, if that is their intention.

**Mr. Weimer moved to approve and submit the letter for funding request;  
Second by Mr. Yerkes.  
Vote: 5-0**

Ms. Shamp asked if someone could attend the meeting on May 18<sup>th</sup> on her behalf. Ms. Kay will attend. Ms. Shamp asked for a motion to adjourn.

**Mr. Van Duzer moved to adjourn as HPB and reconvene as the LPA  
Second by Mr. Yerkes;  
Vote: 5-0**

**IX. ADJOURN AS HPB; RECONVENE AS LPA**

**X. LPA MEMBER ITEMS AND REPORTS**

Mr. Weimer advised that the issue about the possible conflict in meeting times has been resolved with Mr. Janke, as discussed at the prior meeting in his absence.

**XI. LPA ATTORNEY ITEMS**

Ms. Dalton advised that Mr. Mandel has been named as the head of the Utility Ad Hoc committee and will proceed accordingly.

She also advised that the Town is working on a Franchise Fee ordinance and she gave Mr. Van Duzer a copy of that due to its ROW issues.

## **XII. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Dr. Shockey referred to a report in the packets, written by him, referencing refuse containers and some sections of the land development code. He advised that the Town Manager had created an ad hoc committee to find facts about refuse container issues there were a few items that came out of that. He wanted to present some suggested changes to the LPA due to these concerns and give the LPA the opportunity to suggest any revisions or other changes they felt were necessary. Town Council will consider whether to initiate these changes and if Council does so, they will be back as a legislative hearing before the LPA.

## **XIII. LPA ACTION ITEMS**

### **Resolutions to Town Council**

- Snug Harbor-continued by Council to June 1, 2009
- 135 Gulfview-TBD
- Vacation Ordinance-Moved to first hearing/May 18, 2009 (Ms. Kay)
- National Registry Letter-May 18, 2009 (Ms. Kay)

### **LPA Continued Hearings**

- The Cottage-June 23, 2009
- Pink Shell-June 9, 2009

### **Future Work Activities**

- Commercial Rights-of-Way: will be divided into four sections- #2 June 9, 2009, regarding Impervious ROW; items #1, #3 & #4-TBD
- Storm Water-TBD
- Seasonal Parking-July 14, 2009
- Animal Control-June 9, 2009
- Alcoholic Beverages-July 14, 2009
- Parcelization-TBD
- Future Review of SO Ordinance-July 14, 2009
- Kiosk Project-June 23, 2009
- CIP Workshop-TBD
- Historic Plaque presentation-TBD
- LDC 14-12-June 23, 2009 (Dr. Shockey to provide backup and contact MRTF and Keith about their attendance)

## **XIV. PUBLIC COMMENT**

No further comments.

**Motion to adjourn by Ms. Shamp;  
Second by Mr. Van Duzer.  
Vote: 5-0.**

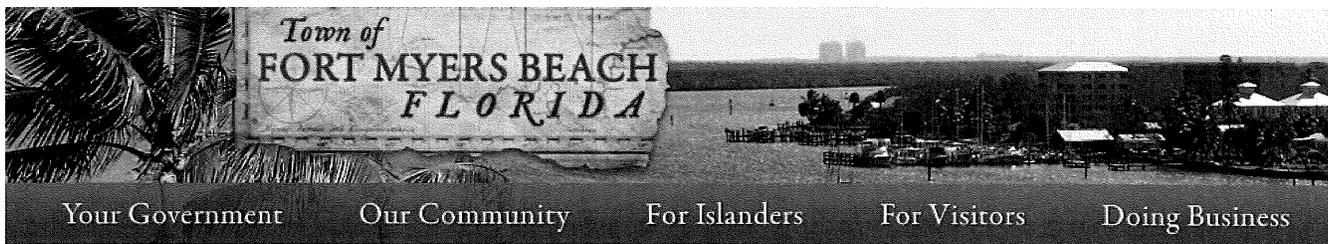
**XV. ADJOURNMENT**  
Adjourned at 12:13 PM.

**Next meeting May 26, 2009 10:30 AM.**

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Dennis Weimer, LPA Chair

- End of document



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### May 26, 2009

FORT MYERS BEACH  
**LOCAL PLANNING AGENCY (LPA)**  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
 May 26, 2009

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**AGENDA**                      [all time frames are informational and approximate]

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2:00 PM

- I.     **Call to Order**
- II.    **Pledge of Allegiance**
- III.   **Invocation**
  
- IV.    **Workshop: Capital Improvements Planning**
  - A.   **Financial issues**
  - B.   **Required LPA involvement**
  - C.   **Identifying and prioritizing needed projects**
  
- V.     **Public Comment**

**Adjourn no later than 4:00 P.M.**

**Next Meeting:**            June 9, 2009, 10:30 AM

- Contact Us
- Request for Action
- Bay Oaks
- How Do I...?
- Notify Me
- Weather & Tidal Info
- Emergency Prep

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**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Workshop**

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

**Tuesday, May 26, 2009**

**I. CALL TO ORDER-LPA WORKSHOP**

Workshop meeting, with Town staff, to discuss the CIP process, was called to order at 2:00 PM by Chairperson Weimer. Five members present:

Dennis Weimer  
Rochelle Kay  
Alan Mandel  
Bill Van Duzer  
Joanne Shamp  
Evie Barnes- resigned

Staff present: LPA Attorney Ann Dalton; Community Development Director Dr. Frank Shockey, Jack Green and Evelyn Wicks.

**II. PLEDGE OF ALLEGIANCE**

**III. WORKSHOP: Capital Improvement Planning**

**A. Financial Issues**

Dr. Shockey addressed the workshop and said that he broke the CIP discussion into 3 basic components: where is the money coming from, what is the LPA's required involvement in CIP matters, and what improvement projects are needed or desired and in what order. Dr. Shockey turned the floor over to Evelyn Wicks.

Evelyn presented a list to the members of some resources for funding. She said that the Town is now pretty much "pay as you go" for projects because of charter provisions preventing long-term debt.

Mr. Van Duzer felt that it is not the duty of the LPA to determine where the funding will come from but rather only what projects need to be addressed and is conflicted in his feelings.

Ms. Shamp appreciates the update from staff to advise them about changes in state law, financial situations, etc.

Mr. Weimer agreed that the LPA duties are to review the CIP proposal and consider

whether it is in compliance with the Comp Plan. Dr. Shockey agreed but noted that the LPA has a larger role in the Comp Planning process that can affect what kinds of improvements are later proposed. Much discussion ensued about what participation is required and how much by the LPA, as well as where the funding comes from. Ms. Wicks clarified that in the case of emergencies, the Town functions from the reserves they have. She said this is one of the issues with the present “pay as you go” plan, as it doesn’t allow the Town to have a smooth CIP wherein the Town knows what is planned for when, and what is actually being done when.

Mr. Weimer asked Mr. Green how many miles of streets the Town has. Mr. Green said that it is about twenty-seven miles of street, not including the part of Estero Blvd that is the County’s responsibility. Mr. Weimer also asked the life expectancy of a street. Mr. Green replied that there are so many different factors that it is difficult to estimate that in general. However, he estimated that the “in town” streets aren’t too bad but the biggest problems are streets with storm drains, especially manhole covers. He said that the Town did not have an assessment tool for gauging how soon a street needs repairs, and that is why they’ve developed one this year to be able to estimate and plan more efficiently.

Mr. Weimer asked if there are other areas than streets, such as Town properties, that truly must be looked at seriously very soon. Mr. Green stated that water utility is a big issue but it is a separate fund and today is for general fund type activities. He said that the pool is a perfect item. In the past, the contractor was responsible for determining the maintenance needs of the pool, and repairs, etc. He said it was not an efficient system because the contractor preferred to do the minimum, or less, and pocket the remainder of the contract money as profit. Now the Town manages the repairs. He gave several examples of the repairs needed. He also said that the public works department lives within its reserves but it is very difficult to plan a five year CIP when they cannot budget beyond three years. Mr. Green was asked for his idea for any way to change that, and he could only say to change the charter, which is extremely difficult and potentially unpopular.

Ms. Kay referred to the Municipal Revenue Sharing Program and pointed out that there are funds available from certain transportation related taxes and wondered if the Town could benefit from these funds. Mr. Green gave some examples of how the Town already uses these restricted funds, for clarification, and some discussion ensued.

Mr. Weimer gave a scenario wherein Bay Oaks is turned over to the Town and there was funding in reserve for that, and he asked whether that reserve could be built into a budgeting process. Ms. Wicks explained further how this works, including sinking funds, and the feasibility of the process. She said that the ad valorem tax is a good vehicle to get these projects done as well and not be in debt. Mr. Mandel pointed out that the charter mandates that the Town cannot take on debt and he wondered if there are any state laws which may say the Town can.

### **Public Comment Opened.**

Ms. Shamp asked if the Town has any franchise fees and Ms. Wicks stated that they do not for electric services. She said it is a potential source and may be on the table during budgeting this year. Ms. Shamp also asked about impact fees. Mr. Eric Smythe, a resident, asked what other projects this funding would be used for. Mr. Green stated that this was not yet determined but CIP projects so far include the North Estero project, storm water, road and water improvements, which come to about \$5.5 million dollars. He added a few more and explained for the public. Mr. Smythe asked if these projects would provide any jobs to beach residents and Mr. Green responded that contractors are not under beach government control. The Town's bid process allows for preference of local bidders where a company bidding is located in the Town, but there is not requirement that a company employee Town residents. A few members had questions regarding to possible errors in the materials provided in the packets and whether or not there are rules as to where and how funds can be invested.

#### **B. Required LPA Involvement**

Dr. Shockey advised that the LPA has an integral role in comprehensive planning matters. He referred to the information packets given to members and pointed out other specific duties involving annually evaluating the capital improvements proposed in the Town's budget for consistency with the Comp Plan. He added that in addition, the LPA makes recommendations regarding amendments to the Comp Plan and works on the evaluation and appraisal of the Comp Plan on a 7 year basis. Finally, Dr. Shockey noted a clause at the end of the section of the Land Development Code providing the LPA's duties which indicates that Town Council may ask the LPA to perform "any other duties" that the Town Council can lawfully assign to the LPA.

Mr. Weimer asked the members to think for a few minutes about what they would like to see prioritized for LPA plans for the future. Mr. Van Duzer was asked how he would spend the money for the Town. He said that his number one project would be storm water management. Ms. Kay concurred. Ms. Shamp was torn between storm water and water utility issues. Mr. Mandel felt the best way for him to decide is to see what staff would like to see done and then decide. Mr. Weimer also agreed with storm water management as being a priority.

Mr. Van Duzer commented that he didn't think that water utility improvement project would be a capital improvement project because the water utility is a self-supporting entity. Mr. Weimer asked Ms. Wicks for her opinion and she said that the Town needs to evaluate what assets they have and how to nurture those to plan for projects. In addition, Mr. Green said that storm water management is very important to the island, as is road improvements; however, he stated that the Town doesn't own anything. There is no flag planted anywhere, except for Town Hall, for instance, and the building is rented. He said that there is nowhere else to go and the island is already built up, so the residents who are there cannot foot the bill for everything. He also pointed out that there is no extra space for staff or storage in the Town anyplace that the Town owns...because the Town does not own a town hall facility. There was

much discussion about the size of the Town's rented office building and the lack of storage or operational space anywhere in the Town for public works or any other department.

Mr. Janke added that there is no branding of the Town of Fort Myers Beach. He said that the Town is built out and so the LPA must be concerned with maintaining and sustaining the amenities that are in place. Mr. Weimer asked what he might see as something coming forward that may be of significance. Mr. Janke said that the acquisition of Bay Oaks, for example, may be a good thing to help find some storage for public works without interfering with the recreational components. He said that rebuilding of the North Estero project is the biggest thing the Town has ever undertaken and, when done, it'll be a reminder that the Town has grown up. Discussion ensued in response to an item Ms. Shamp pointed out regarding a beach "walk."

Ms. Kay asked about funding money and dedicating it to specific items. She asked how that gets done and Mr. Janke advised that the Council usually does that so suggesting this to the Council is where to start.

Mr. Van Duzer commented part of the financial situation is due to inept Councils in the past that kept lowering the millage rate as property values rose, and now the budget is suffering as those property values fall.

Ms. Shamp thanked everyone for their participation. She praised Mr. Green for his work in the recent water crisis and she is impressed by the road surveys and the work being done for these plans. In general, she is appreciative of all of the collective work being done by staff and how well these projects are progressing.

**Public Comment; none further. Public Comment Closed.**

Mr. Weimer thanked Town staff for participating in the workshop and for their input.

**IV. ADJOURNMENT**

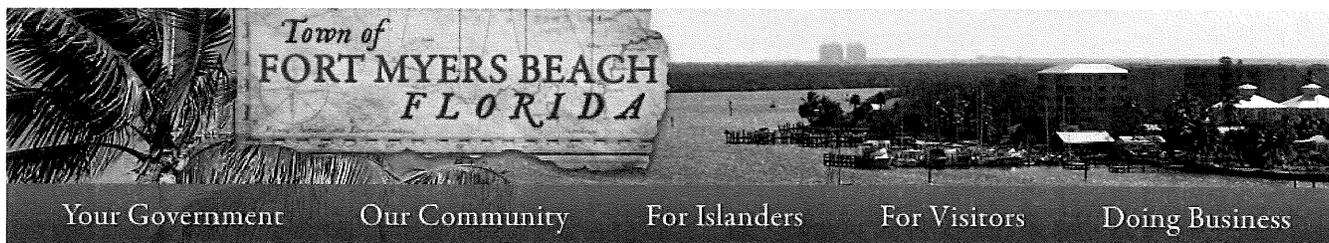
Adjourned at 3:45 PM.

**Next meeting June 9, 2009 at 10:30 AM.**

Adopted \_\_\_\_\_ With/Without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Dennis Weimer, LPA Chair

- End of document



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**June 9, 2009**



FORT MYERS BEACH  
**LOCAL PLANNING AGENCY (LPA)**  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
**June 9, 2009**

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AGENDA	[all time frames are informational and approximate]
<b>10:30 AM</b>	
I. Call to Order	
II. Pledge of Allegiance	
III. Invocation	
IV. Minutes	<b>5 minutes</b>
A. <a href="#">Minutes of April 28, 2009 LPA Meeting</a>	
B. <a href="#">Minutes of May 12, 2009 LPA Meeting</a>	
C. <a href="#">Minutes of May 26, 2009 LPA workshop</a>	
V. Town Capital Improvement Program (CIP) Items	<b>5 minutes</b>
VI. Public Hearings	
A. DCI2006-0001 and DCI 2006-0002 White Sands, Captiva Villas, and Bayside CPD zoning amendments (continued from May 12)	<b>240 minutes</b>
<a href="#">File 1 Staff Report and Attachments except B and E</a>	
<a href="#">File 2 Attachment B (Landscape plan scan, 24x36 paper available at Town Hall)</a>	
<a href="#">File 3 Attachment E (prior resolutions)</a>	
<a href="#">File 4 Applicant's application materials</a>	
<a href="#">File 5 Written Public Comments</a>	
<a href="#">File 6 Draft LPA Resolution</a>	
VII. Administrative Agenda	
A. <a href="#">Resolution 2009- LPA Appreciation of Joe Yerkes</a>	<b>5 minutes</b>
B. <a href="#">Resolution 2009- LPA Appreciation of Evie Barnes</a>	<b>5 minutes</b>
C. <a href="#">Discussion of revised draft Animal Control provisions</a>	<b>60 minutes</b>
D. <a href="#">Update on impervious connections to the ROW (Shamp/Van Duzer)</a>	<b>15 minutes</b>
VIII. Adjourn as LPA, reconvene as HPB	
IX. Chair/Member Items	<b>15 minutes</b>
X. Adjourn as HPB, reconvene as LPA	
XI. LPA Member Items and Reports	<b>15 minutes</b>
XII. LPA Attorney Items	<b>5 minutes</b>
XIII. Community Development Director Items	<b>5 minutes</b>
XIV. <a href="#">LPA Action Item List Review</a>	<b>10 minutes</b>
XV. Public Comment	

Adjourn no later than 4:00 P.M.

Next Meeting: June 23, 2009, 10:30 AM

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**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, June 9, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 10:32 AM by Chairperson Weimer. Following members present:

Dennis Weimer  
Rochelle Kay  
Bill Van Duzer  
Joanne Shamp  
Alan Mandel

Staff present: LPA Attorney Ann Dalton; Community Development Director Dr. Frank Shockey. Members of the public and applicants were also present.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION-Mr. Dennis Weimer**

**IV. MINUTES**

Acceptance of minutes from April 28, May 12 and May 26, 2009 meetings.

**Motion:** Mr. Van Duzer moved that all minutes be accepted as written. Second by Ms. Shamp.

**Vote:** Motion carried 5-0

**V. TOWN CAPITAL IMPROVEMENT PROGRAM (CIP) ITEMS**

Ms. Shamp reported that she sent “Thank You” notes to Town manager and staff, and wished to thank all staff, Jack Green, Evelyn Wicks and Scott Janke for their participation in the workshop.

**VI. PUBLIC HEARING**

**A. DCI2006-0001 and DCI 2006-0002-White Sands, Captiva Villas and Bayside  
CPD Zoning Amendments—Continued hearing-reopened**

Ms. Dalton swore witnesses. Mr. Weimer polled members as to any ex-parte communications regarding this matter. Mr. Van Duzer had meetings with several people regarding the hearing: a lengthy meeting with Peter Lisich, several discussions with Carlton Ryffel; on site meeting at Pink Shell with Mr. Wauchulis and staff; two site visits. Ms. Shamp had two site visits. Mr. Mandel declined a meeting at the Pink Shell. Mr. Weimer has had some discussions with members of the public, with some Town staff, and made a site visit. No others had any communications. Mr. Weimer stated that this is the fourth session for addressing this and asked that the public remember that the meeting must move along and that comments should be kept short and on subject, adding that public comments have been heard in past hearings.

Dr. Shockey updated the meeting about the additional items, submitted by applicant at the last hearing, which have been added to the packets and explained the documents.

**Applicant Comments:** Beverly Grady, Roetzel & Andress, representing the Pink Shell Resort, presented the application for the modifications to the existing development. She said there were two public hearing applications filed, one for Captiva Villas and one for Bayside/White Sands. There was a consensus with staff that only one Master Concept Plan should be used for these purposes. Ms. Grady presented a Power Point demonstration to outline the requested modifications, which the applicant feels will better the Town, tourists, workforce and neighbors. She discussed how the proposed changes would impact the Town of Fort Myers Beach and how these would improve the overall lifestyle of the beach.

Ms. Grady commented that the property went through the typical application process for applying for and instituting any modifications to the Town's Development orders. She said that Pink Shell built pursuant to the Town's Chapter 10 Development Order and the Town issued the permits. Property development regulations are defined in the Town code including height, setbacks, FAR, intensity, etc. Other resolutions granting CPD or RPD zoning, showing how the deviations were granted, were included in the packets she provided. She said that there is a staff recommendation of approval for most of the modifications but one primary concern is the conditions at the end of the proposed resolution, which are not clear as to the entitlements that are already in place which make up the existing Pink Shell Resort Development. Ms. Grady stated that staff's recommended condition would require redevelopment to comply with RM zoning district setbacks, but this would not allow Pink Shell to keep what it already has today. In addition, she expressed concern that the latter part of staff recommendations would repeal all existing deviations that have been granted through the years, that the Town had previously approved as consistent with its Plan and LDC. The applicant is most concerned about the language and specifically the words used in the proposed resolution because, she feels, it is not clear enough to protect the existing rights of the applicant. Ms Grady requested that the process to the extent that the LPA grants approval of some or all of the modifications, that the applicant would continue through the "historically applied process." She stated that Pink Shell and the

other properties were all built and found to be in compliance with the Comp Plan, the Plan Development Zoning Resolutions, Chapter 10 Dev Orders; however, she stated, that the current staff report conditions place uncertainty and threatens those entitlements. She continued that Pink Shell has spent millions in reliance on the Council's approvals to arrive at the resort that exists today. Ms. Grady said that the applicant is suggesting minor changes, such as:

- Retention of the boat ramp which, she said was originally permitted but may have been removed from the site plan when a different plan was being considered. This change reflects something that has been there all along so it is a minor change.
- Permission to relocate a walkway easement that is currently between Captiva Villas and White Sands and just relocate it on Captiva Villas but on the Sanibel View side. She said that they would still need to get approvals from the Council and the County so they just need sufficient language to allow this take place, if decided, without having to go through another public hearing.
- The applicant wants to be "like other resorts" in that they would like to serve the public in addition to their own guests.
- An increase in parking spaces, in place of a landscaped area, but with an additional buffer area
- The applicant requests the ability to use existing units to provide employee housing.
- Permission to replace the existing dumpster with a trash compactor.
- Unified sign package (included in lieu of variances from the sign ordinance).
- The applicant requests to replace accessory docks on the bay side of the property

Ms. Grady introduced Bob and Jack Boykin, Bill Waichulis, Pink Shell manager, Ted Treesh, transportation expert and Bob Mulhere, land use planner (gave his credentials). Ms. Grady turned the floor over to Mr. Mulhere to review the applicant's plan and its consistency with the LDC and the Comp Plan.

Mr. Mulhere showed photos of the existing boat ramp and talked about the use. He also asked the LPA for the ability to request the relocation of the walkway. He said that the applicant's request to remove advertising and "guest only" restrictions is just to make the business competitive in the business world and referred to a traffic study in the packets, which he said show that there is minimal impact to traffic. Mr. Mulhere reviewed the parking space request, saying that the applicant is only requesting to add 57 spaces (referred to visual aids) and would like to move certain spaces to meet safety standards. Control gates are proposed at the entrances to these lots to control access and he also discussed the requested modification to the Type C buffer (visual aid) and discussed the size and location.

A concern of the applicant involving the staff report is the calculation of required parking. Mr. Mulhere said that the LDC allows for "subordinate uses," as defined in Section 3430-21 and pointed out that the applicant is proposing more specific and restrictive uses so

that there are no abuses of the property. He discussed the need for some additional parking but also that the increase in amenities would not necessarily create a need for more parking. He then turned over the floor to Mr. Ted Treesh to address transportation.

Mr. Treesh, TR Transportation Consultants, referred to a traffic analysis in the packets which reviewed the impact of the added facilities to local traffic patterns. Basically, he summarized that this proposed project will have a very minimal impact on the traffic. Mr. Mulhere again spoke, discussing each item and offered advantages and improvements each would provide to the area. He said there are basically three deviations: the unified signage package; reduction of the landscape buffer along Estero Blvd. (only if the Town acquires some of that land) to approve an alternative betterment plan that includes the elimination of the required internal landscaping for the tennis court parking, a deviation for the required landscape buffer width only adjacent to the south property line; and (this was inserted by staff) that the applicant needs to have 321 spaces. He added that he did an in-depth analysis and found that the requests are clearly consistent with the Comp Plan.

Ms. Grady readdressed the meeting and wanted to recognize the residents and business people of the area. She said that the Pink Shell Resort serves all of these people and supports the public and the community, and she gave examples of the many letters and other signs of public support for these requests. In summary, the applicant submits that there are minor modifications, each consistent with the Comp Plan and LDC, and they would like language to ensure that the applicant keep any existing entitlements. The applicant also feels that the amenities, which are subordinate commercial uses, are an integral part of any resort and should be available to the public. Ms. Grady then reviewed the documents and attachments included in the packets, pointing out that the applicant has filed and presented all necessary applications and supporting documents, in addition to the proposed conditions.

Mr. Robert Boykin, owner of the Pink Shell Resort, addressed the meeting and gave a brief history of the company, including that it has been in the family for many years. He said that there is a wealth of support for these modifications and complimented the staff for their diligence in preparing these proceedings and their hard work.

**LPA Questions to Applicant:** Mr. Weimer asked for questions from the LPA members. Ms. Kay asked for clarification as to a part of the resolution, regarding ownership of the business being identified as a “foreign” corporation. Ms. Dalton clarified that this meant the headquarters of the corporation was outside Florida. Ms. Kay also asked about parking calculations recorded as “0” and asked how can that be. Mr. Treesh responded and explained that some of the amenities do not need extra spaces. Mr. Waichulis added the capacity of certain amenities of the property.

Ms. Shamp asked about the current entitlements and deviations that the applicant stated would no longer be permitted or repealed. Ms. Grady referred to item 13, pg. 3, where the applicant marked up Dr. Shockey’s comments and specifically read the item that most concerns her: “redevelopment must comply with the setback and property development

regulations applicable to the RM zoning district at the time of development order approval, except where otherwise allowed by LDC Chapter 34, Article 5.” Ms. Grady said that this is very unclear and the language needs to be eliminated. She also referred to condition #16, pg. 6, and said that the applicant proposed certain language (read from the mentioned section). She further pointed out that there are conditions 16 through 31 which she feels each take a previous resolution and repeals it.

Ms. Shamp also asked how the beach access being proposed to move relates to beach access 41, advertised as a public access. The applicant explained, using visual aids. Ms. Shamp also had some questions about the trash compactor, external advertising, and extra parking for events. There was also some discussion about the boat ramp and the dimensions being changed.

Mr. Mandel asked if non-guests currently use the facilities at Pink Shell and the applicant said that they cannot advertise that but they don't actively restrict outsiders. He also referred to the letters received and asked who the authors were and what percentage are owners.

Mr. Weimer stated that his interpretation of the proposed resolution is a good thing and he does not see how anything would be detrimental to the applicant or other property owners. His feeling is that this is like a “clean sheet of paper” in that the old piece-meal modifications and allowances are all being cleaned up and this will be the new basis for all business modification applications, etc. He asked Ms. Grady if there are other properties in the original MPD which are no longer included in this commercial plan development and asked why they are not included anymore. Ms. Grady stated that these are now separate entities. Mr. Weimer referred to pg. 3, sec. 13, Maximum Building Heights and asked if the applicant was proposing to elevate the building according to the section; Ms. Grady said they are. Discussion took place about the rebuilding in the event of a disaster and the concern that this would become an issue as to height and other specifications such as setbacks. Mr. Mulhere agreed that having specifics to comply with is important for all building but not a blanket ruling since that may cause some businesses to rebuild at the current regulations and lose all that they had from previous applications, thereby losing the millions that were spent to get those provisions in the first place. Mr. Weimer asked the applicant why his specific change from “guest use only” facilities to public use is considered a minor change when this seems to encroach into the residential element of the property and neighborhood. Applicant argued that this property is not mostly residential and that it has always had difficulty keeping the general public out. He stated that it would not be a big change to openly extend use to the general public, even with the parking, provided the extra spaces can be added. Mr. Weimer stated that the general public's comments against this request have to do with parking and asked the manager if they have done anything to preclude the public from parking on Estero Blvd. and if the extra proposed spaces would actually help that much. Mr. Waichulis said the extra space will absolutely help and that recently, there were no parking problems during major events. Discussion ensued about the parking, buffering areas and the dumpster replacement.

**Staff Comments:** Dr. Shockey referred to the packets and an additional memo. He

discussed basic ownership of the property, explaining that not only is there corporate ownership but also condominium ownership as well, therefore it is a bit more complicated than typical property requests of this nature in which one entity is the sole applicant. Dr. Shockey asked that everyone keep in mind that the general context of planned development zoning is to allow people the opportunity to create a development that is essentially compliant with the comprehensive plan's vision for the area but give some flexibility from requirements the development might not meet precisely. Then, changing times may make it necessary to revise some of those requirements while keeping within the general confines of the original plan.

Dr. Shockey reviewed the applicant's requests and said that, overall, the staff does recommend approval of the request to amend the zoning districts, agreeing that many of the applicant's requests are minor and do not involve deviations from the LDC. However, the conditions developed by staff are intended to address the needs of the future, with regard to problems with the past conditions and a reasonable interpretation of what the past conditions ought to mean for the property in the future. In condition #2, the schedule of uses ought to reflect the uses that exist on the property, which he said are somewhat more lenient than before. Dr. Shockey discussed the requests for public usage and advertising to the public and referred to prior resolutions wherein it was ruled that these facilities not be openly advertised for use by the general public. Agreeing with the applicant that this is difficult to enforce, the staff proposed conditions include allowing the applicant the same privileges as any other new hotel on the island: subordinate commercial uses such as small retail stores, personal services, and restaurants, within certain limitations.

The recommended conditions are established in order to maintain the Town's ability to control what goes on with commercial resort properties, regarding subordinate uses, in a consistent fashion rather than site by site basis. Dr. Shockey referred to the site development regulations in Condition 2 and said they are related to the minor site changes in the future and not to build a new structure. Dr. Shockey continued with a review of each condition area and gave the general reasons for these. He referred to document "B" in the staff report packet, representing a landscape plan, and advised that one of the deviations is being recommended to be denied, but that a revised version could be considered, adding that the required 15 ft. wide buffer between the proposed parking lot and the Avaco Bldg. remain in the plan. Dr. Shockey reviewed Conditions #5 and #8 and briefly discussed the existing units on the property, proposed to be used for employee housing.

Dr. Shockey said he could not totally address the alcohol consumption issue because he does not have all of the pertinent information regarding the applicant's state license, so Condition #10 language should recommend that it be limited to the current beverage license rules and expansions must go through usual process. He then reviewed the deviations, in general, and gave reasons why staff is or is not recommending approval. Staff is recommending denial of the landscaping deviation as presented but suggests that the Town Council could approve a modified plan. The last deviation, regarding reducing the required 321 parking spaces based on the current plan, to 265 proposed parking

spaces, is recommended for denial also because staff feels that the applicant could provide more spaces, or reduce the intensity of activities on the property.

Dr. Shockey referred to the applicant's constant use of the word "entitlements" to refer to the existing development on the property. The LDC does not use that word to describe the outcome of a zoning action, nor does the Comp Plan. The Town Council has the authority to amend the LDC and zoning map, without the property owner's permission, as well as the build back provisions contained in the regulations and in the Comp Plan. He said that the applicant is asking for a special condition that provides a guarantee that they will be able to build back exactly what is there, without regard for the reason for the build back, i.e., damage, total destruction or just remodeling or a desire to replace the buildings with new ones. Policy #4-B-1 in the Comp Plan states that "buildings and developments damaged more than 50% of the replacement cost, can be rebuilt to their legally documented actual use, density, ...provided the new construction complies with...any required zoning or other development regulations other than density or intensity, except where compliance would preclude reconstruction otherwise intended by this policy." He continued to read the regulations in the Comp Plan that apply to rebuilding and summarized that the staff's recommended condition is there because a development order is not guaranteed forever, and the rights conferred by planned development zoning are not permanent. If the regulations change before you get a development order, you must comply with the new regulations. Dr. Shockey stated again that the conditions staff recommended are to protect the Town's ability to control what happens on that property in the future, not to guarantee that it remains exactly as it is today. Dr. Shockey then requested the acceptance of his report and all attachments as staff testimony for the record.

**LPA Questions to Staff:** Mr. Weimer asked for questions from LPA for staff. Mr. Mandel asked if the applicant would still be able to rebuild the same number of units that exist today in the event there was a disaster. In essence, Dr. Shockey indicated that this would ultimately be up to the Council's approval, but did not provide a specific answer to the question. Under the current Comp Plan policies and code regulations it depends in part on whether the buildings have been damaged by a disaster. Mr. Mandel asked if staff is satisfied that the 321 spaces would be sufficient for the property when large parties such as weddings and company retreats are held at the resort. Dr. Shockey basically said that this is usually only an issue during special events, which are subject to approval and regulation by the Town manager, and therefore are looked at on a case by case basis.

Ms. Shamp referred to parking and LDC 34-2020, and a public comment document wherein the number of spaces was different, and she wondered how the number of parking spaces was calculated. Dr. Shockey wasn't sure but assumed that the difference between them had to do with square footage measurements and where they came from, or classifying the use of floor areas in one way rather than another. He is satisfied that the number of spaces noted as the requirement matches the use of the floor areas. Ms. Shamp also referred to the sign package and Sec. 30-153, which reads "in order to provide fair, equal and adequate exposure to public and prevent businesses from visually dominating neighborhood properties." they should be regulated and she asked why then

shouldn't the applicant be held to the same rules as other businesses on the island. Dr. Shockey stated that the criteria for granting deviations from the LDC are different from the requirements for a variance. Planned development zoning allows the property to be considered as a single unified resort. Under the sign ordinance each business would have been looked at separately and been allotted a specific maximum number of square feet of sign area. Many more things can be taken into consideration for granting a deviation to allow a sign package in the planned development context. Ms. Shamp also asked if there are other trash compactors on the island and how they are regulated in the LDC. Dr. Shockey stated that there is no specific regulation for these in the LDC but his opinion is that the proposed location is not a good one for the compactor. Discussion ensued about the current use regulations in effect for the property and the temporary use parking permit and disposition of the tennis courts.

Mr. Van Duzer asked if the Pink Shell Resort obtained a special events permit for the most recent "Catch & Release Tournament." Dr. Shockey said that they did apply for one but the Town manager decided it was not needed because it was within the scope of normal resort operations. Mr. Van Duzer asked if a person who participated in the event would have been considered a guest at the resort. Dr. Shockey replied that this is an issue that has ultimately brought them to a hearing today. Mr. Van Duzer also proposed that if Dr. Shockey was directed by the LPA to review all of the applicant's requests and come up with a resolution, could this be written up in a much shorter version to forward to Council. Dr. Shockey agreed that it could be shorter by simply referring to the outdated conditions, but the 4 pages of conditions are included to try to prevent the problems from coming up again in the future.

Mr. Weimer asked what other adjacent properties were included in the original PUD that are not included here. Dr. Shockey said that he thought the Estero Island Beach Villas was part of it from the 1980s, and also Sanibel View. Vacation Villas was not part of the original plan, but Abaco Villas was once included. Mr. Weimer asked what happens to the ones that may still be part of the old PUD and if those places and zoning stay in place. Dr. Shockey said that the recommended conditions would assure that any excluded properties are not affected by this application. Mr. Weimer asked for another clarification as to what exactly staff is recommending. Dr. Shockey repeated staff recommendations, as above. Discussion ensued regarding valet parking and other rights requested by the applicant. Mr. Weimer referred to Condition #9 and its terminology and said that the way it is written, if the LPA recommends approval, this would mean that the LPA supports the expansion of those commercial uses, outside of just guests staying at the resort. He also referred to Condition #10, alcoholic beverages, and said that this usually comes before the LPA under the COP Special Exception process, wondering why it is dealt with here for the applicant. Dr. Shockey explained that this is partially true but that there are certain circumstances wherein this is dealt with in several processes other than a special exception; he explained the regulations. He said that the condition proposed in the staff report would require the applicant to go through either administrative approval or special exception process in order to get the changes to their current license. Discussion ensued to clarify language for this condition and more discussion to review and clarify #24 and #25. Mr. Weimer asked how the signage issue is determined. Dr. Shockey suggested that

in the planned development context a sign package can be related to on the size and type of businesses involved; discussion about the requested signs ensued.

**RECESS FOR LUNCH-1:45 PM**

**RECONVENE-2:20 PM**

Mr. Weimer reconvened the hearing and asked for public comment.

**Public comment opened.**

Carleton Ryffel addressed the meeting and had Dr. Shockey hand out some papers he had prepared. Mr. Ryffel also presented a visual presentation and said he represents several citizens and gave a history of his qualifications, including serving on the Lee County Local Planning Agency and LDC Advisory Committee. He was involved in many of the rezoning cases involving the Pink Shell Resort in the past, with several other owners. He also represents the condo associations who are located in the vicinity of the Pink Shell properties and represents their interests. Mr. Ryffel showed diagrams of the locations involved and discussed the many letters of opposition he submitted from the neighboring property owners involved. He read one of the letters which opposed the applicant's requested changes and referred to the many copies in the packets he provided. Mr. Ryffel requested, on behalf of all of the property owners he represents, that these changes requested by the applicant be denied. He referred to resolutions, included in the packet of documents he handed out, which he feels stipulate that the resort property, including commercial activities such as the restaurants, has always been meant to be for the use of guests and Pink Shell staff only, and states the prohibition against outside advertising the restaurants and other amenities. Mr. Ryffel then referred to the staff report, on pg. 12, item #4 and cited several points, which he addressed one at a time. He said that tennis courts were damaged after the hurricane but the applicant continues to use the open space as a parking area. He also discussed the Vacation Villas easement near the former tennis courts, and their objection to the applicant attempting to use this easement for something it was not intended for. The existing boat ramp is to remain, with the pedestrian walkway rerouted, as shown in the Master Concept Plan. He said that the boat ramp is in the spot where the walkway was meant to be according to the past approvals. Mr. Ryffel said that his group strongly objects to the property being opened to be used by the general public as it is contrary to the basic approval of the Pink Shell as it exists today. He also showed many photos of the parking problems created by the events at the Pink Shell. His group also opposes to the advertising change as this is again against the original purpose of the resort. He showed a photo of a sign at the Chamber of Commerce building advertising that the Pink Shell is "Open to the Public." The group also objects to the proposed location of the trash compactor as it is directly across from this group's property and imposes on their parking easement, view and other privileges. Lastly, Mr. Ryffel also opposed to the additional parking and valet parking issues. He referred to the memos from Dr. Shockey regarding the language for the COP. He said the second one proposed is not as clear as the original language and showed pictures of people consuming alcohol at tables on the beach, expressing his view that if the state issued a license for this, it does not comply with the prior zoning conditions, and the future should be limited by past conditions, not allowed to expand.

Peter Lisich, owner of the property at 131-133 Estero Blvd., a commercial planned development, addressed the meeting. He said that his property is surrounded by the Pink Shell Resort on all sides, sitting between the tennis courts and the open green space next to the valet parking area, with the interpretive walkway. He stated his concern for the applicant's "shameless, vulgar and totally unacceptable request" to expand what was previously approved and had been assured not to have a negative impact to the neighbors. He expressed that the reference to these changes as "minor" is insulting and says that these changes would immediately undo the twenty years of peaceful living that has been enjoyed at his property. He pointed out that during the time he has lived there, Pink Shell had gone through at least three different owners, all with whom they had gotten along with and who respected their peace and quiet, as had the previous managers and employees. He said that these changes have divided the neighborhood and disrupted their quality of life. He referred to the applications and said that no one is clear about the actual document that is up for approval since the applicant keeps changing it. Mr. Lisich agreed with all of the points that Mr. Ryffel brought up and supported that same opinion as to requesting denial of these "minor" changes. He discussed points presented by Mr. Mulhere regarding the "rental community confusion" and said that the owners of individual condo within the Pink Shell Resort do not own things like a simple parking spot. He said the current owners of the Pink Shell condos are a management company used to handling renters for individual condo owners and that the commercial component is a different entity. Mr. Lisich discussed uses and square footage for commercial uses, giving numbers supporting that 48% more commercial use is at the resort than should be there, based on what the applicant's expert pointed out. He also said that no one is clear about the situation with the boat slips (showed a visual aid) and presented documents specifying the number of slips allowed and their uses. Mr. Lisich referred to the Submerged Land Lease reference, the same one referenced by Dr. Shockey in his report, and pointed out the cover memo he included in the packet. Dr. Shockey refers, he said, to the one that is currently expired and titled "Submerged Land Lease Renewal and Modification to Change Description of Use" and Mr. Lisich claimed that this latter lease represents a significant expansion from the uses that were approved with the zoning and in effect at the time. He read the recommendations of Dr. Shockey from the memo and asked where is the current lease, where are the existing slips, when did the Town approve the official slips and the commercial uses. He asked why the LPA would even consider voting on this today without even knowing the answers to these questions, and insisted that this is what staff is recommending, while he doesn't have the correct facts. He also vehemently opposed the installation of the garbage compactor and suggested that the applicant keep it on the other side of their property on the far side of their lots. He asked that the LPA reject all of the applicant's requests.

Mr. John Boucher addressed the meeting and said that he owns a condo in Estero Island Beach Villas, which is totally fenced off from Pink Shell. He said that he and the other residents oppose these changes for several reasons. He stated that this applicant was given height, density and setback variances and agreed to certain conditions which would preserve the quiet, peaceful enjoyment on the north end of the island. The staff recommends rescinding Town Council conditions and creating new ones but he feels that they are dealing with an applicant that does not comply with conditions. He gave

examples of the applicant's non-compliance, i.e. advertising to be open to the public, hosting public functions and advertising meeting rooms, etc. even on the internet. He said that one of the existing conditions is no live loud music yet he and neighbors have called police because of several loud bands at late hours on the property. Alcohol consumption off premises is another problem there, according to Mr. Boucher, who witnessed a vehicle being driven around on the beach there and selling beer. He also pointed out that there was to be a "Beach Public Access" sign on the property which was never installed. He gave several more examples about the non-compliance of this applicant again asked that the LPA not approve any of these changes requested by the applicant. He added that there is no way to police the specific request asking for housing for employees and the residents are afraid that these will become overcrowded migrant worker units, since there is no way to regulate how many people these house. Mr. Boucher warned that this applicant has a history of non-compliance and these changes will not help the applicant suddenly get better about compliance. He also discussed his objection to the proposed parking arrangements.

**Public comment closed.**

**Applicant rebuttal.** Ms. Grady again addressed the meeting and asked Mr. Mulhere to speak about some of the comments made by public. Mr. Mulhere asked the meeting to assume that Pink Shell would need to provide parking as required in the Code for the subordinate uses, and said that he considered that scenario. He said that there is a section of the Code, 34-2020, which reads "restaurant parking requirement for accessory restaurant: when a restaurant is located within the same building as the principal use and is clearly provided primarily for the employees and customers of the principal use, (the resort) no additional parking spaces are required." He remains that they would then need no additional spaces. The Code requires 2 spaces for the meeting space; the ballroom would need 16 spaces; the fitness facility, it is not open to the public, so that is 0 spaces; he continued to add spaces according to the Code square footage requirements until his sum of 266 spaces and said that Pink Shell has 265 spaces on the site plan.

Ms. Grady asked Carlton Ryffel, for the record, if he took the photos that he presented. Ms. Dalton objected to Ms. Grady's questioning of Mr. Ryffel. She asked Mr. Weimer if she could ask the question and was denied questioning any of the public. She stated her question to the LPA and asked who took the photos, which she believes were taken 2 years ago, and wanted to know who the people are that Mr. Ryffel said he was representing.

Ms. Grady again discussed the requests, beginning with the boat ramps. She said that she is not aware of an actual request to fill in the boat ramp, as stated by Mr. Ryffel. She added that the boat ramp would not be used by outsiders bringing a trailer to the site and parking there and, she added that Pink Shell is willing to limit the use of the ramp. She said that the valet parking is something that is permitted and that it does need to be available to meet parking requirements of prior resolutions. Pink Shell wants to retain that permitted ability to use it. She said that the extra spaces are 57 are in addition to what is considered adequate by the code, established by Mr. Mulhere's testimony. The signage idea was developed in meetings with staff as a good thing for the north end of the

island to have one unified set of signs for the resort. Most of the signs, she said, are directional and for the convenience of the guests to find parts of the resort. Ms. Grady discussed the trash compactor and the fact that no one came up with an alternative, so at this point the request remains to just replace the existing dumpster with a trash compactor, adding that applicant felt this was a positive move.

Ms. Grady further discussed the process of the application for changes and said that the applicant believes that the changes are minor. She agreed that there is a post-disaster build-back provision but it is left to interpretation of people in the future who are not present today and their concerns is that those people may have different views. She added that the comments by Dr. Shockey worry her in the case of vested rights and the wording of the resolution is not respecting the past rights. She said that the property owner relies on the Town Council's application of its Plan and its Code, approves that plan and that guarantees that they can rebuild that master concept plan. The applicant requested the LPA make a recommendation of approval on each request.

**LPA Questions on rebuttal:** Mr. Van Duzer referred to the parking spaces, specifically to the restaurant area of 5450 sf. He said that there are no more required parking spaces because it is currently primarily used by guests only. However, if the restriction is taken away, he feels there would then be additional parking spaces required. The applicant claimed that the restaurant is primarily to serve guests and employees, as stated in the Code. Mr. Van Duzer asked what structures will be used by employees. Ms. Grady stated that there is no stipulation as to what buildings will be used. Mr. Waichulis stated that there are currently 9 students from other countries in the two existing cottages and they are working as servers.

Ms. Kay asked if primary use is the same when the restaurant is advertised to the public. Mr. Mulhere stated that the Code says "primarily" and not "primary" use so it is vague.

Ms. Shamp read the exact Code as to the words "clearly" and "primarily" and said that the applicant focused on "primarily" yet she believes that when a restaurant is not advertised externally, then it could be said that it "clearly" is for the guests primarily. Mr. Mulhere agreed with this usage.

Mr. Mandel asked where is the "satellite parking" which was referred to earlier. Mr. Waichulis said that they have used Summerlin Square shopping center and worked with Lee County, to use its parking areas for Park & Ride. Mr. Mandel pointed out that there is supposed to be no advertised use of the property now but there is still a need for parking; he asked if the applicant has any ideas for extra parking. Ms. Grady thought that the 5 extra spaces they proposed on adjacent property would be helpful and discussed the additional spaces they requested to add on the bayside, but thought they had proposed adequate parking. Ms. Kay asked Ms. Grady about the scenic walk and asked if it was supposed to have been built because it isn't there now. Ms. Grady said "yes, and it's been there..." but Ms. Kay pointed out that it is not there and is not connected because the boat ramp cuts it in two. Mr. ? (did not identify) quickly addressed Ms. Kay with a visual aid and added that it is in the plan.

Ms. Shamp asked about entrance gates and said it would encourage the use of valet parking services but wanted to know about lot #41 and if it is a part of the entrance gates referred to (pointing to a diagram). Ms. Shamp said that while doing her site visit, she saw a small walkway from Vacation Villas, another area chained off and said that there was no access to the beach there, although the plan says there should be. Mr. Waichulis answered, referring to the diagram.

Mr. Weimer commented that one of the public comments clearly points out a significant issue that he sees with the application before the LPA. He said that the arguments the applicant presented look to be "cherry picking." He said the applicant wants to consider expansion of the restaurant to the public but wants to take no responsibility as to its impact on parking. He added that the applicant takes the position that people don't go to the pool bar, they'll go to the resort and just happen to eat at the pool bar. He encouraged the applicant to really consider what their responsibilities are as this moves forward to the Council because he didn't feel that they would be easily swayed by this argument. Mr. Weimer asked the Town attorney to clarify his interpretation of the parking requirement and the neighbors' claims about the easement. Ms. Dalton said there is a private matter dispute between the two property owners and Mr. Weimer wondered if there would be a legal difficulty involving the Town at some future proceeding if they pass a resolution to grant certain changes that the applicant is requesting. Ms. Dalton opined that if the LPA agreed to the Pink Shell's requests, the Town could potentially be pulled into a future legal proceeding. Dr. Shockey pointed out the condition #29 in the recommended items which is a continuation of the county commissioners resolution ZAB-84-196, condition #2, that six parking spaces provided by the developer on lots 38 and 39 are for the use of Pink Shell Vacation Villas Condo and it says that a minimum of six spaces must continue to be provided on those lots. He said that the dispute as to where these should be is between the two owners. Dr. Shockey located the resolution online to check the correct number of required spaces. Ms. Grady added that this may have been a mistake on their part and referred to the actual easement document, which states five spaces. Discussion ensued about the discrepancy between the easement and the resolution requirements for either five or six spaces. Mr. Weimer asked Ms. Grady if there have been any negotiations in regard to just moving the parking spaces and she answered with all of the conditions for the process to do so. She said there are three steps: first, local government approval, second, county approval and then third, the actual other party, Vacation Villas. Mr. Weimer reiterated that this is an especially important process because it shows that the LDC and the Comp Plan need some changes and that these regulations reflect possible future changes.

Ms. Dalton said that the Town doesn't know if the county has signed off on this easement since it was 1989 and things were dealt with differently then, and not all records are available. In addition, she said that there is an alternate thought that when an application comes forward for consideration, all interested parties are supposed to be joined into the application and staff has indicated the applicants do not include the other party to the easement.

**Staff Rebuttal:** Dr. Shockey clarified that nothing in this application, including any of

the entrance gates shown on the plan presented by the applicant, has to do with the Sanibel View property. He also referred to Mr. Lisich's phrase "existing only" with reference to the dockage. He said that this term is defined in the Town and the county's LDC to a use permitted because it is "existing only" as of a specific date in the past. He read the Town's definition and said that a use that is "existing only" is treated the same as a "permitted use" and may be expanded or reconstructed on the same parcel, in accordance with all applicable regulations. Dr. Shockey again addressed the items that are being requested and argued subordinate uses and conditions. He suggested that some lessened deviation from the parking requirement, to require more parking to be provided than proposed but less than the LDC might otherwise require, may be appropriate but that it is up to the LPA to decide if they wish to recommend that.

Dr. Shockey again pointed out that amendments to the LDC and the Comp Plan can create non-conformities. He did not recommend following what the applicant is suggesting, that the Town should specifically guarantee some future rebuilding that may be at odds with what the Comp Plan and LDC could be amended to require as the Town changes.

**LPA Follow up:** Mr. Weimer asked if the LPA chose not to approve opening the business to the public, would that change the number of spaces. Dr. Shockey said it would depend on what was opened to the public and what was not. Mr. Weimer asked if Dr. Shockey had any opinion as to the removal of the boat ramp. He said he did not see any specific condition requiring it to be removed; it merely was not shown on some prior plans. Mr. Van Duzer answered that, from his recollection, the ramp was removed because there were plans at one time to put a building there. Then, the building was not constructed but later plans never had the ramp again.

#### **Short recess-15 minutes**

Mr. Weimer polled the LPA members as to continuing with the hearing. Members agreed to attempt to finalize this matter. Mr. Van Duzer said that there are about eleven conditions listed on pgs. 1-2 and suggested that they make a motion on these items and then direct staff to redraft the resolution and present it again at the next meeting for approval. Ms. Dalton said that could be done but it would necessitate another hearing at the next meeting. Mr. Weimer also agreed that a motion at this point would help to move this forward. Ms. Dalton stated that she can print out the motion to make it easier.

**MOTION:** Mr. Weimer moved approval of LPA Resolution 2009-13. The LPA recommends that the Town Council APPROVE applicant's request to amend the CPD zoning district subject to the approval of thirty [30] conditions and the DENIAL of one [1] condition. The LPA further recommends that the Town Council DENY two [2] deviations as set forth with specificity below.

#### **Conditions:**

LPA recommends APPROVAL OF Condition #1.

LPA recommends APPROVAL of Condition #2, as written.

LPA recommends APPROVAL of Condition #3, as written.  
LPA recommends DENIAL of Condition #4, as written; With the change “*Refuse containers on the subject property must comply with LDC Section 6-11 and all applicable buffer requirements*” the LPA would recommend APPROVAL of Condition #4.  
LPA recommends APPROVAL of Condition #5, as written.  
LPA recommends APPROVAL of Condition #6, as written.  
LPA recommends APPROVAL of Condition #7, as written.  
LPA recommends APPROVAL of Condition #8, as written.  
LPA recommends DENIAL of Condition #9, as written.  
LPA recommends APPROVAL of Condition #10, as written and not as suggested in Dr. Shockey’s report.  
LPA recommends APPROVAL of Condition #11, with the change “*a maximum of [forty-one 41], boat slips were approved by that lease.*”  
LPA recommends APPROVAL of Condition #12, with the change: “*Use of this building is limited to accessory administrative offices for the management of water related activities and leasing of boats and boat slips*” etc.  
LPA recommends APPROVAL of Condition #13, as written.  
LPA recommends APPROVAL of Condition #14, as written.  
LPA recommends APPROVAL of Condition #15, as written.  
LPA recommends APPROVAL of Condition #16, as written.  
LPA recommends APPROVAL of Condition 17, as written.  
LPA recommends APPROVAL of Condition #18, as written.  
LPA recommends APPROVAL of Condition #19, with corrections on a, b, c and d; also conditions 1-8 and condition 10 are repealed, but condition 9 remains in force.  
LPA recommends APPROVAL of Condition #20, as written.  
LPA recommends APPROVAL of Condition #21, with correction on a.  
LPA recommends APPROVAL of Condition #22, as written.  
LPA recommends APPROVAL of Condition #23, as written.  
LPA recommends APPROVAL of Condition #24, as written.  
LPA recommends APPROVAL of Condition #25, with corrections conditions 1-5 and 8 and 9 (inclusive) of Resolution Z-8295-017 are repealed; condition 6 is modified to conform to the uses and s/f stated in Condition #2 of this Resolution; condition 7 is modified as follows: a-signage indicating that the services are for guests of the hotel/motel only must be prominently displayed; b-advertising of the commercial uses is prohibited except in connection with advertising for the hotel/motel operation, and such advertising must reasonably indicate that such uses are for hotel/motel guests only; c-outdoor entertainment must be limited to the hours between 7:00 AM and 10:00 PM; d-this condition is repealed; but otherwise continues in full force and effect.  
LPA recommends APPROVAL of Condition #26, as written.  
LPA recommends APPROVAL of Condition #27, as written.  
LPA recommends APPROVAL of Condition #28, as written.  
LPA recommends APPROVAL of Condition #29, as written.  
LPA recommends APPROVAL of Condition #30, as written.  
LPA recommends APPROVAL of Condition #31, as written.

**Deviations:**

LPA recommends DENIAL of Deviation #1.

LPA recommends DENIAL of Deviation #2.  
(Lengthy discussion ensued about adding spaces and the Code requirements for parking.)  
LPA recommends ELIMINATION of Deviation #3.

**Recommended findings and conclusions:**

1. The requested amendment to the Commercial Planned Development (CPD) zoning district, as conditioned, DOES comply;
2. The proposed use or mix of uses as conditioned above IS appropriate at subject location;
3. Sufficient safeguards to the public interest ARE provided by the special conditions to the concept plan or by other applicable regulations;
4. All special conditions ARE reasonably related to the impacts on the public's interest created by or expected from the proposed development;
5. The proposed use MEETS all specific requirements of the Comp Plan that are relevant to the requested planned development, such as the following policies:
  - Comp Plan Policy 4B4
  - Comp Plan Policy 4C3
6. **A-Regarding requested Deviation #1**, the LPA recommends DENIAL of this deviation.
  - a. Deviation #1 DOES NOT enhance the achievement of the objectives of the planned development; and
  - b. The general intent of LDC Chapter 34 to protect the public health, safety and welfare WILL NOT be promoted by Deviation #1[as modified] and;
  - c. Deviation #1 DOES NOT OPERATE to the benefit and MAY OPERATE to the detriment of the of the public interest; and
  - d. Deviation #1 IS NOT consistent with the Ft. Myers Beach Comp Plan.**B-Regarding Deviation #2**, LPA recommends DENIAL of this deviation.
  - a. Deviation #1 DOES NOT enhance the achievement of the objectives of the planned development; and
  - b. The general intent of LDC Chapter 34 to protect the public health, safety and welfare WILL NOT be promoted by Deviation #1[as modified] and;
  - c. Deviation #1 DOES NOT OPERATE to the benefit and MAY OPERATE to the detriment of the of the public interest; and
  - d. Deviation #1 IS NOT consistent with the Ft. Myers Beach Comp Plan.

**2 MINUTE RECESS**

**MOTION SECONDED**-by Mr. Mandel;

**Discussion:** Ms. Shamp stated that she took this matter very seriously and that this was a very difficult issue for her; other members agreed with her comments.

**VOTE:** Motion carried 5-0.

**Hearing closed-DCI2006-0001 and DCI 2006-0002-White Sands, Captiva Villas and Bayside CPD Zoning Amendments**

**MOTION TO ADJOURN:** by Ms. Kay;  
Seconded by Mr. Mandel.  
**VOTE: 5-0.**

**VII. ADJOURNMENT**  
Adjourned at 6:31 PM.

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Dennis Weimer, LPA Chair

- End of document



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**June 23, 2009**

FORT MYERS BEACH  
 LOCAL PLANNING AGENCY (LPA)  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
 June 23, 2009

- Contact Us
- Request for Action
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- Weather & Tidal Info
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**AGENDA [all time frames are informational and approximate]**

- 
- 10:30 AM
- I. Call to Order
  - II. Pledge of Allegiance
  - III. Invocation
  - IV. Town Capital Improvement Program (CIP) Items 5 minutes
  - V. Administrative Agenda
    - A. Presentation regarding proposed LDC amendment to add Section 14-12, regarding beach furniture and equipment vendors (Keith Laakonen, Environmental Science Coordinator and MRTF staff liaison) 60 minutes
    - B. Resolution 2009-11 LPA Appreciation of Evie Barnes 5 minutes
    - C. Resolution 2009-12 LPA Appreciation of Joe Yerkes 5 minutes
    - D. Update on impervious connections to the ROW (Shamp/Van Duzer) 15 minutes
    - E. LPA Policies and Procedures Manual Updates 15 minutes
    - F. Schedule workshop date with Town Council (verbal) 15 minutes
  - VI. Adjourn as LPA, reconvene as HPB
  - VII. Public Hearing
    - A. COA2009-0001 "The Cottage" Special certificate of appropriateness (continued at applicant's request from April 14, 2009) 15 minutes
      - Resolution from April 14
      - Original Staff Report from March 10 (also included denied demolition request)
      - Original Application (also included denied demolition request)
  - VIII. Administrative Agenda
    - A. Report on status of "historic vistas" project development (R. Kay) 15 minutes
  - IX. Adjourn as HPB, reconvene as LPA
  - X. LPA Member Items and Reports 15 minutes
  - XI. LPA Attorney Items 5 minutes
  - XII. Community Development Director Items 5 minutes
  - XIII. LPA Action Item List Review 10 minutes
  - XIV. Public Comment
- Adjourn no later than 4:00 P.M.
- Next Meeting: July 14, 2009, 10:30 AM

**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, June 23, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 10:30 AM by Chairperson Weimer. Six members present:

Dennis Weimer  
Rochelle Kay  
Bill Van Duzer  
Joanne Shamp  
Joe Yerkes  
Carlton Ryffel – New member

Staff present: LPA Attorney Ann Dalton; Staff member Keith Laakonen; Members of the public and press were also present. Mr. Weimer introduced Mr. Carlton Ryffel as the newest member of the LPA and thanked him for joining the members in service to the people of the Town of Fort Myers Beach.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION - Mr. Dennis Weimer**

**IV. ADJOURN AS LPA/RECONVENE AS HPB**

**Motion: Ms. Shamp moved to adjourn as the LPA and reconvene as HPB for hearing;**  
**Seconded by Mr. Mandel;**  
**Vote: Motion passed 6-0**

Ms. Shamp opened the meeting of the HPB at 10:34 AM, with all members present, and opened the hearing.

**V. PUBLIC HEARING**

**A. COA2009-0001 “The Cottage” Special Certificate of Appropriateness (Con’t. at applicant’s request from April 14, 2009)**

Ms. Shamp opened the hearing and polled members as to any ex-parte communications regarding this matter. Mr. Weimer stated that he had; no other

members had any communications. Ms. Dalton swore witnesses. Theresa Schober, applicant, addressed the HPB. She gave a summary of the events since the last hearing, including Council's instruction to issue an RFP for relocation of the building from the property. Deadline was June 1, 2009 and no proposals were received so the Council suggested that staff withdraw the application for COA to relocate the cottage.

Mr. Weimer asked if the HPB had actually denied the request for this. Ms. Dalton updated the LPA, referring to prior applications and paperwork included in the packets of information. Ms. Dalton added that the HPB has already denied the application for demolition so this hearing today is only regarding the application for relocation.

**Open public comment.**

**No comments.**

**Closed public comment.**

Mr. Mandel asked what happens next. Ms. Dalton referred to Dr. Shockey's memo from June 18, 2009, in which it is indicated that the applicant may come forward with another COA for an alternative.

**Motion: Mr. Van Duzer moved to acknowledge the withdrawal of the application.**

**Seconded by Mr. Ryffel;**

**Vote: Motion passed 6-0**

Ms. Shamp closed the hearing at 10:43 AM.

**VI. ADMINISTRATIVE AGENDA**

**A. Report on Historic Vistas**

Ms. Kay presented photographs from the historic information kiosks projects in Boulder CO for consideration by the HPB. She had talked about these at earlier meetings as being attractive possibilities for displaying information at the historic locations on the beach. Ms. Shamp referred to the HAC meeting and reported that the minutes from that meeting reflect that the Estero Island Historical Society is very concerned about the lack of progress in any historical preservation efforts on the island. They were also concerned that the plaque and brochure program has stopped at staff level and that nothing is being done. Due to that, these members do not want to continue attending HAC meetings until some progress can be made. Ms. Shamp agreed with that feeling and expressed her opinion that preservation efforts should be moving forward.

**Motion: Mr. Weimer moved to adjourn as the HPB and reconvene as the LPA;**

**Seconded by Mr. Mandel.**

**Vote: Motion passed 6-0**

**VII. ADJOURN AS HPB; RECONVENED AS LPA**

Mr. Weimer reconvened the LPA at 10:48 AM.

## VIII. TOWN CAPITAL IMPROVEMENT ITEMS

Nothing to report.

## IX. ADMINISTRATIVE AGENDA

### A. Presentation regarding proposed LDC amendment to add Section 14-12 regarding beach furniture and equipment vendors (Keith Laakkonen, Environmental Science Coordinator and MRTF Staff liaison)

Keith Laakkonen addressed the LPA and presented a review about the issue and referred to the packet of information distributed. Ms. Dalton advised that if the Town moves forward with an agreement between the vendors and the Town, she suggested that the LDC sections be modified to incorporate all the requirements that would be set forth in the agreement, so that all regulatory references match.

Mr. Hester addressed the LPA on behalf of MRTF and referred to the hand-outs. He clarified dune lines on the beach for removing furniture during turtle season and possible vendor exceptions. Ms. Shamp asked about vendor requirements for insurance and asked for a copy of the agreement; Ms. Dalton made copies to distribute.

Ms. Kay asked what was referred to the LPA by Council and Mr. Laakkonen replied that it is actually Sec.14-12, beach furniture and equipment licenses and said that it solidifies certain things required of those holding licenses and limits the number of licenses to 14, requiring a Lee County Occupational License and liability insurance, naming the Town on the insurance as an additional insured. He said it further stipulates how far beach equipment should be from the beach, what should be done with trash receptacles, etc.

Mr. Mandel asked about fees. Mr. Ryffel asked where the number of 14 licenses came from and Mr. Hester responded with the numbers related to the existing vendors. Chris Weber, Mid Island Water Sports, addressed the LPA and said that there are eleven vendors on the island but twenty-five properties. He pointed out that this amendment would require each property to have its own license and that there are only two of them that just rent chairs at this time; others also rent personal watercraft or offer parasailing. Discussion ensued regarding the licenses and insurance, as well as the confusion with proposed Section 14-12 and the relationship between "agreements" and licenses

Mr. Weimer asked if the issue in Section 14-5 was people not having an acceptable place to move their furniture to, why create a licensing law instead of revising the Section 14-5 to make the requirement adjustable to address turtle season. Mr. Hester agreed that it might have been a better idea; however, after reviewing all of these issues, there were too many different circumstances to take into account. More discussion ensued.

Mr. Van Duzer pointed out a conflict in the section dealing with trash receptacles and

suggested this go back to Council and MRTF to clarify.

**Open public comment.**

Ms. Sharon Faircloth, Holiday Water Sports, addressed the LPA. She has a few locations on the beach which rent furniture, along with other concessions. She referred to Section 14-12 about licenses and expressed her displeasure in having to have another license. She also was not happy with the agreement and said it needs work, pointing out that there is already a stipulation in the ordinance which creates a way for a vendor to obtain an exception. Mr. Ryffel suggested that this be revisited when all documents are available to review.

Ms. Gabrielle Hickey, Gulf Coast Cabana, agreed with Ms. Faircloth that if the LPA is only looking at the proposed language for Section 14-12, they are in agreement. However, the additional documents attached are still troubling to the business owners and, she said, these are the reasons why it was not passed the last time. She agreed that the number 14 was arrived at because there were 14 original vendors at the meeting where the change was discussed; not any of the attached items were discussed at that meeting. Ms. Kay asked which specific parts of the agreement would be offensive to Gabrielle. She responded that she doesn't like the part that says it has to be looked at year to year and photos must be taken at specific sites, etc.

Chris Weber again addressed the LPA and said that he agrees with these other people in agreeing with the initial change but not the attached agreement. He specifically mentioned the trash cans and the setback limit, adding that most businesses comply and respect the restrictions now, especially regarding the sea turtles, but changing to the proposed amendments would add ridiculous restrictions to everyone. He suggested this go back to MRTF and schedule workshops to come up with amicable conditions and changes.

Ms. Shamp asked if putting a limit on licenses is legal. Ms. Dalton agreed that using some random number for limits on licensing is legally dangerous. Mr. Mandel asked if there was some attempt here to form a "line" on the beach during the day, one at night, a safe trash can area for sea turtle times and is the rationale for the license to make vendors have insurance. Mr. Hester agreed that the daytime and night lines are being asked for to make the same guidelines for everyone and protect the sea turtles. In addition, the trash cans are an obstacle for the turtles as well. More discussion ensued.

Mr. Ryffel agreed that limiting licenses to an arbitrary number is dangerous. Mr. Weimer suggested that 14-5 could be modified to satisfy this problem.

**Closed public comment.**

**Motion: Mr. Weimer moved that this issue be placed on the agenda for the second meeting in July with direction to Town staff to include the following items in the LPA packets:**

- Updated copy of the LDC Section 14-5
- Workshop notes from MRTEF
- Minutes from Town Council meeting at which this was referred to LPA
- Outline of the issues staff feel need to be addressed in modifying 14-5 or 14-12

Seconded by Mr. Van Duzer.

Vote: Motion passed 6-0

B. Resolution 2009-11 LPA Appreciation of Evie Barnes

Motion: Mr. Van Duzer moved to adopt the Resolution.

Seconded by Mr. Mandel.

Vote: Motion passed 6-0 (Mr. Mandel will deliver)

C. Resolution 2009-12 LPA Appreciation of Joe Yerkes

Motion: Mr. Van Duzer moved to adopt the Resolution;

Seconded by Ms. Shamp.

Vote: Motion passed 6-0 (Ms. Kay will deliver)

D. LPA Policies and Procedures Manual Update Proposal

Mr. Weimer pointed out that the prior decision of the LPA to have members meet with staff on a monthly basis about developing items for the Capital Improvements Plan was reversed after the CIP workshop, so he proposed that it was no longer needed and asked that it be removed as a line item on the agenda. He also proposed to change the procedures for land use hearings to have swearing in done at the beginning, before affidavit of publication.

Motion: Ms. Shamp moved that the manual be updated to comply with Mr. Weimer's proposals; Seconded by Mr. Van Duzer.

Vote: Motion passed 6-0

E. Schedule Workshop Date with Town Council (verbal)

No dates set but Mr. Weimer will follow up to schedule this.

**RECESS FOR LUNCH**

**RECONVENE LPA AT 12:47 PM**

F. Update on Impervious Connections to the ROW (Shamp/Van Duzer)

Mr. Weimer brought the members up to date about what this is and what has been done then turned it over to Mr. Van Duzer.

Mr. Van Duzer reported that they were mainly focused on residential driveways and how they cross from private property into the ROW to connect to the pavement of the road. He said that they discussed the sizes of driveways and how they affect the ROWs, and the issues involved in setting the maximum sizes. Ms. Shamp's report

suggests the maximum widths of driveways should be limited where they cross the ROWs and determined by percentage of the lot area or length of frontage, etc. Discussion ensued regarding water retention and the ROWs.

Cathie Lewis, public works staff, addressed the LPA and stated that the county has not been consistent in the manner in which they have managed driveway permits at the beach. She agreed that driveway minimums and maximums should be instituted to set limits and drainage at the front of properties. She suggested that there are situations wherein culverts may be necessary under the driveway aprons and not just swales. Mr. Weimer asked what determines the necessity of a swale and Ms. Lewis responded that there are some cases when a swale would need to be so deep to work, it would be better to install a pipe. Discussion ensued regarding changes to the LDC to address these issues. Ms. Lewis advised that the Storm Water Master Plan is nearing completion and, once done, it should give guidance to make these changes easier.

Ms. Shamp asked how swales will impact the areas and bike lanes and other appearance issues. Ms. Lewis said that there are many ways to do this and keep the aesthetics in place while allowing residents to keep more of the storm water on their property.

Mr. Ryffel wondered how the Town will hold water on the properties that are already developed. Ms. Lewis said that the redevelopment of properties would be affected more so than those already established except that this will help those residents who are looking for ways to improve the water retention on their properties. She said that there are two different issues here: one within the public ROW and the other on private property, so that the Town would not be installing swales on private property but residents could come to the Town for help if they wanted to improve their water retention problems on their own properties. Mr. Ryffel argued that certain restrictions should not be made when deciding the width of driveways. Discussion ensued regarding the methods available, etc.

Mr. Mandel asked what happens once the studies are done. Ms. Lewis answered that the Town currently issues about three permits a week and this is an opportunity to institute the new regulations in the LDC. She explained that North Estero Blvd. is a drainage project, to correct the flooring along N. Estero Blvd., so the drainage issues are paramount and the road construction aspect is secondary. She further explained how the drainage projects will work throughout the beach and more discussion continued about this. Mr. Mandel also asked who would be paying for the drainage system as part of the project. Ms. Lewis said mostly, all taxpayers in the town, but 75% of the drainage portion is paid by Hazard Mitigation Program grants through FEMA; the water quality part is funded by the SFL Water Management District. She said this would be the model for other parts of the island. More discussion ensued about driveway aprons and ROWs regarding swales.

Ms. Shamp asked if it would be helpful if the LPA immediately established a basis for restrictions by saying the driveway specification in the ROW is a minimum of twelve

feet and not to exceed 20% of the property width. Ms. Lewis agreed that this would make a difference, with some additional language regarding impervious surfaces. Mr. Weimer concluded that the LPA needed direction from staff in the key points, being only driveway access, in the ROW, and anything else imperative at the moment. Mr. Van Duzer gave an example of how the county used to address this in the past and said that the Town could do this as well. He said that the LPA needs to set the parameters and the staff would need to inspect it before a permit is issued to put in the driveways. Much more discussion ensued about how this will be addressed.

Mr. Weimer stated the consensus that the LPA would like to have staff draft language to use as the change in the LDC and Ms. Lewis and Ms. Dalton agreed that Public Works would get the draft done, specifically addressing only residential at this time. Ms. Kay asked why the new driveways on Estero Blvd. are concrete and the answer was that it had to do with cost and convenience. She pointed out that this contradicts what they are talking about with drainage, pervious and impervious surfaces, and Ms. Lewis said that this is true but that every area is different, especially in situations where the quality of runoff water is an issue.

**X. LPA MEMBER ITEMS AND REPORTS**

Mr. Mandel reported continued work on the budget.

Ms. Kay asked about the rules for ex-parte communication regarding committees and projects and being approached, outside a meeting, by members of the public. Ms. Dalton explained this briefly, adding that there is no exact provision in the Town for LPA members, but that there are stipulations in the Code of Ethics as well as the county's codes. There was brief discussion about what types of things would not be looked at as ethical and some things to avoid. (NOTE: This subject is later discussed again, started by Mr. Ryffel, close to adjournment.)

No other items to report.

**XI. LPA ATTORNEY ITEMS**

Nothing to report.

**XII. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Nothing to report.

**XIII. LPA ACTION ITEMS**

**Resolutions to Town Council**

- Snug Harbor-continued to August 10, 2009 at 9:00 AM/Mr. Weimer
- Vacation Ordinance-TBD (Ms. Kay)
- Gulfview-TBD
- National Registry Letter-Ms. Kay reported on her meeting with Town Council wherein they decided that the HPB misperceived the potential to use funds for this and Mr. Weimer added that he researched this and it will again be addressed. Ms.

Kay also stated that there is still no finished brochure product yet.

- Historic Plaque Program-TBD
- Pink Shell Resort CPD to Council-Mr. Weimer

**Continued Hearings**

- The Cottage-TBD

**Future Work Activities**

- Rights-of-Way: regarding Impervious Surfaces/Residential-report on July 14th
- Storm Water-TBD
- Seasonal Parking-July 28, 2009
- Animal Control-July 14, 2009-review document
- Alcoholic Beverages-July 14, 2009
- Parcelization-TBD
- Future Review of SO Ordinance-July 14, 2009
- CIP Workshop-TBD
- LDC 14-12-July 14, 2009
- Review CIP-July 14, 2009
- Meeting schedule for the summer months: No meeting on July 28; August 11, 2009-OK; August 25, 2009-OK; September 15, 200-OK and September 29, 2009-OK.

Mr. Ryffel wanted to briefly talk about Ms. Kay’s questions about ex-parte communications and said that the County Commission had a rule, regarding zoning matters, that they will not allow themselves to be lobbied. They do not allow homeowners, etc. to approach them about zoning changes; however, they do have another process, the Lobbyist Reporting Law, which allows them to meet one-on-one with anyone about anything but zoning. He said they keep notebooks, including the dates, times and everything about the meetings. They then turn in the notebooks to be filed and these books are public record at any time. He asked that the LPA consider doing this and said that it would be considered true government in the “sunshine” and true transparency.

**Motion: Ms. Kay moved to adjourn;**

**Seconded by Ms. Shamp.**

**Vote: Motion passed 6-0**

**XIV. ADJOURNMENT**

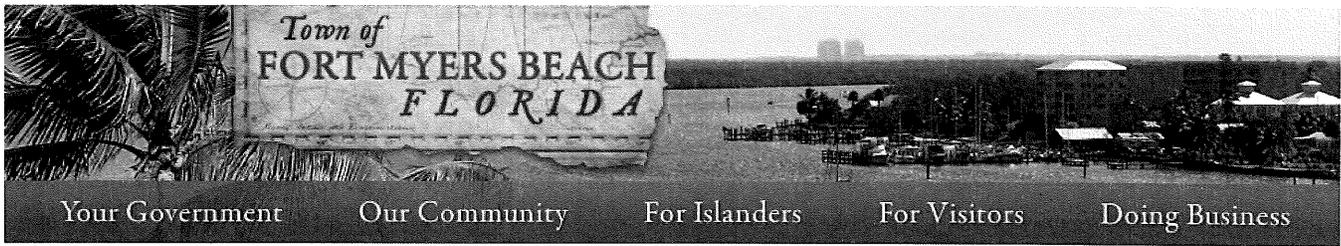
Adjourned at 2:27 PM.

Next meeting July 14, 2009 10:30 AM.

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Dennis Weimer, LPA Chair

- End of document



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**July 14, 2009**

FORT MYERS BEACH  
**LOCAL PLANNING AGENCY (LPA)**  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
 July 14, 2009

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**AGENDA** [all time frames are informational and approximate]

**10:30 AM**

- I. **Call to Order**
- II. **Pledge of Allegiance**
- III. **Invocation**
- IV. **Minutes** **5 minutes**
  - A. Minutes of February 24, 2009 LPA Meeting
- V. **Adjourn as LPA, reconvene as HPB**
- VI. **Public Hearing**

A. COA2009-0003 Special Certificate of Appropriateness for demolition of the structure known as "the Cottage" at Newton Park **30 minutes**

VII. **Adjourn as HPB, reconvene as LPA**

VIII. **Public Hearings**

A. DCI2009-0001 Newton Park CPD **90 minutes**

**Lunch Break**

- IX. **Administrative Agenda**
  - A. Discussion of revised draft Animal Control provisions **60 minutes**
  - B. Discussion of residential impervious surface connections in the ROW **30 minutes**
  - C. Discussion of amendment to LDC Chapter 14 to add Section 14-12, requiring licensing of vendors of beach furniture **30 minutes**
  - D. Discussion of Open Alcoholic Beverage Container provisions **30 minutes**
  - E. Discussion of Liquor Licensing provisions **30 minutes**
  - F. Discussion of Regulation of Sexually Oriented Business provisions **30 minutes**
  - G. Discussion of LDC Chapter 34 (Div 3, Div 5, Sub IV) provisions **30 minutes**
- X. **LPA Member items and Reports** **15 minutes**
- XI. **LPA Attorney Items** **5 minutes**
- XII. **Community Development Director Items** **5 minutes**
- XIII. LPA Action Item List Review **10 minutes**
- XIV. **Public Comment**

**Adjourn no later than 4:00 P.M.**  
**Next Meeting:** August 11, 2009, 10:30 AM

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**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, July 14, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 10:35 AM by Chairperson Weimer. Six members present:

Dennis Weimer  
Rochelle Kay  
Bill Van Duzer  
Joanne Shamp  
Joe Yerkes  
Carlton Ryffel – New member

Staff present: LPA Attorney Ann Dalton; Community Development Director Dr. Frank Shockey, staff member Keith Laakonen; Members of the public and press were also present.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION - Mr. Dennis Weimer**

**IV. MINUTES**

**Motion:** Mr. Van Duzer moved to adopt the minutes of the LPA meeting of February 24, 2009

Seconded by Ms. Shamp;

**Vote:** Motion passed 6-0

Administrative Note: Mr. Weimer reported that there was a request to postpone the Public Hearings until after noon and move instead to the Administrative Agenda. Ms. Shamp noted possible opposition from the public and asked if the LPA could hear comment from the public regarding this decision. Ms. Dalton answered with the legal issues involving this and there was discussion. Mr. Van Duzer suggested opening the hearing with only the public comment portion, and then continuing it later.

**Motion:** Mr. Van Duzer moved to adjourn as the LPA and reconvene as the HPB;

Seconded by Ms. Kay.

**Vote:** Motion passed 6-0

**V. ADJOURN AS THE LPA- RECONVENE AS HPB**

**VI. PUBLIC HEARING**

**A. COA2009-0001 “The Cottage” Special Certificate of Appropriateness for Demolition**

Ms. Shamp opened the public hearing at 10:42 AM, with all members present. She asked for any ex-parte communications from members. Mr. Van Duzer stated he has had numerous people talk to him about this issue, informally, and said he did not give his opinions. Ms. Shamp stated she had one resident approach her with an opinion. Mr. Mandel had a family member of the former owner comment to him. Mr. Weimer said he has had some communication through his involvement in a committee dealing with future uses of these properties, but felt that this has no bearing on his ability to deal fairly in this hearing. Ms. Dalton swore in the witnesses. Ms. Shamp asked for the Affidavit of Publication. Dr. Shockey stated that the affidavit was not yet available but Town Clerk attests that the ad ran in News-Press last week. He also stated that the applicant was notified by certified mail, return receipt requested.

**Open public comment.**

Herb Acken addressed the HPB as a private citizen and supports retaining the Cottage. He stated that the Town does not have many real assets and there may be a need to use other buildings in the future, so the building should be preserved for at least that reason. He suggested putting the building on Ebay for sale. He also stated that this is an historic building, as well as an asset of the Town.

Lee Melsek, Ft. Myers Beach, addressed the HPB, once again reporting that the categorizing of this structure, in the first place, as an historic place was erroneous, since the property was not built on the beach and is not beach architecture. He further stated that the only criterion that it does meet for the “historic” designation is that it is more than 50 yrs. old. He said that the state has already said it is not historic, the Town Council has said it is not historic; in view of the current financial burdens, he feels there is no reason to spend more money in saving a structure that has no relationship to island history. He criticized the HPB for wanting to keep the building. He said “it’s time to get rid of the building called ‘The Cottage’ and get on with developing Newton Park.”

**No further public comment.**

**Motion:** Mr. Weimer moved to continue this hearing until noon and including continuation of public comment then.

Seconded by Mr. Ryffel.

**Vote:** Motion passed 6-0

Ms. Shamp closed the hearing and asked for motion to adjourn.

**Motion:** Mr. Van Duzer moved to adjourn as the HPB and reconvene as the LPA.

Seconded by Mr. Mandel;  
**Vote:** Motion passed 6-0

**VII. ADJOURN AS HPB-RECONVENE AS LPA**

Mr. Weimer reconvened the LPA at 10:56 AM.

**VIII. ADMINISTRATIVE AGENDA**

**A. Revised Animal Control Provisions**

Mr. Weimer referred to the June 4<sup>th</sup> Memo by Dr. Shockey (in packets), regarding modifications in the proposed ordinance.

Mr. Van Duzer referred to a recent memo of July 6, 2009, from the Town attorney, as a suggestion by the county that the Town adopt the county ordinance as its own and make whatever changes they see fit; he suggested a discussion of that possibility. Ms. Shamp said that that this was also the recommendation of the Town Council last year and she agrees with Mr. Van Duzer's suggestion to take a bit more time to finalize this.

Mr. Mandel said that there is \$66,000.00 charged by the county to the Town for current control. He feels that this is too much money to pay for the service. Mr. Weimer also agreed with this suggestion and wants to incorporate the state, county and local ordinance contents into a workable one for the beach. He asked staff's opinion on going back again and studying the revised county ordinance. Dr. Shockey said that he had looked at changing the ordinance in a way that the town would have the option to employ the county to enforce the ordinance without conflicting with their procedures, or to employ someone else, without having to change the ordinance to have that flexibility.

Mr. Weimer again asked if it is better to take the county ordinance and tweak it with the couple of items that the LPA has come up with, or to have an ordinance that starts with the state law provisions, includes requirements similar to the county's, and then includes the Town's own concerns. Ms. Dalton stated that it is basically a policy issue. She then tried to explain that the county's position is that much of the \$66,000.00 is the overhead cost of taking on the Town's enforcement. She said that she and Mr. Janke have been working on this and one of the options they've come up with for the Council is to have *no* ordinance, pointing out that the Town now has three animal control ordinances that are somewhat redundant. So, repeal of all of the ordinances and doing nothing is an option but would cause portions of the state law, like dangerous dogs, etc., to be subject to enforcement by the sheriff. Theoretically, the Town would not be charged for the service because the sheriff is required by state law to enforce state law; the sheriff charges when they must enforce Town ordinances. She said that the bad side of this is not knowing what priority the sheriff would give to this and the Town may not be happy with their service, or lack thereof. Ms. Dalton said the second option being proposed by the county is using their ordinance because they feel that doing so would streamline their procedure and enforcement since it would be the same here as it is in many other communities. The county has requested that the ordinances all stay consistent so that their officers can

open to a section in the Town's code and have it read the same as that same section in the county code.

Mr. Weimer said that he still feels that the LPA is "not taking care of business" by adopting the county ordinance and not dealing with beach-specific animal concerns. Mr. Mandel asked if the Town would still need to pay the \$66,000.000 if the Town did not adopt the county ordinance at all and, instead, relied totally of the state. Ms. Dalton explained that by having any ordinance, the county's services would be required for some form of enforcement. Dr. Shockey expanded on her explanation, saying that if there is a state law, there are provisions within that state law process for someone to go to court regarding the ordinance violation and county animal control officers, but not municipal animal control officers, can investigate violations of state law. By having a local ordinance the county can choose to handle the violations by civil citation instead.

Mr. Ryffel asked a few questions for clarification, as to where the modifications came from and why there are a few specific items; Dr. Shockey explained. Mr. Ryffel then asked if the county would have to review the Town's suggestions for revised ordinance before passing/approving it. Ms. Dalton replied that this was a sovereign immunity issue and that the county would enter into a contractual situation with the Town, agreeing to take the Town's ordinance and enforce it, but the county does not have to sign off on it. Mr. Ryffel suggested that the LPA deal with the county's request by taking the staff suggestions for local issues and incorporating them into the county ordinance.

Mr. Weimer said that the whole problem leading up to this is that the county was not enforcing what existed at the time and did not want to enforce additional things the Town wanted. He said the first short-term animal control ordinance that the LPA recommended be passed would have given the Town the right to make a decision as to who would enforce it. He said that if the Town goes with the county ordinance, it is right back at the same point it was a year ago. Ms. Dalton stated that the Town could take a "skeleton" of the county ordinance and add the other pieces to it; she agreed that adopting the county ordinance as-is would "awful."

Mr. Weimer recalled the items put into the proposed short-term ordinance back in November 2008 and said the main thing was to give the Town the ability to separately contract with someone that would enforce the ordinance on the beach. He also added that they wanted a leash requirement, a leash length requirement, a "clean up" requirement and to give the Town the right to address other animals that are not even covered in the county's ordinance.

Dr. Shockey and Ms. Dalton agreed that the easiest and most efficient way to address this is to take the county ordinance, strip out what the Town does not want and add in what it does want. Ms. Shamp said that she would also like to add something about animals in the dunes and asked the staff Environmentalist, Keith Laakonen, if there was anything else he would like to see included. Mr. Laakonen felt that the terms "pets" and "dogs" should be clarified and signs be specific to restrict all pets from certain areas.

Mr. Ryffel referred to the “17 pg. document” in the packets and asked if it included all of the appropriate regulations of the ordinance and whether it is the document for review. Mr. Weimer again asked which would be the best method. Ms. Shamp opined that the Town cannot address animal control cheaper than the county method and thought that one LPA member should work with Dr. Shockey to start with the county ordinance, add in what the Town wants, remove the rest and go from there. Mr. Mandel agreed and added that there should still be negotiation with the county for a lower price, but if not possible, perhaps add in some type of penalty for non-compliance. He pointed out that there are no remedies for the county’s lack of response and/or enforcement and there should be something for that amount of money. Discussion ensued about the additional county issues and the Town issues.

**Motion:** Mr. Van Duzer moved that the LPA direct staff to adapt the county ordinance, including wording required to address the additional items suggested, and move it forward to a hearing of the draft ordinance.

Seconded by Ms. Kay;

**Vote:** Motion passed 6-0.

**Motion:** Mr. Van Duzer moved to adjourn as the LPA and reconvene as the HPB.

Seconded by Mr. Mandel.

**Vote:** Motion carried 6-0.

#### **IX. ADJOURN AS LPA; RECONVENE AS HPB**

##### **A. Continuation: COA2009-0001 “The Cottage” Special Certificate of Appropriateness for Demolition**

Ms. Shamp called the continuation of the hearing to order at 11:52 AM, with all members present. Ms. Dalton swore in witnesses. Ms. Shamp asked the applicant to present its case.

Town Manager Scott Janke, addressed the HPB, representing the applicant along with Theresa Schober and Councilmember Raymond. Mr. Janke gave an overview of the matter, stating that Ms. Schober would elaborate. He said that the deadline for razing the Cottage is Oct. 1. The Town did issue an RFP for relocating the Cottage with no response received.

Ms. Schober referred to the application in the packets which is for certificate of appropriateness for the Town to demolish the Newton Cottage. She said the property consisted of six lots and was acquired with assistance from FL Communities Trust and Lee County. She restated the initial intention of the acquisition, which was to develop a beachfront park with interpretive signage on environmental and cultural themes, to provide restroom facilities and community meeting space. The Town has been seeking alternative locations for the remaining structures, without success. On April 8, 2009, the Town issued an RFP for interested parties to purchase/take over the property, with unsuccessful results. She added that demolition is allowable under the acquisition guidelines, according to the state. The applicant requests that the HPB concentrate on the adaptive reuse of the Newton estate, thereby going ahead with demolition of this structure to provide more resources for the remaining property and

use by the community.

Ms. Kay asked about the errors in the original application for designation and asked what they are. Ms. Schober referred to the "existing conditions" area of the applicant's narrative, included in packets, where there are several points to address this, i.e., the family didn't own the building until the 1970s, the building is not 1940's construction, as indicated, etc. Location of origin and history cannot be documented.

Council Robert Raymond addressed the HPB as a representative of Town Council. Mr. Raymond stated that he has an architectural report done for the Town in March of 2007 on the Newton Park property. He referred only to the part that pertains to the Cottage. The report states that the Cottage was present as early as 1944, having been moved here from elsewhere. The report also supports that the Cottage is not historically relevant and it does not illustrate any history. He continued to read from the report (included in the HPB packets). In summary, he expressed the feeling of the Council in that they want to get the Newton property up and running as a useful, enjoyable part of the Town as soon as possible.

Mr. Weimer asked Ms. Schober if there was any estimate to move the Cottage. She said the only one she was aware of was an estimate to move it to Connecticut St., at a base price of \$263,000, not including costs from FPL and other utilities. There was some discussion about additional and specific costs, mostly included in the report.

Mr. Weimer asked what steps are necessary to proceed, should the HPB approve demolition. Ms. Schober said that the FL Communities Trust gave specific steps to follow (in the packets of information) in the event this is the decision. She did not see any problems in proceeding with the HPB's decision.

Ms. Kay asked for the management plan and the razing of the property. Ms. Schober said there are issues like hazardous materials to deal with and these have not been estimated yet. Mr. Janke added that, if demolition is granted, the Town would contact the fire company to see if they would help and use the site as a training place.

Ms. Shamp asked Ms. Schober if, in her expert opinion, relocation has been shown to not be feasible based on no response from the RFPs, efforts to relocate by the state or county at Edison, that the structure may have some issues regarding its ability to be moved because the walls may be weak, and that the cost involved in moving it to Connecticut St. and the fact that it is not significant on state or federal level. Ms. Schober stated that the Town hasn't formally had a structural evaluation so she cannot speak about that. Ms. Shamp then asked if the cost to rehabilitate is not feasible based on the architectural report, which estimates the costs of repairs to be \$110,000.00. Ms. Schober did not agree with that cost and said that there are other estimates which are, unfortunately higher. Ms. Shamp asked if the cost of rehabilitation might not be justified according to the lack of historical significance due to errors in the original historic designation report. Ms. Schober did not wish to act as an expert for the LPA today. She said that the applicant has proposed that the

costs are too high for budgeting at this time; the applicant has a goal for the property to be open park space and this building is not consistent with that goal. Ms. Shamp asked if there would be an attempt to auction or otherwise market some of the interesting parts of the building. Ms. Schober said that the Town has not proposed to do so.

Ms. Shamp asked for staff to present its case. Dr. Shockey addressed the HPB on behalf of staff. He said that staff's recommendation is to approve the demolition with some recommended conditions: the applicant must still comply with the provisions of the deed restrictions and obligations laid upon them by the state of Florida and its agencies; and the permit cannot be issued until an actual order has been issued by an appropriate governmental body or court. Dr. Shockey continued in his points dealing with the historical designation and referred to an architectural report, provided by the applicant, which agrees that the building is not "unique enough for the architecture to be the sole factor which determines significance." He also mentioned Exhibit A, a letter (in packets) from the director from the state division of Historic Resources, wherein he concurs with the architect's report stating that "because of extensive alterations, it is our opinion that this residence is not eligible for listing in the National Register of Historic Places." The Land Development Code includes criteria for issuance of a certificate of appropriateness in Chapter 22. The staff report addresses those criteria, one of which stipulates that the specific guidelines in the resolution that designated the historic resource must be followed. That resolution, FMBHD2004-02, attached as Exhibit B, does not include specific guidelines; so, staff recommends that the HPB find that the resolution does not contain guidelines related to the structure. In addition, the general requirement for issuing a certificate of appropriateness is that the Secretary of the Interior Standards for Rehabilitation of Historic Properties (also in packets-Attachment A) be followed; those standards are applicable to proposed rehabilitation projects, but this request is for demolition. The staff recommendation here is that these standards do not apply to the request, which is for demolition. The last set of criteria in Chapter 22 contains specific criteria to be considered before the HPB can issue a special certificate of appropriateness for demolition. Dr. Shockey recited these criteria and referred to the staff report (in packets) which addresses this and the other criteria in Chapter 22. Overall, Dr. Shockey stated that the staff recommendation is supported by the findings of the architect that the structure is not sufficiently historic from an architectural perspective to warrant preservation, and that the historic value of the property will be preserved through the rehabilitation and reuse of the "Seven Seas" building within the Newton Park property. The staff recommendation is approval, subject to the conditions, with the request that the HPB enter the report and its attachments and exhibits as staff's additional testimony in this matter.

**Public comment opened.**

**No comment in addition to earlier comments.**

**Public comment closed.**

Ms. Schober, on behalf of the applicant, concurs with the staff report. Ms. Shamp closed the testimony portion and asked for discussion.

Mr. Ryffel desired to move to approve the staff recommendation. This was corrected

by Ms. Dalton who advised that there is a resolution in the packet and Ms. Shamp offered assistance from Mr. Weimer to guide Mr. Ryffel.

**Motion:** Mr. Weimer moved approval of Resolution 2009-14, going through the whereas clauses and findings, and corrected the STRAP number to read 29-46-24W30080H.0030. The HPB APPROVES the issuance of a Special Certificate of Appropriateness for demolition of the subject property, subject to the conditions set forth. (“Whereas” clauses were stated for the resolution stated, including additional ones given by Ms. Dalton):

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The HPB finds that the building or structure IS NOT of such interest or quality that it would reasonably meet national, state or local criteria for additional designation as a historic or architectural landmark, pursuant to the requirements of LDC Section 22-104(d).
2. The HPB finds that the building or structure IS of such design, craftsmanship or material that it could be reproduced only with great difficulty or expense.
3. The HPB finds that the building or structure IS NOT one of the last remaining examples of its kind in the neighborhood, the town, county or the region.
4. The HPB finds that the building or structure DOES NOT contribute to the historic character of a designated historic district.
5. The HPB finds that retention of the building or structure WOULD promote the general welfare of the Town by providing an opportunity for the study of local history, architecture and design, or by developing an understanding of the importance and value of a particular culture and heritage.
6. The HPB finds that there ARE definite plans for reuse of the property if the proposed demolition is carried out.
7. The HPB finds that demolition of the designated building or structure HAS NOT been ordered.
8. The HPB finds that the criteria for issuance of a certificate of appropriateness pursuant to the requirements of LDC Section 22-101(b) HAVE been met by this application.

In addition, the staff report should be attached in the findings of fact.

Seconded by Mr. Mandel;

Ms. Shamp asked for discussion. Ms. Kay again stated her feelings that certain items in the Cottage should be preserved and that she still believes this is a historical building. Mr. Weimer also feels the same about the historic significance of the building but supports that the expenses on the part of the Town just to save the building would be a hardship that he cannot support. He feels that there could be future use of the building by the Town, however. Mr. Van Duzer also shares the feelings of Mr. Weimer and Ms. Kay, and he is saddened by having to make this decision. Mr. Mandel also is torn by this decision but realizes the financial strain on the Town in trying to save the structure. Ms. Shamp added that she too has a difficult time with this decision but is satisfied that there is no other answer, since the applicant was diligent in attempting to save the building and there is no other option. She agreed that trying to sell some of the valuable items in the

Cottage may help the Town in other ways.

**Vote:** Motion passed 6-0.

Hearing closed.

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

Second by Ms. Kay;

**Vote:** Motion passed 6-0.

**X. ADJOURN AS THE HPB AND RECONVENE AS LPA**

Meeting adjourned at 12:58 PM and recessed for lunch break.

**BREAK FOR LUNCH**

Reconvene at 1:41 PM.

**XI. PUBLIC HEARING**

**A. DCI2009-0001 Newton Park CPD**

Ms. Dalton swore in witnesses. Dr. Shockey presented that the affidavit was not available but the hearing was advertised at the same time and dates as the previous historic preservation hearing, and mailings were sent to surrounding neighbors. No members have had ex-parte communications but Mr. Weimer stated that he does participate in local government meetings wherein this subject is sometimes discussed. Mr. Weimer asked for the applicant to present its case.

Theresa Schober, Cultural Resources Director, addressed the LPA and had Greg Disario of David M. Jones Landscape Architects with her to give a joint presentation. Ms. Schober gave a brief opening statement to give the reasoning for the hearing. She said the Town is requesting to change the current zoning of the Newton Property at 4600, 4610 and 4650 Estero Blvd. from residential conservation to commercial planned development to support the intended uses of the property that are identified in the Town's grant agreement with FL Communities Trust and Lee County. She referred to the packet of information provided to the LPA members, including the warrantee deed, of which Exhibit B is the Town's grant award agreement, in the application it is Exhibit 7.71. This was included because it specifies the uses that were intended for the property which lead to the acquisition of the property with the grant funds. She read an example from the specifications "the project site shall be managed only by for the conservation, protection and enhancement of natural and historical resources and for passive natural resource based outdoor recreation which is compatible with" these and other related uses. Ms. Schober said that the CPD the applicant put together meets the varied activities that were intended for this property, such as picnic areas, nature trails, user oriented recreation facilities, etc. It will include signage on natural environments, educational classes, a staffed museum run by volunteers, protection of habitats, etc. Ms. Schober said that Supplement D details the variety of Comp Plan objectives that this project meets, which were part of the manner in which the Town received the funding. Ms. Schober presented a board with the listing of these uses for the audience to view.

She stated dates for the two public meetings in February 2009 wherein the public had opportunity to voice opinions and many attended and were supportive, giving input

for ideas. She said that much of the public comment is included in the application in the packets.

Ms. Schober gave a few of the uses for the property and said that the applicant's intention is that this will be a neighborhood park, less than one acre, which will provide recreational facilities to the public, it will provide access to the beach, the building is intended to be used for educational programs, public meetings, lecture and conference space and possible rental to commercial entities, etc. as included in the application. There is also proposed use for a retail store to sell Newton items, educational materials and other items to assist in costs. There is a proposed use for consumption of alcohol on the property for special receptions, celebrations and gatherings on a limited, case-by-case basis, to include beer and wine and not for everyday sale or use. She then introduced Greg Disario to present the Master Concept Plan and the Conceptual Site Plan but noted that the staff report had a few inaccuracies in it: pg. 5-6 a gazebo is mentioned but it is not intended for the property; the other issue is in Condition 7, pg. 3, the language in the citing of the LDC "Consumption of Alcoholic Beverages on Premises" only allows up to twelve events per year, but the applicant feels this is too low a number and more would allow for much more revenue for the project.

Greg Disario walked the meeting through the site layout (included in the packet of information). He pointed out highlights such as a future trolley stop at the location and parking issues to include a "one-way" circulation and turning the traffic to the side street so as not to need any more ingress from Estero Blvd. Mr. Disario talked about the proposed walkways and trails, with Bocce courts and picnic areas, handicapped accessibility to the property. Ms. Schober added there were five deviations proposed, which were summarized into three by Dr. Shockey, and these will be part of the MCP.

Mr. Mandel asked how many people would be attending events there and how that will affect the parking situation. She said that there are 19 spaces proposed, in addition to the dozen that exist at the Strandview access. The building is only 1700 s/ft. and there is more parking than is required for the uses.

Mr. Ryffel asked where the "consumption on premises" is on the property. She said it would be events with temporary permits allowing consumption inside and a limited area outside. He asked if this would then allow alcohol on the beach and Ms. Schober said it would not but deferred to Dr. Shockey to explain the details. Mr. Ryffel pointed out that there would be discussion about this subject later in the meeting and suggested that she may want to be part of that meeting since it will effectively impact her proposal. Mr. Ryffel asked and Ms. Schober agreed that these events would be "special" and require temporary permits and that there is no intention to have this option for "any time we feel like it" consumption events.

Ms. Kay asked how events and parties are compatible with the intended uses for the property pertaining to "preservation of natural resources, etc." Ms. Schober stated that these things were all discussed and reviewed by the FL Communities Trust and

have all been approved, noting that this would not be intended as a regular daycare but perhaps an occasional day camp for learning about the resources, etc. She said that the schedule of uses is identical as those for the Mound House, which include special alcoholic consumption on the premises.

Ms. Shamp asked what restrictions are in place at the Mound House. Ms. Schober said that the outside events could only be in conjunction with a permitted special event, which is the Town special event process. Inside there is no greater than a two-hour time period and limited to beer and wine. Ms. Shamp asked how the facility would be used for a special event at the same time as keeping the public area still open and public. Ms. Schober stated that there would be a type of cordoning off the "event area." She gave examples of other county sites that do this in a similar manner. Ms. Shamp also asked about the seawall and what would be in place to keep people from falling over. Ms. Schober said there is a proposed dune for the spot, referring to her visual aids, and added that there would be a security when people are actually present there. Mr. Disario addressed the question as well and described how the dunes proposed would help keep children safe on the property.

Mr. Ryffel asked if there were any plans for music/entertainment connected to weddings, etc. She said that these issues have not been fully addressed yet because those uses haven't been adopted by Council yet, but that they are not asking for amplified music there. He then asked what is on each side of the property and she pointed out the site on the diagram describing the residence and commercial properties.

Mr. Weimer had a concern about losing some parking on Strandview and Ms. Schober said that the net result would be more spaces. Mr. Weimer referred to the staff report, item 7 under "conditions" and then LDC Section 34-12-64(d); he asked what her recommendation would be. Ms. Schober said the applicant is only asking that this not be limited to twelve events annually for the site. Mr. Weimer only brought up the points already discussed by Ms. Schober, for clarification and these were repeated and made clear.

Mr. Mandel asked a question regarding permitting of these events to which Ms. Schober deferred to Dr. Shockey. Ms. Dalton intervened, citing Ordinance 97-5, the Town Parks and Recreation Ordinance, and read Section 13 *"a person under written contract with the Town may sell, serve and/or permit to be sold beer and wine at events designated by the Town, and persons may consume said beer and wine solely bearing on the premises on the premises only without violating the provisions of this section. Notwithstanding the foregoing, Council is hereby authorized to designate by resolution for a one-time event any recreation facility whereby the sale and consumption of alcoholic beverages may be allowed when the private group making application must secure a permit or license authorized by Chapter 561 and the Town manager may place restriction or limitation."*

Ms. Kay asked how the residents of the private home next to the property feel about

these proposals. Ms. Schober said they were actually in favor of this (Ashton family). Mr. Van Duzer commented that he personally knows the family and they have expressed to him how “tickled” they are to see this possible change take place, especially the traffic.

Mr. Weimer then asked staff to present its case. Dr. Shockey again briefed the audience as to the request of the applicant to rezone a bit less than .8 acres from RC to CPD, which would allow the schedule of uses for adapted reuse of the Newton Property and to allow some deviations for the LDC. Staff recommends approval of the request to rezone, with a series of conditions as noted in the staff report. He noted that on the MCP there are five deviations, some of which are related and can be dealt with by one simpler deviation. The first allows for the use of site development regulations that are specified in Condition 2 of the staff report. He gave the highlights of the deviations and asked for questions if there were any specific points he failed to make. He said the in the case of on-premises consumption of alcoholic beverages, there are state laws with which the applicant would need to comply, regardless of the Town’s decision, and this condition clarifies that this would still be the case and provides for temporary permits or a membership organization permit. He said that the limitation of twelve events per year is simply a code stipulation and could certainly be edited in this case, as long as state regulations were followed. Dr. Shockey continued to address each deviation and just gave main points, all in support of the rezoning for this property uses. He said that with the recommended limiting conditions, the request is all consistent with the recreation future land use category. He also said that there was no problem with the concern about the use of the word “gazebo” to describe a platform proposed to be located on the property since it does not matter if the structure there is a gazebo or platform, etc., as long as it complies with the building code requirements and the flood development regulations. Dr. Shockey then completed his testimony by asking the LPA to accept the staff report and all attachments as the remainder of staff testimony.

Ms. Shamp asked about the surrounding zoning. Dr. Shockey said the NW is RM; the SE is RC; across Estero is RPD and RM; SW is EC because it is the beach.

Mr. Weimer suggested adding a different term for the “gazebo” and Ms. Schober agreed, requesting that it just be changed; Ms. Dalton agreed to modify the language in the resolution.

**Public comment opened.**

**No public comment.**

**Public comment closed.**

Ms. Schober asked Dr. Shockey asked if there should be a change of the term “principal use” to “accessory” use so that there is no conflict. Dr. Shockey read from the definition and applicant agreed to change the word in the MCP.

Mr. Ryffel stated that he didn’t see a difference in calling the accessory structure a platform or a gazebo. Discussion took place about the word to use for this structure.

Mr. Weimer asked what language would need to be included in the resolution if the LPA would grant elimination of the limit of twelve events. Dr. Shockey agreed that there could be a specific number or it could be just left open. Mr. Weimer asked what the restrictions were at the Mound House.

Testimony portion closed; LPA discussion opened.

**Motion:** Mr. Ryffel moved to approve the rezoning aligned with the staff recommendations, except that the restriction on the number of temporary permits for alcoholic beverage service be removed.

Ms. Shamp strongly opposed the elimination of the number of permits. She said that they need to uphold the Comp Plan and the LDC and said she sees nothing in the Comp Plan about the Newton property in Policy 10D, where it is supposed to be an oasis park with interpretive rest facilities; the deed restrictions says “passive, natural resource based outdoor recreation compatible with the site..” She said that removing this restriction opens the property to more commercial use and less passive park, although she does support the “occasional” use of alcoholic beverages because this would be a nice Town resource for some events. However, she pointed out that she does not feel this would fit in with the intent of the Comp Plan , the intent of the deed restriction or the intent of a community park.

Ms. Kay said that she believes that, as a passive park many of the requests are not in line. Specifically, opening the limitation on the number of events would further her feeling of commercializing this area. She also said that “gazebo” is in the reports but she recommends that word be changed to “educational platform.”

Mr. Mandel said he just thought that, should there be a restriction, it should be made by staff at the time of permitting.

Mr. Weimer understands Ms. Shamp’s concerns but also pointed out that there are revenue opportunities to the Town and there would be limits as to who could use this property, and when they could use it, if restrictions were made.

Ms. Dalton requested adding a reference to Town Ordinance 97-5, in Condition 7, so that the language would read *“any on-premise consumption of alcoholic beverages must comply with all applicable provisions of state law and agency rules, as well as Town Ordinance 97-5, as amended.”* Inclusion of the Findings of Fact from the staff report would be #9, *“the findings of fact set forth in the staff report annotated SR, and provided to the LPA on the date of this hearing are hereby incorporated by references fully set forth herein, with the exception of the references of “gazebo,” pg. 5 and 6, to be modified to read ‘educational platform’.”*

Mr. Weimer asked for re-crafting of Conditions 7 & 8 for the resolution.

#### **Recess for drafting of the resolution.**

Ms. Dalton explained the changes and read them into the record, as above.

The resolution “whereas” clauses were read and accepted and the Recommended Findings and Conclusions were read separately and resulted as follows:

Item 1 wording is “IS CONSISTENT” and “COMPLIES”. In item 2 “there IS NOT

an error”; ITEM 3 is “there DO EXIST changes”; Item 4 is “uses IS appropriate”; Item 5 is “sufficient safeguards ARE provided”; Item 6 “all conditions ARE reasonably related”; Item 7 is “as conditioned, MEETS all performance”; Item 8a is “DOES”; 8b is “WILL” item 8c is “DOES operate” and “DOES NOT operate to the detriment”; Item 8d is “IS CONSISTENT”; and the LPA recommendation on each deviation 1—3 is “APPROVED.” Mr. Ryffel signified his agreement with these revisions.

**Motion seconded by:** Mr. Mandel;

**Vote:** Motion carried 4-2 with members Kay and Shamp opposed.

**Hearing closed at 3:20 PM.**

## **XII. ADMINISTRATIVE AGENDA**

Mr. Weimer directed the LPA’s attention to the item for discussion of the proposed LDC amendment to add Section 14-12 for licensing of beach furniture.

**A. Discussion of amendment to LDC Chapter 14 to add Section 14-12, requiring licensing of vendors of beach furniture.**

Ms. Shamp said that she does not like to see more regulations that cannot be enforced and that Section 14-12a1 is unnecessary and should be deleted; as well as 14-12b2, the refuse containers, should be amended. She also had conflict with where the chairs can be placed and can the vendors operate on state property. Mr. Laakonen agreed that they can.

Mr. Ryffel asked Ms. Shamp to clarify her concerns; she said that she wants to see the LPA approve 14-12a, but remove “or complimentary use” and move beach furniture vending license up to #1 (see packet information). Regarding the receptacles, she just wants clarification about “portable or fixed turtle friendly receptacles.

Mr. Mandel referred to a letter received from a citizen (vendor) which brings a question as to whether these restrictions border on restraint of trade. Ms. Dalton clarified for the audience that this is in reference from a Ms. Hickey of Gulf Coast Cabana Rentals, who is present. In the letter (included in the packets), she refers to PWVLs and PAL licenses, which are in the LDC, and said she did not know the legislative history of determining the numbers so she could not pass a judgment about restraint of trade. She added that the government maintains the ability to pass legislation, as long as there is a rational basis for it so, if there is a basis for the numbers, it is fine; if not, that would be a problem.

Mr. Weimer recalled that the LPA had asked for more information about what happened and why this had not been passed by the original Council and how it got resubmitted to the LPA. He said that research led him to the conclusion that the

original topic for discussion at that time was about raking and cleaning the beach. He said that somehow the furniture issue became part of it, when there is already a section in Sec. 14-5 which addresses this. He added that the last hearing produced information that the people who are supplying these services are currently getting occupational licenses and are living within the LDC. He feels that this whole item should be dismissed off of the agenda and the beach furniture issue is covered, not needing additional regulation. He further expanded to the insurance subject being raised and said it only got included when the talks turned to parasailing.

**Motion:** Mr. Weimer moved to dismiss the whole issue from the agenda.  
Second by Mr. Van Duzer;  
Dr. Shockley advised that the Town Council initiated the amendment process so he suggested that the LPA pass a resolution that they recommend this not be adopted to communicate why they have not held a hearing. Ms. Dalton advised that there is no need for a hearing if the LPA feels the issue should not be pursued. Mr. Weimer asked for public comment.

**Public comment opened.**

Mr. Charles Hester, Chair of the Marine Resources Task Force, addressed the LPA. He gave an overview of Section 14-12, saying that it is designed to alleviate the storage hardship for the properties which cannot meet the LDC off-beach requirements and the LDC says *“furniture must be removed from the beach between the hours of 9:00 PM and 7:00 AM, and put either behind the permanent dune line, or where the beach is wide and there is none, than 200 ft. from the mean high water line; or where the beach is narrow, to an adjacent permanent structure and landward of any seawall...”* etc. reading from the section and the point that the Town manager MAY adjust this. He said explained that MRTF began this and had protection of the sea turtles and beach life issues in mind.

Ms. Sharon Faircloth owner of Holiday Water Sports, agreed with the LPA and hoped that they go ahead with the dismissal of the issue. She added that the number limiting the operators of PWVLs and PALs originally was arrived at due to a safety issue.

Gabriel Hickey addressed the LPA: She told the LPA that she has minutes from the past meetings from Jan. 12 and March 29 a few years ago, wherein the number to limit furniture and equipment vendors was picked and it was because there were 14 vendors at the meeting but there are fewer now. She said that she stacks her chairs and asked if the LPA thinks it is not a safety issue if someone should knock the stack down and gets hurt. She said that she believes it is unfair for Mr. Weimer to decide to disregard the whole issue when at the last meeting all three of these vendors agreed on all of the suggestions except the added insurance.

Chris Weber, of Mid Island Water Sports at the Holiday Inn, addressed the LPA

and again said he didn't mind so much the requirement to be licensed but more so the additional "agreement" the surface at MRTF meetings. He said this is just a way to direct where the vendors can put their equipment and it becomes much more of a hardship. He said that all of the added permits are just adding more fees and hardships on the vendors.

Mr. Ryffel commented, for the record, that he had a brief ex-parte discussion about this a few weeks ago.

Resolution was drafted and approved by the members, to state that the LPA felt no further consideration of the proposed Section 14-12 was necessary.

**Vote:** Motion carried 6-0.

**B. Update on Impervious Connections to the ROW (Shamp/Van Duzer)**

Ms. Shamp reported that she got a date of Aug. 11, 2009 for having the recommended language for this item.

**XIII. LPA MEMBER ITEMS AND REPORTS**

Ms. Shamp asked for approval for the HPB to be heard first at the joint meeting with Council and asked if the Mayor could personally invite the members of the HAC. Mr. Weimer added that there is a joint meeting between the LPA and the Council on Sept. 17<sup>th</sup> from 9:00 AM to noon. Mr. Weimer requested that Ms. Shamp personally invite those members and advise them they will be first on that agenda. Discussion ensued about the regular meeting of the LPA that week; vote taken decided there would a regular LPA meeting immediately following the joint meeting on Sept. 17<sup>th</sup> and no LPA meeting on Sept. 15<sup>th</sup>. Mr. Mandel reported continued work on the budget. The water utility committee is also still moving ahead.

Mr. Weimer reported that he wrote to Mr. Janke concerning the LPA's desire to update the procedures manual in accordance with CIP process. He read the letter into the record (in packet). The decision was that there is no further action required since staff may bring CIP items to the LPA at any time.

No other items to report.

**XIV. LPA ATTORNEY ITEMS**

Ms. Dalton brought up a question asked by newest member, Mr. Ryffel: Is it necessary for LPA members to go through every piece of a resolution when making a motion? Ms. Dalton stated that if there is only a motion to approve zoning, there is nothing on the record indicating the findings of fact and it is necessary to put into the record what this body had determined so there is no guessing. She did clarify, however, that reading of all of the "boilerplate" language was not necessary, only the specifics of the language where there is a choice, the LPA's choice should be recorded.

Mr. Van Duzer asked the LPA to look at the Code of Ethics and read specifically #4: *"Members shall avoid the appearance of impropriety by refraining from engaging in private discussion with the applicant or their representatives about specific upcoming LPA agenda items."* He said he was concerned because he had been contacted by Pink Shell and asked to go there, as he was by the opposing sides as well, and he did meet with

all of them. He was not aware that this was an important ethical issue as long as he disclosed his ex parte communications. Mr. Weimer agreed that this is an important item to address and clarify in the near future.

**XV. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Dr. Shockey reported that ten plaques have been ordered. He also said that the brochures will be printed ASAP.

**XVI. LPA ACTION ITEMS**

**Resolutions to Town Council**

- Snug Harbor-continued to August 10, 2009 at 9:00 AM/Mr. Weimer
- Vacation Ordinance-Second hearing TBD (Ms. Kay)
- Gulfview-TBD
- Historic Plaque Program-on order; Ms. Shamp will set date-TBD
- Pink Shell Resort CPD to Council-Waiting for minutes; Mr. Weimer

**Resolutions**

- Town Council to have minutes for the Newton House issue on Aug. 17<sup>th</sup>.

**Motion:** Mr. Mandel moved that the requirement for approved minutes to be available before moving item to Council be waived.

Second by Ms. Shamp;

**Vote:** Motion carried 6-0.

- Resolution 2009-16-Beach Furniture to Council-Aug. 17<sup>th</sup>; Mr. Van Duzer

**Future Work Activities**

- Rights-of-Way: LDC proposed language-report on Aug. 11, 2009
- Storm Water-TBD
- Seasonal Parking-Sept. 29, 2009
- Animal Control-Proposed draft ordinance-Oct. 27, 2009
- Alcoholic Beverages-Aug. 11, 2009
- Parcelization-TBD

Mr. Weimer asked Dr. Shockey for a list for the next meeting for the expiring terms for the LPA members.

**Motion:** Ms. Shamp moved to adjourn.

Seconded by Mr. Mandel;

**Vote:** Motion carried 6-0

**XVII. ADJOURNMENT**

Adjourned at 4:25 PM.

**Next meeting August 11, 2009 10:30 AM.**

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Dennis Weimer, LPA Chair

- End of document



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**August 11, 2009**

FORT MYERS BEACH  
**LOCAL PLANNING AGENCY (LPA)**  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
**August 11, 2009**

- Contact Us
- Request for Action
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- Notify Me
- Weather & Tidal Info
- Emergency Prep

AGENDA	[all time frames are informational and approximate]
<b>10:30 AM</b>	
I. Call to Order	
II. Pledge of Allegiance	
III. Invocation	
IV. Minutes	<b>10 minutes</b>
<ul style="list-style-type: none"> <li>A. Minutes of <a href="#">June 9, 2009 LPA Meeting</a></li> <li>B. Minutes of <a href="#">June 23, 2009 LPA Meeting</a></li> </ul>	
V. Administrative Agenda	
<ul style="list-style-type: none"> <li>A. Review of <a href="#">FY 2009-2010 Capital Improvements Plan</a> for consistency with the Fort Myers Beach Comprehensive Plan <span style="float: right;"><b>30 minutes</b></span></li> <li>B. Discuss draft language for <a href="#">LDC Chapter 34, Article IV, Divisions 3 and 5</a> (carry over from July 14 LPA) <span style="float: right;"><b>60 minutes</b></span></li> </ul>	
<b>Lunch Break</b>	
<ul style="list-style-type: none"> <li>C. Discuss draft language for <a href="#">stand-alone liquor licensing ordinance</a>, <a href="#">open container ordinance</a>, and <a href="#">SOB ordinance</a> provisions (carry over from July 14 LPA) <span style="float: right;"><b>60 minutes</b></span></li> <li>D. Proposed concepts for residential driveway ROW connection standards <span style="float: right;"><b>15 minutes</b></span></li> <li>E. LPA PnP <a href="#">discussion on "code of ethics"</a> <span style="float: right;"><b>30 minutes</b></span></li> </ul>	
VI. Adjourn as LPA and reconvene as Historic Preservation Board	
VII. Administrative Agenda	
<ul style="list-style-type: none"> <li>A. The Plaques Have Arrived <span style="float: right;"><b>5 minutes</b></span></li> </ul>	

VIII. Adjourn as Historic Preservation Board and reconvene as LPA

IX. LPA Member Items and Reports 15 minutes

X. LPA Attorney Items 5 minutes

XI. Community Development Director Items 5 minutes

XII. LPA Action Item List Review 10 minutes

XIII. Public Comment

Adjourn no later than 4:00 P.M.

Next Meeting: August 25, 2009, 10:30 AM

**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, August 11, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 10:31AM by Chairperson Weimer. The following members present:

Dennis Weimer  
Rochelle Kay  
Bill Van Duzer  
Joanne Shamp  
Alan Mandel  
Carleton Ryffel was absent, and provided a reason

Staff present: LPA Attorney Anne Dalton; Community Development Director Dr. Frank Shockey. Members of the public and press were also present.

Mr. Weimer asked for an acceptance of the excused absence for Mr. Ryffel; all LPA members agreed.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION-Mr. Dennis Weimer**

**IV. MINUTES**

Acceptance of minutes from June 9, 2009 meeting.

**Motion: Mr. Van Duzer moved that these minutes be approved as written.**

**Seconded by Mr. Mandel**

**Vote: Motion passed 5-0**

Acceptance of minutes from June 23, 2009 meeting.

**Motion: Mr. Mandel moved that these minutes be accepted as written.**

**Seconded by Ms. Kay**

**Vote: Motion passed 5-0**

**V. ADMINISTRATIVE AGENDA**

**A. Review of the FY 2009-2010 CIP for Consistency with the FMB Comp Plan**

Dr. Shockey explained the LPA's responsibility to recommend to the Town Council

annually whether the CIP included in the proposed budget is consistent with the Comp Plan. He referred to the packet, Exhibit A, which is this year's proposed CIP, and the pages following, including the schedule of capital improvements that is included in the Comp Plan's Capital Improvements Element. The LPA is to review the proposed CIP and compare to the schedule, and may advise beyond that by suggesting further options, goals, etc. He also referred to a memo he passed out before the meeting which discussed some of the specific policies from other parts of the Comp Plan that established the desire for these capital improvement projects. Dr. Shockey recommended approval of the 2009-2010 capital improvements program, as it is, in his opinion, consistent with the comprehensive plan.

Mr. Weimer asked for member discussion of the proposed resolution.

**Motion: Mr. Van Duzer moved to adopt Resolution 2009-17**  
**Seconded by Mr. Mandel**

Ms. Shamp commented that she did not see any reference to adding public restrooms at the beach accesses and felt that this is a cost, safety and welfare issue for the Town. She personally objected to the fact that there does not seem to be support for these in the Comp Plan. Mr. Weimer did not agree that this would mean that it is inconsistent with the Comp Plan. Ms. Kay expressed her concern about the security of the restrooms and the expense in keeping these "comfort stations" safe and working. There was discussion about the cost and number of stations or restrooms proposed, and whether they would be comparable to the one at Newton Park. Mr. Weimer asked Ms. Shamp to explain why she felt that this particular item was not supported in the Comp Plan. She stated that the only reference to these "comfort stations" is in the reference to the Newton Park oasis and that there should be support for all of the proposed stations in the Comp Plan due to the other problems created by the restrooms. Mr. Weimer suggested that although the Comp Plan does not address each item exactly and specifically, it does not mean that these items are inconsistent. Ms. Shamp insisted that there are big enough concerns surrounding these facilities that they should be specifically named in the Comp Plan so that there is a system in place to deal with any issues that may arise. She is in agreement that these facilities are needed, but unless they are addressed in the Comp Plan, there is no manner in place by which to handle their supervision.

Mr. Mandel likes the proposal because it invites more tourism but also hopes that the Tourist Development Council would have some financial input to keep these facilities up and running. Ms. Kay agreed but commented that the residents living nearby these facilities are ultimately going to end up policing them. Mr. Van Duzer said he is in favor of giving this a "trial run," so to speak, because there are presently no facilities at the beach accesses anywhere on the beach and it is detrimental to tourism. Both he and Mr. Weimer agreed that the Comp Plan does not limit the number of facilities and they agree that these facilities are needed, so they do not feel it is inconsistent with the Plan.

Mr. Mandel asked Dr. Shockey about \$4,159,000 proposed for North Estero improvements and pointed out a discrepancy in amounts in sources of funds in the revenue detail sheet after behind the capital improvement program. The numbers broken out into sources on the revenue detail sheet matched the \$4,159,000 listed in the capital improvement program when added to a total. His concern was regarding funds moved from water management purpose and Dr. Shockey stated that he didn't believe that funds were being redirected from any other planned project in order to fund the North Estero improvements. Ms. Dalton added that there will be a transfer from the water corporation to the Town of funds to assist with the improvements, to take place at the next Council meeting.

Ms. Shamp addressed beach renourishment, stating that it is supported in the Comp Plan, but on pg. 517, she pointed out what she felt were inconsistencies regarding the phrase "critically eroded" and "and therefore, when necessary," as to when this task gets done. She claimed that the engineering studies do not show this as a "critically eroded" area and it would then not be a priority. She asked Dr. Shockey about a comment on pg. 517 of the Comp Plan, regarding the renourishment, wherein it states "the report indicates that maintenance renourishment would be needed every ten years in an annualized cost of \$546,000.00 per year. She asked where these funds will come from in the future, pointing out that she finds funds included for beach renourishment only for year #1. Dr. Shockey said that this item is there as informational and that it would be up to the Town in the future as to whether or not they chose to maintain the renourished beach. Some discussion ensued about whether this meant there would be a need to spend \$546,000 a year on annual maintenance or a need to set aside \$546,000 per year for maintenance to take place less frequently than annually. Ms. Dalton commented that "O and M" is not usually considered part of the capital expenditures (operations and management) and this may explain why funds to maintain the renourished beach were not planned as capital improvements.

Mr. Weimer recapitulated the motion on the floor, which was that the LPA recommends that the Town Council find that all the items on the attached proposed 2009-2010 CIP, is consistent with the Town of Fort Myers Beach Comp Plan, eliminating statements 2 and 3, and is consistent with Dr. Shockey's memo of Aug. 11, also attached.

**Amended Motion: Mr. Van Duzer moved to adopt Resolution 2009-17, as stated above.  
Seconded by Mr. Mandel**

**Vote: Motion passed 3-2, with Ms. Shamp and Ms. Kay opposed and Mr. Ryffel absent**

**B. Discussion of Draft Language for LDC Chapter 34, Article IV, Divisions 3 and 5  
(carry over from July 14 LPA)**

Mr. Weimer asked Dr. Shockey for a quick review of the goals being sought for this item, since he was not present for the earlier discussion on this topic. Dr. Shockey explained that it stemmed from the Council's suggestion that the alcoholic beverage regulations in the chapter be considered to come up with a way to establish some

consistency in the restrictions placed on individual licensees in that there is a wide variety of time, food, entertainment, etc. constraints dealing with different businesses on the beach. In addition, the present provisions in the code are older and may be a bit outdated, in need of some revision. Then in discussion of the beverage regulations some LPA members became interested in some other regulations that were related indirectly to the beverage regulations and so these had been added to the mix of discussion at LPA request with the permission of the town manager. Mr. Weimer commented that the draft he has seen seems very involved and reaches beyond Town ordinances and he asked Ms. Dalton to comment. She stated that she is obligated to advise the LPA when it may be looking at issues that may involve legal work so involved that it may begin to incur significant fees. She suggested that there are some areas within this item that are very controversial and involve constitutional problems, which will no doubt create legal problems necessitating incurring legal fees.

Mr. Weimer reminded the LPA that, initially, they were trying to address and set forth clear rules for hours of service for alcoholic beverages, so that there would be some alternative wording for different businesses, depending on the situation. He added that, with this new memo and proposed changes to several subjects at once, he is afraid that there is so much more involved, he doubts they will get anything cleared up. He suggested that the LPA only concentrate on those initial hours of service and similar issues for alcoholic beverages for now and not get involved in anything bigger. Mr. Mandel agreed and added that the major issue in the licensing is consistency, or lack thereof, stemming from so many individualized approval resolutions. He also added that the noise problems associated with the service of alcoholic beverages is one that should still be addressed. He suggested that they discuss the matter with the Town Council at their joint meeting and decide together what is most important. Ms. Shamp agreed that this is getting out of hand and cautioned that before moving forward and incurring huge legal fees, the LPA should be clear as to what the Council wants them to address; she suggested postponing this until they've had an opportunity to meet with the Council and clarify the issues. Mr. Van Duzer and Weimer concurred.

**Motion:** Mr. Mandel moved that agenda items B and C (draft language for alcoholic beverage service, stand alone liquor licensing, open container ordinance and SOB provisions) be tabled until after a workshop discussion with Town Council.

**Seconded by Mr. Van Duzer.**

**Vote:** Motion carried 5-0; Mr. Ryffel being absent.

- C. Proposed Concepts for Residential Driveway ROW Connection Standards  
New information was presented to the LPA members and a ten minute recess was called for to review the documents.

***Recess: 11:20 AM Reconvene: 11:30 AM***

Cathie Lewis was present to answer questions regarding the document, which she prepared. Mr. Mandel asked for clarification regarding the dimensions of the

driveway aprons. Mr. Van Duzer said that he put this in because he was thinking about commercial areas where other widths are required. Mr. Weimer gave an example of a driveway that would conflict with these restrictions. Discussion ensued about the different sizes and dimensions. Ms. Lewis explained her guidelines in preparing this and that this document is only a starting point for the LPA to look at the whole issue.

Ms. Kay referred to the design specifications and asked about “circular driveways.” Ms. Lewis explained that this suggests the language be more specific than what is in the code to make it clear that new circular driveways would not be allowed. Ms. Shamp thanked Ms. Lewis for her work on this study. She asked how feasible some of the language in the document is regarding drainage, etc., when the Town does not yet have a storm water system in place. Ms. Lewis said that is why the language is somewhat vague at this point.

Mr. Green further explained the items in the report, regarding the drainage and storm water runoff, adding that this is mainly for new construction and reconstruction. Mr. Weimer asked if there are specific design standards which must be incorporated into the LDC on these driveways. Mr. Green replied that this is one of the problems, in that there are no consistencies in the county doing this job. Dr. Shockey added that there are other problems that having no specific guidelines creates regarding swales, culverts, etc. Ms. Shamp asked Ms. Lewis about pervious vs. impervious surfaces and whether this needs to be addressed at this point. Ms. Lewis said they could include a list of acceptable surfaces but that this should be done later, further into the project. Dr. Shockey added that the county presently has some limitations on types of materials, but if the county’s standards are repealed they would need to be replaced with something.

Mr. Van Duzer expressed his satisfaction with the segment that addresses “Permitting Process.” He said that this is what involves everyone and that the guidelines start here. Mr. Mandel asked if there was a decision about the fee. Ms. Lewis said the current fee for a driveway permit is \$75.00 and could go up to \$120.00 or more depending on the need for particular kinds of inspections and plan reviews. Mr. Weimer also praised Ms. Lewis for her thorough job on the document. He also asked about item “G” which regards the “hold harmless” clause. Ms. Dalton said that some of this would be better covered in the general sections of the code and not sprinkled throughout. More discussion ensued about the distances and other specifications for driveways.

Ms. Dalton brought up the ROW agreements issue and said it is coming forward. She said that if the LPA wants to offer an opinion on this, they should decide at this time and said she could bring it to the next meeting for their review. Ms. Shamp said that she prefers to avoid extra layers of requirements and wanted to know if this ROW agreement form is necessary for the residential permits. Mr. Weimer suggested holding off this discussion for later in the meeting and added that there will be a need for this agreement for residential but wanted to return to the topic at hand.

Mr. Weimer said the driveway document presented by Ms. Lewis is a good starting point and asked Ms. Dalton for guidance as to the process to move it along. Ms. Dalton suggested that the LPA allow staff to assign it to a staff member and direct her to work with that person to get something with legal review. Mr. Weimer requested that this document be incorporated into the minutes and asked that Mr. Van Duzer and Ms. Shamp review it, bring out the questions/concerns and present it to the LPA at the meeting on September 17, after which time staff could prepare the document for a hearing. Discussion ensued about the process to follow.

D. LPA Policies and Procedures discussion on “Code of Ethics”

Mr. Weimer reviewed sub paragraph 4 of the Code of Ethics and found two areas that were of concern. Ms. Dalton agreed with Mr. Weimer’s interpretation of the area dealing with “prohibition,” in that members are required to refrain from engaging in private discussions with applicants or representatives. She said that Town staff would not be part of this rule. Mr. Weimer asked her about the second point, formal notification. Ms. Dalton said the LDC addresses the Council and the LPA’s obligation in ex parte matters and said that the LPA does not have the ability to vary from that obligation. She added that, as it is written, should there be an email, a letter or even a phone call from a member of the public, etc., regarding a quasi-judicial item, the email should go to the Town Clerk for inclusion in the meeting agenda packets.

Mr. Van Duzer said he had not been clear on this before and is satisfied with the wording. Ms. Dalton referred to the LDC dealing with the prohibited communications, saying that LPA members may engage in these ex parte communications but are required to disclose the information discussed in that communication as a matter of clearing up any issues of prejudice (she read the section for the meeting). More discussion ensued about types of ex parte communications and differences between the LPA code of ethics and the LDC requirements.

Ms. Shamp referred to Section 34-52, which defines unrestricted communication as “any communication, by the public, with public officials which are specifically allowed and encouraged...” Ms. Dalton pointed out that the problem is the LPA’s PnP code of ethics is not so specific, and may need to be tweaked. She added that the LPA needs to decide how specific they wish to be in reporting this type of communication, how quickly and by what method. Her concerns were basically about the inconsistencies in this ethics policy and the actual requirements of the LDC concerning this subject.

The general consensus was to refer the whole policy back to “be in accordance with the guidelines of the LDC.” Mr. Weimer asked that paragraph to be revised to just say “in compliance with the LDC.”

**RECESS FOR LUNCH-12:50 PM**  
**RECONVENE-1:18 PM**

**Motion: Ms. Shamp moved to adjourn as the LPA and reconvene as the HPB**

**Seconded by Mr. Van Duzer**

**Vote: Motion carried 5-0; with Mr. Ryffel being absent**

**VI. ADJOURN AS LPA/RECONVENE AS HPB**

Ms. Shamp called the meeting to order at 1:18PM and Dr. Shockey exhibited one of the long-awaited historic recognition plaques. Ms. Shamp also asked if Dr. Shockey could get the brochures for the same time as the presentation of the plaques.

Ms. Shamp announced that the Seven Seas renovation contract was awarded to Maddox Construction at the recent council meeting.

**Motion: Mr. Van Duzer moved to adjourn as the LPA and reconvene as the HPB**

**Seconded by Mr. Mandel**

**Vote: Motion carried 5-0; with Mr. Ryffel being absent**

Meeting adjourned at 1:25 PM

**VII. ADJOURN AS HPB/RECONVENE AS LPA**

Meeting reconvened at 1:25 PM

**VIII. LPA MEMBER ITEMS**

Mr. Van Duzer—nothing to report

Ms. Shamp reported that Mr. Weimer was commended at the Town Council meeting for his extraordinary job with the Bay Oaks project.

Ms. Kay—nothing to report

Mr. Mandel reported that the water utility project is coming along.

Mr. Weimer invited the public to look at his front porch with reconstructed with a new durable material. He reported on his participation in a temporary committee to look at the Mound House and Newton properties' future public display and use. They had submitted reports to the Town Manager for review. In addition, the Snug Harbor CPD was heard, finally, by the Council at a recent meeting, who commended the LPA's work. This led to brief discussion about the ROW agreement and building canopies.

Ms. Dalton will prepare a document and packet, to be sent to each member before the next meeting, for their discussion of the ROW agreement agenda item discussed earlier.

Mr. Weimer added that the mayor wanted to discuss the Action List/Agenda Management at the joint meeting. He said the Council wants to see if there is a way to bring the LPA and Council together on the items on agenda.

**IX. LPA ATTORNEY ITEMS**

Nothing to report.

**X. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Nothing to report.

Request for review of the upcoming meeting dates: Sept. 15, 2009 was cancelled and

Anne Dalton, Esquire  
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Fort Myers, Florida 33901  
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## Memorandum

**To:** Chair, Vice Chair, LPA Members, Town of Fort Myers Beach  
**CC:** Town Manager, Community Development Director, Town Clerk  
**Date:** July 3, 2009  
**Subject:** Draft Open Alcoholic Beverage Container Ordinance/Legal  
Comments

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LDC changes which affect the regulation of Sexually Oriented Businesses (Chapter 34, Division 3), Alcoholic Beverages (Chapter 34, Division 5), Entertainment and Conduct (Chapter 34, Subdivision IV) and related subjects have been prepared pursuant to LPA direction.

However, it is requested that further direction be provided by the LPA prior to legal review being conducted, since this is a very comprehensive revision to this section of the Land Development Code.

# FORT MYERS BEACH LAND DEVELOPMENT CODE

## DIVISION 1. GENERALLY

### CHAPTER 34 ZONING DISTRICTS, DESIGN STANDARDS, AND NONCONFORMITIES

#### ***Division 3. Sexually-oriented Businesses***

- Sec. 34-1201. Applicability of division.*  
*Sec. 34-1202. Definitions.*  
*Sec. 34-1203. Purpose of division.*  
*Sec. 34-1204. Prohibited locations.*  
*Secs. 34-1205--34-1230. Reserved.*

#### ***Division 4. Aircraft***

- Secs. 34-1231. Use of engine-propelled aircraft.*  
*Secs. 34-1232--34-1260. Reserved.*

#### ***Division 5. Alcoholic Beverages***

##### ***Subdivision I. Generally***

- Sec. 34-1261. ~~Definitions~~Purpose and intent.*  
*Sec. 34-1262. ~~Compliance with applicable regulations~~Definitions.*

##### ***Subdivision II. Hours of Business***

- Sec. 34-1263. ~~Sale for off-premises consumption~~Hours of business during which sales or service, consumption, and occupancy are prohibited.*

##### ***Subdivision III. Location***

- Sec. 34-1264. ~~Sale or service for on-premises consumption~~Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.*  
*Sec. 34-1265. Bottle clubs.*  
*Sec. 34-1266. Consumption, possession in public areas.*  
*Sec. 34-1267. Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.*

##### ***Subdivision IV. Entertainment and Conduct***

- Sec. 34-1268. Hours music or disturbing noises prohibited.*

*Sec. 34-1269. Nudity, specified sexual activities, and exposure of specified anatomical areas prohibited.*

*Sec. 34-1270. Sale of food prerequisite to consumption on the premises of alcoholic beverages for bona fide restaurants and certain other alcoholic beverage establishments.*

*Sec. 34-1271. Ratio of alcoholic beverage to food sales; gross revenues; record keeping and reporting.*

*Sec. 34-1272. Package stores.*

*Sec. 34-1273. Permitting intoxicated persons to loiter about premises.*

*Sec. 34-1274. Serving of set-ups, etc., by vendors not licensed to sell for consumption on the premises.*

*Sec. 34-1275. Use of licensed premises for criminal purposes.*

#### ***Subdivision V. General Health, Safety, and Welfare.***

*Sec. 34-1276. Adequate and sanitary equipment, compliance with applicable regulations.*

#### ***Subdivision VI. Patron Age Restrictions***

*Sec. 34-1277. Patron age restrictions.*

#### ***Subdivision VII. Enforcement and Penalties***

*Sec. 34-1278. Enforcement and penalties.*  
*Secs. 34-~~1265~~1279--34-1290. Reserved.*

## DIVISION 3. SEXUALLY-ORIENTED BUSINESSES

#### **Sec. 34-1201. Applicability of division.**

This division shall apply to all sexually-oriented businesses (as defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04).

#### **Sec. 34-1202. Definitions.**

***Sexually-oriented business*** means a sexually-oriented business as defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04.

**Sec. 34-1203. Purpose of division.**

The purpose of this division is to provide reasonable regulations to promote the health, safety, morals, and general welfare of the citizens of the town, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of sexually-oriented businesses within the town and alleviate the adverse effects of sexually-oriented businesses on adjacent and nearby uses of land. The provisions of this division have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually-oriented materials. It is neither the intent nor effect of this division to restrict or deny access by adults to sexually-oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually-oriented entertainment to their intended market. It is neither the intent nor effect of this division to condone or legitimize the distribution of obscene material.

**Sec. 34-1204. Prohibited locations.**

(a) No use of land for purposes Sexually-oriented businesses governed by this division shall must not be located closer than 1,000 feet, measured on a straight horizontal line to from the closest point on the perimeter boundary of the parcel of land on which the business is located to; from:

- (1) The closest wall point on the perimeter boundary of parcel of land of any building premises containing a similar use; or
- (2) The closest point on Any zoning district boundary line which of a zoning district that allows residential uses; or
- (3) The closest point on the perimeter boundary line of the parcel of land on which Any alcoholic beverage establishment, hotel, motel, restaurant, school (noncommercial or operated as a business), day care center (child), park, playground, place of worship, religious facility, public recreation facility, or cultural facility is located; or
- (4) The closest point on the perimeter boundary line of the parcel of land on which any membership organization, personal services, recreational facilities, retail store, or temporary use oriented primarily toward children or families is located.

(b) A person commits a violation of this code if the person operates or causes to be operated a sexually-oriented business within 1,000 feet of the prohibiting uses provided by this division.

(c) For the purposes of this section, measurement must be made in a straight line, without regard to the intervening structures or objects from the nearest point on the property line of the premises where the sexually-oriented business is conducted or proposed to the nearest property or district boundary line of the premises of a prohibiting use provided by this division. Presence of a municipal, county, or other political subdivision boundary is irrelevant for purposes of calculating and applying the distance requirements of the division.

(c) Any sexually oriented business lawfully operating on [the effective date of this ordinance], 2009, but in violation of any provision of this division is a non-conforming use. Such nonconforming use may continue for a period not to exceed one (1) year from the effective date of this division, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming use must not be increased, enlarged, extended, or altered except that the use may be changed to a conforming use. If two (2) or more sexually-oriented businesses are within 1,000 feet of each other and otherwise in a permissible location, the sexually-oriented business that was first lawfully established and continually operated at a particular location is the conforming use and the later established business(es) (is)(are) nonconforming.

(d) A sexually-oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually-oriented business license, or a use listed in subsection (b) of this section within 1,000 feet of the sexually-oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or been revoked.

**Secs. 34-1205--34-1230. Reserved.**

**DIVISION 4.  
AIRCRAFT**

**Sec. 34-1231. [No changes].**  
**Secs. 34-1232–34-1260. Reserved.**

*[The remainder of this page intentionally left blank].*

## Alcoholic Beverages

### DIVISION 5. ALCOHOLIC BEVERAGES

#### Subdivision I. Generally

#### Sec. 34-1261. ~~Definitions~~Purpose and intent.

For purposes of this division and when referred to elsewhere in this chapter, certain terms or phrases shall have the following meaning:

—*Alcoholic beverage* means distilled spirits and all beverages, other than medicine, intended for human consumption and containing one-half of one percent or more alcohol by volume.

—*Beer, wine, and liquor* have the same meanings as provided in F.S. chs. 563, 564, and 565, respectively.

—*Full course meals* means items on a menu at a restaurant which include soups and salads, main dishes with side orders, and desserts.

—*Kitchen, commercial* means a facility used for the preparation of food which is sold to the public and that is subject to state and local health department inspections.

—*Liquor license* means a license issued by the state for the retail sale, service, and consumption of liquor.

—*Park*, only when used in this division, means a park facility which is owned, leased, or operated by a governmental agency. It does not include beach access strips.

—*Sale of*, only when used in this division, includes the term "or service."<sup>22</sup>

It is the purpose and intent of this subdivision to establish provisions for hours of operation, location of places of business, sanitary regulations, the type of entertainment and conduct permitted, patron age restrictions, provisions for enforcement, penalties

for violations, and procedures for the town to follow with regard to alcoholic beverages in commercial establishments. The procedures established by this division, in furtherance of § 34-1 of this code, are designed to promote and protect the general health, safety, and welfare of the public, and to treat all regulated establishments in a non-discriminatory manner consistent with the manner of treatment of any other lawful business transacted in the town.

#### Sec. 34-1262. ~~Compliance with applicable regulations~~Definitions.

For purposes of this division and when referred to elsewhere in this chapter, the following phrases, terms or words have the following meaning, except where the context clearly indicates a different meaning:

—*Alcoholic beverage* means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law.

—*Alcoholic beverage establishment* means any establishment within the municipal limits of the town that meets all local zoning requirements, possesses all municipal and county permits required by law, and is currently licensed by the division of alcoholic beverages and tobacco for the sales or service of alcoholic beverages for consumption off the licensed premises, on the licensed premises, or both.

—*Bar* means an operation the primary activity of which is the sales or service of alcoholic beverages for consumption on the premises.

—*Beach* means the land between the mean high and mean low water lines owned by the State of Florida and the zone of unconsolidated sand extending landward from the mean high water line to the place where there is a marked change in material or physiographic form or the line of permanent vegetation, usually the effective limit of storm waves; including any beach areas owned by the town or Lee County, and any beach area that has arisen upon it a right of customary use by the public

## Alcoholic Beverages

or a public easement, prescriptive or otherwise; and the foreshore of tidal navigable waters.

**Beer** means all brewed beverages, including malt beverages, containing malt. This definition is intended to accord with the definition in the Beverage Law.

**Beverage Law** means chapters 561 through 565, 567, and 568 of the Florida Statutes.

**Bottle club** means a commercial establishment, operated for a profit, whether or not a profit is actually made, wherein patrons consume alcoholic beverages that are brought onto the premises and not sold or supplied to the patrons by the establishment, whether the patrons bring in and maintain custody of their own alcoholic beverages or surrender custody to the establishment for dispersing on the licensed premises, and which is located in a building or other enclosed permanent structure. This definition does not apply to sporting facilities where events sanctioned by nationally recognized regulatory athletic or sports associations are held, bona fide restaurants licensed by the division of hotels and restaurants of the department of business and professional regulation whose primary business is the service of full course meals, or hotels and motels licensed by the division of hotels and restaurants of the department of business and professional regulation. This definition is intended to accord with the definition in the Beverage Law.

**Cocktail bar** means an alcoholic beverage establishment licensed by the state for, and engaged primarily in, sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation not prohibited by this division.

**Consumption off the premises** means consumption of alcoholic beverages at a place different from the licensed premises where purchased.

**Consumption on the premises** means consumption of alcoholic beverages upon the premises where purchased.

**Container** means any bottle, can, cup, glass, or other receptacle.

**Customer service area** means the area of an establishment available for food or beverage service or consumption, or both, calculated by measuring all areas, including any approved outdoor seating area, covered by customer tables and counter surfaces and all floor area within five (5) feet of the edge of said tables and counter surfaces, measured in all directions where customer mobility is provided. Areas between tables or counters that overlap in measurement with another table or counter must only be included in the calculation once.

**Employee** means a person who works or performs in an alcoholic beverage establishment, irrespective of whether the person is the owner, manager, or operator of said establishment; is paid a salary or wage by the owner, manager, or operator of said establishment, or accepts gratuities or splits gratuities with the owner, manager, or operator of said establishment.

**Expansion** means the spatial enlargement of premises, the expansion of an alcoholic beverage establishment approved and licensed for the sales or service of beer and/or wine to include liquor sales or service, and the expansion to a nightclub use from another alcoholic beverage establishment.

**Floor area, gross** means the sum of the floor areas of all floors of a building or structure, measured from the face of exterior walls, or from the centerline of a wall separating a shared building wall, including any outdoor or patio area approved for use as customer service area.

**Full course meals** means food items available on a menu that include soups, salads, side orders, entrées, non-alcoholic beverages, and desserts.

**Hotel bar** means a bar operated in connection with any hotel/motel or multiple-family building with more than 100 units, operated by the same owner or management, licensed by the state as an alcoholic beverage establishment under the Beverage Law for consumption on the premises during the hours of operation of the hotel business

## Alcoholic Beverages

and hours of business not prohibited by this division.

**Hours of operation** means the posted hours that an establishment is open to the public for business within the limitations on hours of business established by this division.

**Independent contractor** means any person who, pursuant to a formal, informal, written, or verbal agreement, works, performs, or dances in an alcoholic beverage establishment.

**Licensed premises** means not only rooms where alcoholic beverages are stored or sold by the licensee, but also all other rooms in the building which are so closely connected therewith as to admit free passage from rooms where alcoholic beverages are stored or sold by the licensee to other rooms over which the licensee has some dominion or control and also includes all of the area embraced within the sketch appearing on or attached to the application for the license involved and designated as such on said sketch, in addition to that area included or designated by general law. This definition is intended to accord with the definition in the Beverage Law.

**Licensee** means a legal or business entity, person, or persons that hold a license issued by the division of alcoholic beverages and tobacco of the department of business and professional regulation and meet the qualifications of § 561.15 of the Florida Statutes. This definition is intended to accord with the definition in the Beverage Law.

**Liquor** means distilled spirits, spirituous liquors, spirituous beverages, or distilled spirituous beverages containing the substance known as ethyl alcohol, ethanol, or spirits of wine in any form, including all dilutions and mixtures thereof from whatever source by whatever process produced. This definition is intended to accord with the definition in the Beverage Law.

**Membership organization** means an organization operating with formal membership requirements with the intent to pursue common goals or activities and licensed by the state as an alcoholic beverage

establishment for sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation of the membership organization and hours of business not prohibited by this division.

**Nightclub** means an alcoholic beverage establishment licensed by the state for, and engaged in, sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation and hours of operation not prohibited by this division, and operating after 11:00 p.m. in connection with dancing, vaudeville, theatrical, or similar entertainment; and where a band, orchestra, or other form of performed entertainment is provided [The LPA does not recommend this additional use.]

**Nudity** is defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04.

**Open container** means any container of alcoholic beverage that has been opened, has its seal broken, had its contents partially removed, or from which consumption is capable immediately.

**Operation** means the sales or service of alcoholic beverages in the normal course of business.

**Operator** means the person or entity, or combination of persons and entities, operating an alcoholic beverage establishment on licensed premises who either holds or has applied for a license to sell or serve alcoholic beverages from the premises.

**Outdoor seating area** means a specifically delineated area within the licensed premises, not enclosed by a structure and which may or may not be roofed, and approved by a town permit for dining and consumption on the premises as a commercial accessory use to any alcoholic beverage establishment.

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<sup>1</sup>A bottle of wine that has been resealed and is transported pursuant to F.S. § 564.08 is not an open container under the provisions of F.S. § 316.1936.

## Alcoholic Beverages

**Owner** means any person having a legal or equitable interest in property.

**Package goods** means any container of alcoholic beverages.

**Package store** means an alcoholic beverage establishment licensed by the state where alcoholic beverages and package goods are sold, during hours of operation and during hours of business not prohibited by this division, only in sealed containers for consumption off the premises.

**Parcel of land** means real property capable of being described with such definiteness that its location and boundaries may be established, that is designated by its owner or developer as land to be used or developed as a unified whole, or that has been used as a unified whole.

**Permit** means an official document or certificate required or issued by the town authorizing performance of a specified activity.

**Person** means any individual, association, corporation, estate, firm, limited partnership, partnership, trust, or other legal entity.

**Public area** means an area open to the public, including any auditorium, beach, bridge, building, canal, causeway, dock, lake, lagoon, marina, museum, open space, park, parkway, pier, playground, pool, preserve, range, recreational facility and/or field, roadway, semi-public parking lot, sidewalk, stream, waterway, and abutting lands and adjacent littoral waters, and all rights-of-way and public service facilities located on grounds, buildings, and structures that are under the jurisdiction, control, and administration of the town, special district, county, state, or federal government, within the municipal limits of the town.

**Restaurant** means an establishment engaged primarily in the sales or service of food and beverages in a ready to consume state.

**Restaurant, bona fide** means a restaurant that is also an alcoholic beverage establishment that:

(a) is engaged primarily in the service of food and non-alcoholic beverages, where the sales or service of alcoholic beverages is incidental to the sale and service of food and non-alcoholic beverages; and

(b) meets all local zoning requirements, and possesses all municipal and county permits required by law; and

(c) is currently and lawfully licensed by the division of hotels and restaurants of the department of business and professional regulation; and

(d) offers and serves full course meals with full kitchen facilities and food preparation staff capable of preparing and serving full course meals continuously during all hours of operation; and

(e) has a customer service area consisting of tables and chairs, or customer counters, and kitchen facilities, restroom facilities, pantries, and storage room(s) that, aggregated together, comprise no less than 75 percent of the gross floor area, and that are adequate to accommodate the service of full course meals; and

(f) has a sufficient total number of seats or chairs at tables, counters, and bars within the customer service area to accommodate the full occupant load as determined by the town in accordance with the provisions of the Florida Building Code and the Florida Fire Code or successor codes.

This definition is intended to accord with the definition in the Beverage Law.

**Restaurant bar** means a bar operated in direct connection with a bona fide restaurant and by the same owner or management, licensed by the state for sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation and hours of business not prohibited by this division.

**Revenue, gross** means all money and other consideration received by or paid to the operator of a alcoholic beverage establishment from the retail sale of alcoholic beverages, food, and non-alcoholic beverages without regard to whether such receipts are

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represented by check, credit, charge account, exchange, or otherwise. Gross revenue must not include direct taxes that are passed on to and paid by the patrons (such as sales tax) or revenue generate from catering services. Gross revenue also must not include tips and gratuities paid by customers to and retained by employees, independent contractors, or the operator, for which such employees are not accountable to the operator, whether or not such gratuities are credited against wages owed by the operator to such employees. No income tax, franchise tax, tangible or intangible tax, or other tax based on the income, profits, or assets of the operator will be deducted from gross revenue. Each charge or sale on installment or credit is to be treated as a sale for the full price on the date the charge or sale is made, regardless of when the operator actually receives payment.

*Sales or service* means the distribution or transfer of any alcoholic beverage for a consideration, any gift of an alcoholic beverage in connection with, or as part of, a transfer of property other than an alcoholic beverage for a consideration, or the distribution or transfer of an alcoholic beverage by any establishment licensed under the Beverage Law. This definition is intended to accord with the definition in the Beverage Law.

*Semi-public parking lot* means any area wherein motor vehicles are parked by the public in conjunction with any business, enterprise, commercial establishment, office building, or multiple-family building.

*Sexually-oriented business* means a sexually-oriented business as defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04.

*Specified anatomical areas* means specified anatomical areas as defined in the Fort Myers Beach Obscenity, Public Nudity, and Sexually Oriented Businesses Regulation Ordinance, Ord. 96-04.

*Specified sexual activity* means specified sexual activity as defined in the Fort Myers Beach

Obscenity, Public Nudity, and Sexually-Oriented Business Regulation Ordinance, Ord. 96-04.

*Vendor* means any and all persons engaged in the activity of sales or service of any alcoholic beverage regulated by this division.

*Wine* means all beverages made from fresh fruits, berries, or grapes, either by natural fermentation or by natural fermentation with brandy added, in the manner required by the laws and regulations of the United States, and includes all sparkling wines, champagnes, combination of the aforesaid beverages, vermouths, and like products. Sugar, flavor, and coloring materials may be added to wine to make it conform to the consumer's taste, except that the ultimate flavor or color of the product may not be altered to imitate a beverage other than wine or to change the character of the wine. This definition is intended to accord with the definition in the Beverage Law.

No structure, building, establishment, or premises shall be occupied, used, or maintained for the purpose of the retail sale, service, or consumption of alcoholic beverages except in conformity with all applicable town regulations, including this chapter, and with the applicable state regulations:

### Subdivision II. Hours of Business

**Sec. 34-1263. Sale for off-premises consumption** Hours of business during which sales or service, consumption, and occupancy are prohibited.

(a) *Where permitted.* The sale of alcoholic beverages for consumption off the premises shall be allowed in any zoning district where retail stores are a permitted use, provided that package stores must meet the additional regulations set forth in subsection (d) of this section:

—(b) *Sealed containers only.* Only alcoholic beverages in original factory-sealed containers shall be permitted to be sold for off-premises consumption.

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—(c) *State liquor laws.* Any establishment engaged in the sale of alcoholic beverages for consumption off-site shall be required to comply with all applicable state liquor laws:

—(d) *Location of package stores.* No package store or other establishment primarily engaged in the retail sale of liquor for consumption off-site shall be permitted closer than 500 feet to any place of worship, religious facility, school (noncommercial), day care center (child), park, or dwelling unit, or 500 feet from any other establishment primarily engaged in the sale of alcoholic beverages:

- (1) For purposes of this subsection, the distance shall be measured in a straight line from any public entrance or exit of the establishment to the nearest property line of the place of worship, religious facility, school (noncommercial), day care center (child), park, or dwelling unit, or any public entrance or exit of any other establishment primarily engaged in the sale of alcoholic beverages.
- (2) Where an establishment for the sale of alcoholic beverages is located in conformity with the provisions of this subsection, and a place of worship, religious facility, school (noncommercial), day care center (child), park, or dwelling unit is subsequently established in the proximity of such existing establishment, then the separation requirements shall not apply.
- (3) Notwithstanding subsection (d) (1) of this section, where a package store is located in a multiple-occupancy complex which is 25,000 square feet or greater in size, or in a retail sales establishment wherein the sale of alcoholic beverages for consumption off-site is clearly incidental to other retail sales commodities, such as in a grocery store, supermarket, or drugstore, the separation requirements from any dwelling unit shall not apply.
- (4) In any planned development zoning district where the applicant is contemplating the sale of alcoholic beverages for consumption off the premises in an establishment which cannot meet the distance requirements set forth in subsection (d) of this section, the

applicant shall request a deviation from the requirements of subsection (d):

(a) *Sales or service.* The sales or service of alcoholic beverages on any licensed premises of an alcoholic beverage establishment is prohibited between the following hours:

- (1) 11:30 p.m. on Sunday and 7:00 a.m. on Monday.
- (2) 11:30 p.m. on Monday and 7:00 a.m. on Tuesday.
- (3) 11:30 p.m. on Tuesday and 7:00 a.m. on Wednesday.
- (4) 11:30 p.m. on Wednesday and 7:00 a.m. on Thursday.
- (5) 11:30 p.m. on Thursday and 7:00 a.m. on Friday.
- (6) 1:00 a.m. on Saturday and 7:00 a.m. on Saturday.
- (7) 1:00 a.m. on Sunday and 7:00 a.m. on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above. [On April 28, 2009, the LPA suggested that this section be removed and the provisions of subsection (b) below be the only limitations on hours of business.]

(b) *Consumption and occupation of establishments licensed for consumption on the premises.* The consumption of alcoholic beverages on and occupation of any alcoholic beverage establishment licensed for on the premises consumption is prohibited between the following hours:

- (1) 12:30 a.m. on Monday and 7:00 a.m. on Monday.
- (2) 12:30 a.m. on Tuesday and 7:00 a.m. on Tuesday.

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- (3) 12:30 a.m. on Wednesday and 7:00 a.m. on Wednesday.
- (4) 12:30 a.m. on Thursday and 7:00 a.m. on Thursday.
- (5) 12:30 a.m. on Friday and 7:00 a.m. on Friday.
- (6) 2:00 a.m. on Saturday and 7:00 a.m. on Saturday.
- (7) 2:00 a.m. on Sunday and 7:00 a.m. on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above.

Alcoholic beverage establishments are prohibited from opening or remaining open to the public for business or to allow patrons, customers, or persons other than employees and vendors to remain on such licensed premises during the hours specified above.

(c) *More limited hours of operation.* Owners or operators of alcoholic beverage establishments or other lawful businesses regulated by this division, for business or other reasons, may choose to restrict an operation's hours within the hours of business not prohibited by this division. Nothing in this division will be construed to prevent an alcoholic beverage establishment from posting hours of operation more restrictive than those provide herein.

### Subdivision III. Location

**Sec. 34-1264. Sale or service for on-premises consumption** Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.

(a) *Approval required.* The sale or service of alcoholic beverages for consumption on the

premises shall not be permitted until such location has been approved by the town as follows:

- (1) *Administrative approval.* The director may administratively approve the sale or service of alcoholic beverages for consumption on the premises when in conjunction with the following uses if the proposed use satisfies the requirements set forth in this division. When circumstances so warrant the director may determine that administrative approval is not the appropriate action and that the applicant must instead apply for approval as a special exception. Such circumstances may include the previous denial of a similar use at that location; the record of public opposition to a similar use at that location, and similar circumstances. When the director has approved a request for consumption on the premises at a location where the actual building has not been constructed, the director shall not approve another request for consumption on the premises which could potentially violate the distance requirements. If the first building is completed within less than one year, and it can be shown the second use would not violate the prescribed distance requirements, the director may approve the second location subject to all other requirements contained in this division:
  - a. *Bars or cocktail lounges* located in commercial zoning districts which permit bars or cocktail lounges, provided the standards set forth in subsections (b)(1) and (3) of this section are met;
  - b. *Charter, party fishing boat, or cruise ship,* provided the standards of section (b)(3) are met. The EOP approval is specific to the charter, party fishing boat, or cruise ship operating from a specific location and does not run with the land nor is it transferable.
  - c. *Clubs and membership organizations* located in commercial zoning districts; where permitted, provided the standards set forth in subsections (b)(2)d and (b)(3) of this section are met;
  - d. *Cocktail lounges in golf course clubs,* provided the standards set forth in subsections (b)(2)c and (b)(3) of this section are met;

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- ~~c. *Hotels/motels*, provided the standards set forth in subsections (b)(2)b and (b)(3) of this section are met; and~~
- ~~f. *Restaurants*, provided the standards set forth in subsections (b)(2)a and (b)(3) of this section are met.~~
- ~~(2) *Special exception*:~~
  - ~~a. A special exception for consumption on the premises shall be required for:
 
    - ~~1. Any establishment not covered by subsection (a)(1) of this section; or~~
    - ~~2. Any establishment which provides outdoor seating areas for its patrons consuming alcoholic beverages; except that a restaurant may have outdoor seating approved administratively provided the outdoor seating area is not within 500 feet of a place of worship, religious facility, school (noncommercial), day care center (child), park, or dwelling unit under separate ownership;~~~~
  - ~~b. The burden of proof that the grant of the special exception will not have an adverse effect on surrounding properties lies with the applicant.~~
  - ~~c. A single special exception for consumption on the premises for a multiple-occupancy complex in a conventional zoning district shall be sufficient to permit consumption on the premises in every restaurant which exists or may be established within the multiple-occupancy complex.~~
- ~~(3) *Planned developments*:~~
  - ~~a. No administrative approval is necessary where an individual establishment or other facility proposing consumption on the premises is explicitly designated on the master concept plan and is included on the approved schedule of uses.~~
  - ~~b. If consumption on the premises is shown as a permitted use on the approved schedule of uses for a multiple-occupancy complex, no administrative approval for consumption on the premises shall be required for restaurants within the multiple-occupancy complex.~~
- ~~c. Consumption on the premises for other uses within planned developments require administrative approval or a special exception.~~
- ~~(b) *Location; parking*:~~
  - ~~(1) *Prohibited locations*:~~
    - ~~a. Except as may be exempted in subsections (a)(1) or (b)(2) of this section, no establishment for the sale or service of alcoholic beverages for consumption on the premises shall be located within 500 feet of:
 
      - ~~1. A place of worship, religious facility, school (noncommercial), day care center (child), or park;~~
      - ~~2. A dwelling unit under separate ownership, except when approved as part of a planned development; or~~
      - ~~3. Another establishment primarily engaged in the sale of alcoholic beverages for consumption on the premises, excluding those uses listed under subsection (b)(2) of this section.~~~~
    - ~~Distance shall be measured from any public entrance or exit of the establishment in a straight line to the nearest property line of the place of worship, religious facility, school (noncommercial), day care center (child), dwelling unit, or park, or to the closest public entrance or exit of any other establishment primarily engaged in the sale of alcoholic beverages.~~
    - ~~b. Where an establishment for the sale of alcoholic beverages is located in conformity with the provisions of this subsection, and a place of worship, religious facility, school (noncommercial), day care center (child), park or dwelling unit is subsequently established in the proximity of such existing establishment, then the separation requirements shall not apply.~~
  - ~~(2) *Exceptions to location standards*. Exceptions to location standards are as follows:
 
    - ~~a. *Restaurants*, provided:~~~~

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- ~~1. The restaurant is in full compliance with state requirements;~~
  - ~~2. The restaurant serves cooked, full-course meals, prepared daily on the premises; and~~
  - ~~3. Only a service bar is used and the sale or service of alcoholic beverages is only to patrons ordering meals; or, if the restaurant contains a cocktail lounge for patrons waiting to be seated at dining tables, the lounge shall be located so that there is no indication from the outside of the structure that the cocktail lounge is within the building;~~
  - ~~4. The other requirements of § 34-1264(k) shall be met.~~
- ~~b. *Hotels/motels:*~~
- ~~1. The hotel/motel contains at least 100 guest rooms under the same roof and that bars or cocktail lounges are located within the hotel or motel and under the same roof; and~~
  - ~~2. The exterior of the building must not have storefronts or give the appearance of commercial or mercantile activity visible from the street.~~
- ~~If the use contains windows visible from the street, the windows shall be of fixed, obscure glass. Access to the cocktail lounge or bar must be through the lobby. Additional entrances are not permitted unless the additional entrance or door opens into an enclosed courtyard or patio. The additional entrance may not be visible from the street. A fire door or exit shall be permitted, provided that the door or exit is equipped with panic type hardware and is maintained in a locked position except in an emergency.~~
- ~~c. *Golf course clubhouses, provided that:*~~
- ~~1. The golf course consists of at least nine holes a clubhouse, locker rooms, and attendant golf facilities, and comprises in all at least 35 acres of land;~~
  - ~~2. Failure of such club to maintain the golf course, clubhouse, and golf facilities shall automatically terminate the privilege of the cocktail lounge and sale of beer from the refreshment stands;~~
- ~~d. *Membership organizations, provided that:*~~
- ~~1. such club or organization conforms to all the requirements of F.S. ch. 561 and other applicable state laws, and~~
  - ~~2. there are no signs or other indications visible from the exterior of the clubhouse, building, or structure that alcoholic beverages are served.~~
- ~~(3) *Parking.* Restaurants providing alcoholic beverages for consumption on the premises must comply with the parking requirements set forth in § 34-2020(d)(2). Any bar or cocktail lounge must provide parking in accordance with § 34-2020(d)(2). All other uses must meet the parking requirements of the principal use.~~
- ~~(c) *Procedure for approval:*~~
- ~~(1) *Administrative approval:*~~
- ~~a. *Application.* An applicant for a consumption on the premises permit shall submit the following information on a form provided by the town:~~
- ~~1. The name, address, and telephone number of the applicant;~~
  - ~~2. The name, address, and telephone number of the owner of the premises, if not the applicant;~~
  - ~~3. A notarized authorization from the property owner to apply for the permit;~~
  - ~~4. Location by STRAP and street address;~~
  - ~~5. Type of state liquor license being requested;~~
  - ~~6. A site plan, drawn to scale, showing:
 
    - ~~i. The property in question, including all buildings on the property and adjacent property;~~
    - ~~ii. Entrances to and exits from the building to be used by the public;~~
    - ~~iii. A parking plan, including entrances and exits;~~~~

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- iv. The floor area of the building and proposed seating capacity. If a restaurant is proposing a bar or lounge for patrons waiting to be seated in the restaurant, the floor area and seating area of the lounge shall be shown in addition to the restaurant seating area.
- 7. A town map marked to indicate all of the property within 500 feet of the building to be used for consumption on the premises.
- 8. An notarized affidavit executed by the applicant indicating that no place of worship, religious facilities, day care centers (child), noncommercial schools, dwelling units or parks are located within 500 feet of the building to be used.
- b. *Findings by director.* Prior to permit approval, the director shall conclude that all applicable standards have been met. In addition, the director shall make the following findings of fact:
  - 1. There will be no apparent deleterious effect upon surrounding properties and the immediate neighborhood as represented by property owners within 500 feet of the premises.
  - 2. The premises are suitable in regard to their location, site characteristics, and intended purpose. Lighting must be shuttered and shielded from surrounding properties.
- (2) *Special exception.*
  - a. Applications for special exceptions shall be submitted on forms supplied by the town and shall contain the same information as required for administrative approval.
  - b. Advertisements and public hearings shall be conducted in accordance with the requirements set forth in article II of this chapter.
- (d) *Temporary one-day permit.*
  - (1) *Intent, applicability.* It is the intent of this subsection to require that nonprofit and for-profit organizations and establishments in the town obtain a one-day temporary alcoholic beverage permit for the sale of alcoholic beverages at the specific location where an event is held. This subsection will pertain to but not necessarily be limited to the following uses:
    - a. Grand openings or open houses at residential or commercial developments;
    - b. Special outdoor holiday or celebration events at bars and restaurants;
    - c. Weddings and other special occasions at clubhouses;
    - d. Political rallies or events;
    - e. Block parties; and
    - f. Carnivals.
  - (2) Only twelve temporary alcoholic beverage permits may be issued per year to a specific location. If more than twelve permits are sought per year for a specific location, then the location must obtain a permanent alcoholic beverage special exception. If the event for which the temporary alcoholic beverage permit is sought continues for longer than one day, the applicant may petition the director for an extended permit. A temporary alcoholic beverage permit may not be issued for more than three days.
  - (3) *Procedure for approval.*
    - a. Any owner, lessee, or tenant seeking approval for consumption on the premises for a temporary alcoholic beverage permit, must submit a written request to the director. The written request must include:
      - 1. The name and address of the applicant;
      - 2. A general description of the exact site where alcoholic beverages are to be sold and consumed;
      - 3. The type of alcoholic beverages to be sold and consumed; and
      - 4. A fee in accordance with the adopted fee schedule.
    - b. The director will make a final decision within ten working days. The decision will be in the form of approval, approval with conditions or denial. The director may forward the request to other appropriate agencies for comment.

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- ~~c.~~ The town council will review all requests for temporary alcoholic beverage permits where an event will run longer than three days. Under no circumstances will a temporary alcoholic beverage permit be issued for more than ten days.
- ~~(c) Expiration of approval.~~ After the following time periods, the administrative or special exception approval of a location for the sale and consumption of alcoholic beverages on the premises granted in accordance with this section shall expire, and become null and void:
- ~~(1)~~ In the case of an existing structure, the approval shall expire six months from the date of approval unless, within that period of time, operation of the alcoholic beverage establishment has commenced. For purposes of this subsection, the term "operation" shall be defined as the sale of alcoholic beverages in the normal course of business.
  - ~~(2)~~ In the case of a new structure, the approval shall expire one year from the date of approval unless, within that period of time, operation of the alcoholic beverage establishment has commenced. The director may grant one extension of up to six months if construction is substantially complete.
- ~~(f) Transfer of permit.~~ Alcoholic beverage permits, as noted in subsection 34-1264(i), issued by virtue of this section are a privilege running with the land. Sale of the real property shall automatically vest the purchaser with all rights and obligations originally granted to or imposed on the applicant. Such privilege may not be separated from the fee simple interest in the realty.
- ~~(g) Expansion of area designated for permit.~~ The area designated for an alcoholic beverage permit cannot be expanded without filing a new application for an alcoholic beverage permit in accordance with the requirements contained in this chapter. The new application must cover both the existing designated area as well as the proposed expanded area. All areas approved must be under the same alcoholic beverage permit and subject to uniform rules and regulations:
- ~~(h) Nonconforming establishments.~~
    - ~~(1) Expansion.~~ A legally existing establishment engaged in the sale or service of alcoholic beverages which is made nonconforming by reason of new regulations contained in this chapter shall not be expanded without a special exception. The term "expansion," as used in this subsection, shall include the enlargement of space for such use and uses incidental thereto, the expansion of a beer and wine bar to include intoxicating liquor, as that term is defined by the Florida Statutes, and the expansion of a bar use to a nightclub use. Nothing in this subsection may be construed as an attempt to modify any prohibition or diminish any requirement of the state.
    - ~~(2) Abandonment.~~ An establishment engaged in the sale or service of alcoholic beverages may thereafter become a nonconforming use due to a change in regulations, as provided in division 3 of article V of this chapter. Nonconforming uses may continue until there is an abandonment of the permitted location for a continuous nine-month period. For purposes of this subsection, the term "abandonment" shall mean failure to use the location for consumption on the premises purposes as authorized by the special exception, administrative approval, or other approval. Once a nonconforming use is abandoned, it cannot be reestablished unless it conforms to the requirements of this chapter and new permits are issued.
  - ~~(i) Revocation of permit or approval.~~
    - ~~(1)~~ The town council has the authority to revoke an alcoholic beverage special exception, administrative approval, or other approval upon any of the following grounds:
      - ~~a.~~ A determination that an application for special exception or administrative approval contains knowingly false or misleading information.
      - ~~b.~~ Violation by the permit holder of any provision of this chapter, or violation of any state statute which results in the revocation of the permit holder's state alcoholic beverage license by the state

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- alcoholic beverage license board or any successor regulatory authority:
- c. Repeated violation of any town ordinance at the location within the 12-month period preceding the revocation hearing.
  - d. Failure to renew a state liquor license, or written declaration of abandonment by the tenant and owner of the premises if under lease, or by the owner himself if not under lease.
  - e. Abandonment of the premises. An establishment which continually maintains (renews) its state liquor license, even though it has suspended active business with the public, shall not be deemed to have been abandoned for purposes of this subsection.
  - f. Violation by the permit holder of any condition imposed upon the issuance of the special exception or administrative approval.
  - g. Violation of any of the minimum standards of the special exception.
- (2) Prior to revoking an administrative approval, special exception, or other approval for alcoholic beverages, the town council shall conduct a public hearing at which the permit holder may appear and present evidence and testimony concerning the proposed revocation. At the hearing, the town council may revoke the permit if a violation described in this subsection is established by a preponderance of the evidence. The permit holder shall be notified of the grounds upon which revocation is sought prior to any hearing, and shall be given notice of the time and place of the hearing in the same manner as set forth in article II of this chapter.
  - (3) When an alcoholic beverage permit is revoked in accordance with the terms of this subsection, the town may not consider a petition requesting an alcoholic beverage permit on the property for a period of 12 months from the date of final action on the revocation.
  - (4) Upon written demand of the town council, any owner or operator of an establishment with a COP license, must make, under oath, a statement itemizing the percentage of gross receipts that are from the sale of alcoholic beverages. Failure to comply with such demand within 60 days of the date of demand shall be grounds for revocation of the special exception, administrative approval, or other approval.
- (j) *Appeals.* All appeals of decisions by the director shall be in accordance with procedures set forth in § 34-86 for appeals of administrative decisions.
  - (k) *Alcoholic beverages in restaurants.* The sale of alcoholic beverages for on-premises consumption in restaurants (see § 34-1264(b)(2)) must conform to the following regulations:
    - (1) The sale of alcoholic beverages must be incidental to the sale of food, and restaurants permitted to serve alcohol shall provide that food service facilities will remain open serving appropriate food items on the menu at all times coincident with the sale of alcoholic beverages.
    - (2) The sale of alcoholic beverages shall be permitted only when it accounts for no more than 49% of the combined gross sales attributable to the sale of food and all beverages during any continuous twelve-month period.
    - (3) Restaurants selling alcoholic beverages shall keep separate books and records reflecting the gross sales of food and nonalcoholic beverages and the gross sales of alcoholic beverages for each month. The failure to keep the books and records required herein shall be a violation of this code.
    - (4) The town manager or designee may, during normal working hours, request to inspect and audit the books and records of the business from which alcoholic beverages sales are made wholly for the purpose of verifying that the gross sales of alcoholic beverages are no more than 49% of the gross sales of food and all beverages during any continuous twelve-month period. Refusal of an owner or operator of such business to allow said inspection shall be a violation of this code. Should the audit reveal that this requirement is not being met,

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the town manager shall initiate enforcement proceedings for a violation of this code.

- ~~(5) For any restaurant which has been selling alcoholic beverages for less than twelve months, the provisions of this section shall be interpreted and applied with respect to said lesser period of time.~~
- ~~(6) These regulations may be enforced through the normal code enforcement procedures of this code (for example, § 1-5, or article V of ch.2). In addition to these procedures, violations of these regulations may be restricted by injunction initiated by the Town of Fort Myers Beach, by any citizen thereof, or by any person affected by the violation of such regulations.~~

(a) **Prohibited locations.** Alcoholic beverage establishments are prohibited within 500 feet of:

- (1) A school (noncommercial);
- (2) A place of worship, religious facility, day care center (child), or park;
- (3) A dwelling unit under separate ownership; or
- (4) Another alcoholic beverage establishment.

(b) **Measuring distances.** Distances must be measured on a straight horizontal line, without regard to intervening structures, objects, or political boundaries, from the nearest point on the perimeter boundary line of the parcel of land on which the alcoholic beverage establishment is located, to the nearest point on the perimeter boundary line of the parcel of land on which the prohibiting use is located.

(c) **Exceptions.**

(1) **Bona fide restaurants,** provided:

- a. The bona fide restaurant is in full compliance with the requirements of the state division of hotels and restaurants of the department of business and professional regulation; and
- b. The bona fide restaurant serves full course meals at all times during its hours of operation; and
- c. If the licensed premises includes a bar, only a restaurant bar is used and the sales

or service of alcoholic beverages is only to patrons ordering meals or waiting to be seated at tables, and the restaurant bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The restaurant bar must be directly connected with the dining room and must be only a service bar for patrons of such restaurant. Stools are permitted at the restaurant bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package goods from a restaurant bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the restaurant is not actually engaged in and open to the public for the service of full course meals; and

- d. The bona fide restaurant continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of this code.

(2) **Hotel/motels and resorts,** provided:

- a. The hotel/motel or resort is not located within 500 feet of any noncommercial school.
- b. The hotel/motel or resort contains at least [Option 1]: 100 [On February 10, 2008, the LPA suggested additional Option 2]: 50 units and any alcoholic beverage establishment(s) are under the same roof or on the same premises under unified control; and
- c. If the licensed premises includes a bar, only a hotel bar is used and the sales or service of alcoholic beverages is only to patrons of the hotel/motel or resort, and the hotel bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The hotel bar must be directly connected with the hotel/motel or resort and must be only a service bar for patrons of such hotel/motel or resort. Stools are permitted at the hotel bar and alcoholic beverages must be sold by the drink only.

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- A package store or the sale of package goods from a hotel bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the hotel/motel or resort is not actually operating and open to the public as a hotel/motel or resort; and
- d. The hotel/motel or resort and all alcoholic beverage establishment(s) continue to comply with all applicable laws, regulations, and other definitional and regulatory requirements of this code.
- (3) Membership organizations, provided:
- a. The membership organization is not located within 500 feet of any noncommercial school;
- b. The sales or service of alcoholic beverages is only to members and member-accompanied guests of the membership organization, and there is no indication from the outside of the building and any associated structures that alcoholic beverages are served on the premises; and
- c. The membership organization continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of this code.
- (4) Nonconforming uses. Any alcoholic beverage establishment lawfully operating on licensed premises prior to July 1, 1999 is exempt from subsection (a) of this section, but is subject to the provisions for nonconforming uses in this code, as long as it continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of this code. [See LDC Sec. 34-3241 to 3246].
- (5) Other; town council approval required.
- a. Distance from schools. Except for a bona fide restaurant, a resolution passed by the town council in conjunction with a zoning decision approving the location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a noncommercial school will be required prior to issuance of a use permit. In addition to the considerations

and findings required for rezonings by this chapter, prior to approval the local planning agency will review and make recommendations as to whether, and the town council must find that, the location promotes the public health, safety, and general welfare of the community in accordance with § 562.45 of the Beverage Law.

- b. Distance prohibition from all other uses. Except for a bona fide restaurant, hotel/motel or resort, membership organization, or lawfully existing nonconforming use, a special exception for location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a place of worship, religious facility, day care center (child), park, dwelling unit under separate ownership, or another alcoholic beverage establishment is required prior to issuance of a use permit.

The proceedings for such special approval must be in conformance with the provisions of F.S. § 166.041(3)(c). These restrictions will not be construed to prohibit the issuance of special event permits as provided for in F.S. § 561.422 of the Beverage Law, this code, and all other applicable regulations.

### Secs. 34-1265--34-1290. Reserved. Bottle Clubs.

#### [Options]

[1] Bottle clubs are prohibited uses in any zoning district. [The LPA recommends this option.]

[2] Prior to opening any bottle club, the owner of the parcel of land on which the proposed bottle club plans to operate must apply for approval of the use through the special exception process provided in this chapter. [The LPA does not recommend this option.]

[3] Bottle clubs are subject to all regulations and restrictions in this division pertaining to cocktail bars. [The LPA does not recommend this option.]

## Alcoholic Beverages

### Sec. 34-1266. Consumption, possession in public areas.

#### (a) General prohibition in public areas.

Consuming, using, or selling any alcoholic beverage, or manually possessing any unsealed or open container of any kind that contains any alcoholic beverage while on or within any public area, or while on or within any vehicle located in a public area is prohibited. It is further prohibited for any intoxicated person to enter or remain in any public area.

#### (b) Exceptions.

(1) A person under a written contract with the town to allow sales or service of beer and wine may distribute, and persons of age not prohibited by the patron age provisions of this division of the code may consume, such permitted beer and wine only within the licensed premises of events designated by the town without violating the provisions of this division.

(2) The consumption or possession of an alcoholic beverage in an open container, in a public area specifically authorized and approved by the town council for outdoor seating or a special event pursuant to this code.

(3) Notwithstanding any other provision of law, an alcoholic beverage establishment licensed to sell wine on the premises may permit a patron to remove one unsealed bottle of wine for consumption off the premises if the patron has purchased a full course meal and consumed a portion of the bottle of wine with such meal on the licensed premises. A partially consumed bottle of wine that is to be removed from the licensed premises must be securely resealed by the licensee or its employee before removal from the licensed premises. The partially consumed bottle of wine must be placed in a bag or other container that is secured in a manner such that it is visibly apparent if the bag or other container has been subsequently opened or tampered with, and a dated receipt for the bottle of wine and full course meal must be

provided by the licensee and attached to the container. If transported in a motor vehicle, the container with the resealed bottle of wine must be placed in a locked glove compartment, a locked trunk, or the area behind the last upright seat of a motor vehicle that is not equipped with a trunk or glove compartment capable of being locked.

#### (c) Resolution procedure, conditions.

Notwithstanding the prohibition in subsection (a) of this section, the town council may approve, by resolution, the sales or service and consumption on the premises of alcoholic beverages at any recreational facility for a one-time event. The entity making application for the resolution must secure a temporary permit or license authorized by § 561.422 of the Beverage Law. All beverages so approved must not be served in glass or other breakable containers and the director may place further restrictions or limitations on the special event.

### **SECTION 1267. Alcoholic beverage establishments; permitted locations; approval process.**

(a) Permitted locations. The following types of alcoholic beverage establishments may be permitted to operate in certain zoning districts classified according to the use group(s) and sub-group(s) employed by Tables 34-1 and 34-2 of this chapter, upon proper approval from the town and with continuous compliance to all applicable laws, regulations, and other definitional and regulatory requirements of this code.

(1) Bona fide restaurant. A bona fide restaurant is allowed in any zoning district permitting the retail use group with the open sub-group, provided the bona fide restaurant complies with the distance requirements for prohibited locations.

(2) Cocktail bar. A cocktail bar is allowed in any zoning district permitting the retail use group with the open sub-group, provided the cocktail bar complies with the distance requirements for prohibited locations.

(3) Excursion or pleasure vessels. Owners of excursion or pleasure vessels, who are

## Alcoholic Beverages

licensed under the Beverage Law to sell alcoholic beverages for consumption on the vessel, and their employees, may sell beer, wine, and liquor thereon, provided that such vessels [ Option 1: have the minimum restaurant facilities, accommodations, and seating capacity required for a restaurant.]

[Option 2: have the minimum restaurant facilities, accommodations, and seating capacity required for a bona fide restaurant.]

[Option 3: prohibit the sales of alcoholic beverages for consumption on premises whenever the sale of alcoholic beverages accounts for more than 49 percent of the combined gross revenues attributable to the sale of food and non-alcoholic beverages in any 12-month period.]

[Option 4: prohibit the sales of alcoholic beverages for consumption on premises whenever the sale of alcoholic beverages accounts for more than 74 percent of the combined gross revenues attributable to the sale of food and non-alcoholic beverages in any 12-month period.]

[Option 5: prohibit the sales of alcoholic beverages for consumption on premises whenever the sale of alcoholic beverages accounts for more than 89 percent of the combined gross revenues attributable to the sale of food and non-alcoholic beverages in any 12-month period.]

[The LPA recommended on April 28, 2009 that an additional option (Option 1) be added to eliminate the "bona fide" requirement for restaurants.]

Such vessels, however, are prohibited from operating in any canal in the town surrounded entirely by residentially zoned property but may be permitted to cruise and operate in the open waters within the municipal limits of the town, subject to regulations of any other governmental entity

having jurisdiction over such waterway(s). The sales or service of alcoholic beverages or food on such boats is allowed only while such boats are underway.

- (4) ***Hotel bar.*** A hotel bar is allowed in any zoning district permitting the residential or lodging use groups with the open sub-group, provided the hotel bar complies with the distance requirements for prohibited locations.
- (5) ***Membership organization.*** A membership organization is allowed to sell or serve alcoholic beverages for consumption on the premises in any zoning district permitting the retail use group with the limited and open sub-groups, provided the membership organization complies with the distance requirements for prohibited locations.
- (6) ***Outdoor seating area.*** An outdoor seating area is allowable in any zoning district permitting the retail use group with the open sub-groups, provided such outdoor seating complies with the distance requirements for prohibited locations. Before a new outdoor seating area may commence operations, the same must be approved through the special exception process provided by this chapter. [On April 28, 2009, the LPA deferred recommendation on this provision to further discussion at a subsequent meeting].
- (7) ***Package store.*** A package store is allowed in any zoning district permitting the retail use group with the open sub-groups, provided the package store complies with the distance requirements for prohibited locations.
- (8) ***Restaurant bar.*** A restaurant bar is allowed in any zoning district permitting retail use groups with the open sub-group, provided the restaurant bar complies with the distance requirements for prohibited locations.
- (9) ***Nightclub.*** A nightclub is allowable in any zoning district permitting the retail use group with the open sub-group, provided the nightclub complies with the distance requirements for prohibited locations. Before a nightclub may commence operations, the same must be approved through the special exception process provided by this chapter.

## Alcoholic Beverages

[The LPA does not recommend this additional use.]

(a) **Approval required.** A vendor is prohibited from engaging in the sales or service of alcoholic beverages unless and until such time as the vendor has secured a license from the division of alcoholic beverages and tobacco of the department of business and professional regulation of the state. No alcoholic beverage establishment may open or operate and the town will not process any application to the state for an alcoholic beverage license until the use has been approved by the town through one of the following processes.

- (1) **Administrative review.** The director may administratively approve an alcoholic beverage establishment if the proposed use complies with the requirements of this division, current zoning, all supplemental regulations, and all other applicable regulations. However, the director may, in her sole judgment, require the applicant to apply for a special exception rather than an administrative review. When the director has approved an alcoholic beverage establishment on premises where the building proposed to house the use has not been constructed, the director will not approve through the administrative review process another request that could potentially violate the location requirements of this division. Prior to administrative approval, the director must make the following findings of fact:

- a. There will be no apparent deleterious effect on surrounding property owners and the immediate neighborhood as represented by property owners within 500 feet of the premises, measured in accordance with this division; and
- b. The premises are suitable in regard to their location, site characteristics, and intended purpose.

Prior to administrative approval, the director must conclude that the application and premises are in compliance with all applicable standards and all applicable provisions of this code.

- (2) **Special exception.** An approved special exception is required for an alcoholic beverage establishment that may not be approved through the administrative review process or that proposes to provide outdoor seating areas for consumption on the premises. [On April 28, 2009, the LPA deferred recommendation on this provision to further discussion at a subsequent meeting.] The burden of proof that the approval of the special exception will not have a deleterious effect on the surrounding properties is on the applicant. A single special exception for consumption on the premises for a multiple-occupancy complex is sufficient to permit consumption on the premises in every bona fide restaurant that operates within the multiple-occupancy complex. Otherwise, request for special exceptions will be administered and decided in conformance with the requirements for special exceptions provided in this chapter.
- (3) **Planned development.** Unless explicitly designated on the master concept plan and included in the schedule of uses, alcoholic beverage establishment(s) may be added to a planned development by administrative or special exception approval, as provided in this code.
- (4) **Variance.** Requests for variances or deviations from the requirements of this section will be administered and decided in conformance with the requirements for variances and deviations that are provided in this chapter.
- (5) **Temporary permit.** An approved temporary permit is required for the sale or service of alcoholic beverages by non-profit organizations and for-profit establishments for any special event or at other than regularly licensed premises. A completed application for a temporary permit must be received by the director no later than 21 calendar days in advance of the beginning date of the event. The director will approve, approve with conditions, or deny the application within ten (10) working days, or require town council review and approval.

## Alcoholic Beverages

The town council will review all requests for temporary permits for events proposed to run longer than three (3) days. Under no circumstances will a temporary permit be issued for more than ten (10) days.

No more than twelve (12) temporary alcoholic beverage permits will be issued each calendar year for a specific location. If more than twelve (12) temporary alcoholic beverage permits are proposed or requested, then the applicant must request appropriate permanent approvals.

- (6) **Bona fide restaurant determination.** Any alcoholic beverage establishment may apply for an administrative determination from the town that the establishment qualifies as a bona fide restaurant for purposes of this division. No establishment is required to obtain a determination, and alcoholic beverage establishments must continue to comply with all provisions of this division in order to maintain their exceptions. In addition to the application information required by this section, an applicant for a determination must provide a copy of a valid business tax receipt for the alcoholic beverage establishment on the property that is the subject of the application.

(b) **Application.** An application for approval of an alcoholic beverage establishment or bona fide restaurant determination must be submitted to the director on forms supplied by the town and must provide the following information:

- (1) The name, address, and telephone number of the applicant operator.
- (2) The name, address, and telephone number of the owner of the premises, if different from the applicant operator.
- (3) A notarized authorization from the owner authorizing the applicant operator to apply for the permit.
- (4) Location of the subject premises by STRAP and street address.
- (5) Type of state alcoholic beverage license for the premises.
- (6) Copy of the valid certificate of occupancy for the building that is the subject of the application.
- (7) A site plan, drawn to scale (minimum one-quarter (1/4) inch equals one (1) foot) indicating the layout and dimensions of the premises, private and public entrances to and exits from the building, locations of all tables, counter-tops, and chairs (including the number of tables and chairs provided), customer service areas, gross floor area; and kitchen facilities with sufficient detail to establish that it is sufficient to serve full course meals to the customer service areas of the establishment, if applicable.
- (8) A parking plan, drawn to scale, indicating individual parking spaces, total number of spaces, aisles, entrances, and exits, and compliance with all applicable parking requirements of this code. [On April 28, 2009, the I.P.A. recommended this addition.]
- (9) A copy of the sample menu of food items being offered and served or to be offered and served, if applicable.
- (10) A town map marked to indicate all the property within 500 feet of the parcel of land on which the premises of the alcoholic beverage establishment will be located.
- (11) A notarized affidavit executed by the applicant indicating that no place of worship, religious facilities, child day care center, noncommercial schools, dwelling units, or parks are located within 500 feet of the parcel of land on which the premises of the alcoholic beverage establishment will be located; or an accompanying application for a variance.
- (12) Copies of any approvals, licenses, or other permits required from any other governmental agency necessary to operate the alcoholic beverage establishment.
- (13) Any additional information relevant to determination of compliance with the provisions of this division.

The town may charge a fee in accordance with the schedule of fees adopted by resolution of town council for the review and processing of an

## Alcoholic Beverages

application for approval. In the absence of a resolution by the town council, the director will charge fees that are comparable to the fees charged by the board of county commissioners for similar applications.

(c) *Expiration of approval.* An administrative or special exception approval will expire and become null and void unless operation of the alcoholic beverage establishment has commenced as follows:

- (1) *Existing structure.* Within six (6) months from the date of approval.
- (2) *New structure.* Within twelve (12) months from the date of approval. The director may grant one (1) extension of up to six (6) months if construction is substantially complete and proceeding to completion with due diligence.

(d) *Transfer of approved permit or approval.* Approved alcoholic beverage establishment permits are a privilege running with the land. Sale of real property will automatically vest the purchaser with all rights and obligations originally granted to or imposed on the permittee. Such privilege must not be separated from the fee interest in the real property.

(e) *Expansion of premises.* The premises designated for an alcoholic beverage establishment must not be expanded prior to approval of an application in accordance with the requirements of this chapter. The new application must cover both the existing designated premises as well as the proposed expanded premises. All approved premises must be under the same alcoholic beverage permit and subject to uniform rules and regulations. Nothing in this division may be construed as an attempt to modify any prohibition or diminish any requirement of the state.

(f) *Revocation of permit or approval.*

- (1) *Grounds.* The town council may revoke an alcoholic beverage permit or approval upon any of the following grounds:

- a. *Determination that an application for approval contains knowingly false or misleading information.*
  - b. *Violation by the licensee of any provision of this code, any town ordinance, or any state statute that results in the revocation of the licensee's state alcoholic beverage license.*
  - c. *Repeated violation by the licensee of any provision of this code, or any town ordinance within the twelve (12) month period preceding the revocation hearing.*
  - d. *Failure to renew a state alcoholic beverage license, written declaration of abandonment, or actual abandonment of the premises by the licensee. An alcoholic beverage establishment that continually maintains and renews its state liquor license, even though it has suspended operation, will not be deemed to have been abandoned for the purposes of this section.*
  - e. *Violation by the licensee of any condition imposed upon the issuance of the permit or approval.*
  - f. *Failure to comply with the reporting requirements of this division for percentage of gross revenues from the sales or service of alcoholic beverages.*
  - g. *Violation of any of the minimum standards for a special exception.*
- (2) *Procedure.* Prior to revoking a permit or approval, the town council will conduct a public hearing at which the licensee may appear and present evidence and testimony concerning the subject matter of the revocation action. Prior to the hearing, the licensee will be notified of the grounds upon which revocation is sought and the time and place of the hearing in the same manner as set forth in article II of this chapter. At the conclusion of the hearing, the town council may revoke the permit if a violation described in this section is established by a preponderance of the evidence.
  - (3) *Subsequent permit or approval.* When a permit or approval is revoked in accordance with the provisions of this section, the town

## Alcoholic Beverages

will not consider a petition [Option 1.] from the same operator, owner, or permittee, or [Option 2.] for the same premises, requesting a permit or approval for an alcoholic beverage establishment for twelve (12) months from the date of the revocation decision of town council. If subsequent to revocation, the Town finds that the basis for the revocation has been corrected or abated, the former operator, owner, permittee, or premises may be granted a permit no sooner than ninety (90) days from the effective date of the revocation. [On April 28, 2009, the LPA suggested this additional recommendation.]

(g) **Appeals.** Except as otherwise provide in this division, all appeals of decisions by the director must be in accordance with procedures provided in § 34-86 for appeals of administrative decisions.

### Subdivision IV. Entertainment and Conduct

#### **Sec. 34-1268. Hours music or disturbing noises prohibited.**

(a) Music, singing, and other forms of entertainment, whether amplified or not, may be permitted at any time during the hours of operation of an alcoholic beverage establishment. In outdoor seating areas, however, music, singing, and other forms of entertainment are prohibited between the following hours:

(1) 10:00 p.m. on Monday and 12:00 noon on Tuesday.

(2) 10:00 p.m. on Tuesday and 12:00 noon on Wednesday.

(3) 10:00 p.m. on Wednesday and 12:00 noon on Thursday.

(4) 10:00 p.m. on Thursday and 12:00 noon on Friday.

(5) 10:00 p.m. on Friday and 12:00 noon on Saturday.

(6) 10:00 p.m. on Saturday and 11:00 a.m. on Sunday.

(7) 10:00 p.m. on Sunday and 12:00 noon on Monday. [On April 28, 2009, the LPA suggested that all weekday hours (Sunday through Thursday) be extended to 10:00 p.m.]

(8) On legal holidays established by state law, the hours of prohibition are the same as subsection (6), above.

(b) All music, singing, and other forms of entertainment during the hours not otherwise prohibited in this section must comply at all times with Ordinance 96-24. [The Town may wish to revise the Noise Ordinance to be more effective for enforcement. The LPA recommended and the Town Manager agreed to have the Consultant provide a draft proposal for their consideration in conjunction with the COP Ordinance. The Consultant provided the LPA a proposed draft for their consideration on April 28, 2009.]

#### **Sec. 34-1269. Nudity, specified sexual activities, and exposure of specified anatomical areas prohibited.**

(a) As provided in Ordinance 09-XX, Nudity, specified sexual activities, exposure of specified anatomical areas, and exposure of any device or covering intended to give the appearance of or simulate specified anatomical areas to public view by any person, as those terms are defined and employed in Ordinance 09-XX, are prohibited on the premises of any alcoholic beverage establishment.

(b) Owners, operators, and vendors of alcoholic beverage establishments who permit persons to engage in conduct in violation of this prohibition may be fined in accordance with the provisions of § 1-5 of this code.

(c) It is not a violation of this division for a mother to breast-feed her infant child.

## Alcoholic Beverages

**Sec. 34-1270. Sale of food prerequisite to consumption on the premises of alcoholic beverages for bona fide restaurants and certain other alcoholic beverage establishments.**

The sales and service of alcoholic beverages for consumption on the premises may be permitted only as an incidental use to the sale of food and nonalcoholic beverages for consumption on the premises, and bona fide restaurants and other alcoholic beverage establishments required to offer and serve food as a prerequisite to sales and service of alcoholic beverages must offer and serve full course meals on the menu at all times coincident with the sales or service of alcoholic beverages.

**Sec. 34-1271. Ratio of alcoholic beverage to food sales; gross revenues; record keeping and reporting.**

In all bona fide restaurants and other alcoholic beverage establishments where the sales or service of alcoholic beverages is incidental to the sales or service of food and nonalcoholic beverages, the following requirements and restrictions apply:

**(a) Ratio of alcoholic beverage to food sales.**

The sale of alcoholic beverages for consumption on the premises is prohibited whenever the sale of alcoholic beverages accounts for more than 49 percent of the combined gross revenues attributable to the sale of food and non-alcoholic beverages in any 12-month period.

**(b) Record keeping.** The owner or operator of an alcoholic beverage establishment must maintain separate books and records reflecting the gross revenues of food and non-alcoholic beverages and the gross revenues of alcoholic beverages for each month. The required books and records must be maintained on the premises where the alcoholic beverage establishment is located, or other designated place approved in writing by the town, and must be available for inspection by the town during normal business hours. The required books and records must be legible, clear, and available in the English language. Books and records maintained in digital or electronic formats must be

promptly provided to the director in printed form at the sole expense of the operator of the alcoholic beverage establishment.

**(c) The director or designee may, during normal working hours, request to inspect and audit the required books and records of the alcoholic beverage establishment maintained in accordance with this section wholly for the purpose of verifying that the combined gross revenues of the alcoholic beverage establishment are not less than 51 percent attributable to the sale of food and non-alcoholic beverages during any 12-month period to assure that the alcoholic beverage establishment continuously complies with the requirements of this division. The failure to keep the books and records required by this section or a refusal of an owner or operator of such alcoholic beverage establishment to allow such inspection will be grounds for the town council to revoke the use permit of the alcoholic beverage establishment and notify the state that prior certification of the licensed premises for the sale of alcoholic beverages is no longer valid.**

**(d) On an annual basis beginning October 1, 2009, and each year thereafter, the owner or operator of an alcoholic beverage establishment in which the sales and service of alcoholic beverages are incidental to the sales and service of food and nonalcoholic beverages must file with the town an annual report and notarized affidavit attesting to the fact that the combined annual gross revenues of such alcoholic beverage establishment are not less than 51 percent attributable to the sales and service of food and nonalcoholic beverages during the immediately preceding 12-month period.**

**(e) Should an inspection of the required books and records or review of the required annual report reveal that the combined annual gross revenues of such alcoholic beverage establishment are less than 51 percent attributable to the sale of food and non-alcoholic beverages during any 12-month period, the director will notify the owner or operator of the alcoholic beverage establishment that the property upon which the alcoholic beverage establishment operates is in violation of the code and notify the state that the town's prior certification of the licensed**

## Alcoholic Beverages

premises for the sale of alcoholic beverages is no longer valid. The sales or service of alcoholic beverages by the owner or operator of such business is prohibited for a period of one year from the date of such notice.

(f) The provisions of this section will be interpreted and applied with respect to a lesser period of time for any alcoholic beverage establishment that has been in operation for a period of time less than 12 months.

(g) The owner or operator of an alcoholic beverage establishment may appeal the town's determination of a violation of the gross sales percentage requirement of this division only to the special magistrate for code enforcement, pursuant to the chapter 2, article V, division 2 of this code. While the special magistrate hearing is pending, the town may continue to enforce the provisions of this section by all legal means. After hearing evidence presented by both the town and the owner or operator of an alcoholic beverage establishment, the special magistrate is limited to a determination of whether or not the alcoholic beverage establishment complies with the gross sales percentage requirement in accordance with this division.

### **Sec. 34-1272. Package stores.**

(a) **Consumption on the premises prohibited.** Consumption of any alcoholic beverage is prohibited on or within any parcel of land that is licensed to sell alcoholic beverages for consumption off the premises. The sealed package must not be broken, and the contents must not be consumed in or on the premises under such a license.

(b) **Exception for wine tasting.** A distributor of vinous beverages licensed in accordance with the Beverage Law, or any vendor, is authorized to conduct wine tasting upon any licensed premises authorized to sell wine or liquor as package goods for consumption off the premises, provided the wine tasting is limited to and directed toward the general public of the age of legal consumption, in accordance with the provisions of § 564.08 of the Beverage Law.

### **Sec. 34-1273. Permitting intoxicated persons to loiter about premises.**

(a) Intoxicated persons are prohibited from loitering in and about the licensed premises of alcoholic beverages establishments, and the operator of such premises is prohibited from allowing such intoxicated persons to remain on such licensed premises.

(b) Owners, operators, and vendors of alcoholic beverage establishments who permit persons to engage in conduct in violation of this prohibition may be fined in accordance with the provisions of § 1-5 of this code.

### **Sec. 34-1274. Serving of set-ups, etc., by vendors not licensed to sell for consumption on the premises.**

The sales or service of any glasses, set-ups, or other service to any person for the purpose of consuming liquor is prohibited by any vendor licensed under the Beverage Law who is not licensed to sell liquor to be consumed on the licensed premises.

### **Sec. 34-1275. Use of licensed premises for immoral or criminal Purposes.**

The use of the licensed premises of any alcoholic beverage establishment for any criminal purposes is prohibited, and persons of known criminal habits are prohibited from frequenting, loitering, or assembling on such premises or the entrance thereto.

## **Subdivision V. General Health, Safety, and Welfare**

### **Sec. 34-1276. Adequate and sanitary equipment, compliance with applicable regulations.**

All alcoholic beverages establishments must be maintained in a sanitary manner in compliance with all health codes and other rules established by the state, county, and town. The retail sale, service, or

## Alcoholic Beverages

consumption of alcoholic beverages is prohibited in any structure, building, establishment, or premises that does not have adequate and sanitary equipment to accomplish such sale, service, or consumption or that does not conform to all applicable state and local regulations.

### *Subdivision VI. Patron Age Restrictions*

**Sec. 34-1277. Patron age restrictions.**

(a) **General age prohibition.** It is unlawful for persons under the age of 21 years to enter or remain in any alcoholic beverage establishment, or to be permitted to do so by owners, operators, employees, or independent contractors or alcoholic beverage establishments.

(b) **Exceptions.** This restriction will not apply to:

- (1) Persons lawfully employed by or at the alcoholic beverage establishment;
- (2) Persons accompanied by either of their parents (natural, adoptive, step-parent, or legal guardian) or a responsible adult;
- (3) A bona fide restaurant;
- (4) An alcoholic beverage establishment during any time period outside the hours of operation for the sales or service of alcoholic beverages provided that before anyone under the age of 21 years is admitted into the establishment all alcoholic beverages previously sold or served are consumed, or otherwise discarded, and the establishment's entire inventory of alcoholic beverages is properly secured from public access. The sales or service and consumption of alcoholic beverages must not resume until all persons under the age of 21 have vacated the licensed premises; and

(6) ~~[optional] Members of the military or armed forces with proper military identification to show they are currently on active military duty with a branch of the United States military. [On April 28, 2009, the LPA recommended inclusion of this additional exception to the patron age restrictions.]~~

(c) It may be a defense to alleged violations of this section that the person under the age of 21 obtained access through a fraudulent identification, and the business used reasonable efforts to prevent the use of fraudulent identification(s). Under these circumstances, only the persons who gained access to the alcoholic beverage establishment by presenting fraudulent identification will be considered in violation of this section.

### *Subdivision VII. Enforcement and Penalties*

**Sec. 34-1278. Enforcement and penalties.**

These regulations may be enforced by the sheriff and in accordance with code enforcement procedures provided in article V, chapter 2 of this code. Violations of these regulations may also be restricted by injunction initiated by the town, any citizen thereof, or by any person affected by the violation of the regulation(s). Penalties for violations of these regulations will be in accordance with § 1-5 of this code as applicable and appropriate.

**Sec. 34-1278-34-1290. Reserved.**

ORDINANCE No. 03-01

AN ORDINANCE AMENDING THE TOWN OF FORT MYERS BEACH PARKS AND RECREATION ORDINANCE; SECTION THIRTEEN: INTOXICATING BEVERAGES/ILLEGAL SUBSTANCES; PROVIDING AUTHORITY; AMENDMENT TO SECTION THIRTEEN: INTOXICATING BEVERAGES/ILLEGAL SUBSTANCES; PROVIDING EFFECTIVE DATE.

IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH AS FOLLOWS:

SECTION 1. Authority. This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapter 166, Florida Statutes, and other applicable provisions of law.

SECTION 2. Amendment. SECTION THIRTEEN: Intoxicating Beverages/Illegal Substances of Ordinance 97-05, an ordinance establishing The Town Of Fort Myers Beach Parks And Recreation Ordinance, is hereby amended to read as follows:

GENERAL PROHIBITION No person shall possess, consume, use, sell or distribute alcoholic or intoxicating beverages, illegal substances in any park. Further, no person shall enter or remain in any park under the influence of alcohol, other intoxicants, or illegal substances.

A person under a written contract with the Town may sell, serve and/or permit to be sold or served beer and wine at events designated by the Town, and persons may consume said beer and wine sold therein on the premises only without violating the provisions of this section.

Notwithstanding, the foregoing, the Town Council is hereby authorized to designate by resolution for a onetime event any recreation facility wherein the sale and consumption of alcoholic beverages may be allowed when the private group making application for the resolution must secure a permit or license authorized by Chapter 561, Florida Statutes. Such beverages must be served only in plastic containers and tThe Town Manager may place further restrictions or limitations.

SECTION 3. Effective Date. This ordinance shall take effect immediately upon its adoption.

The foregoing ordinance was enacted by the Town Council upon a motion by Council Member Bill Van Duzer and seconded by Council Member Bill Thomas

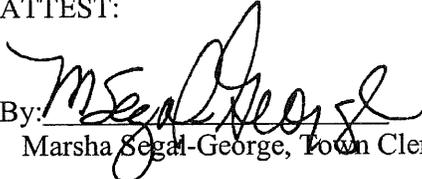
and, upon being put to a vote, the result was as follows:

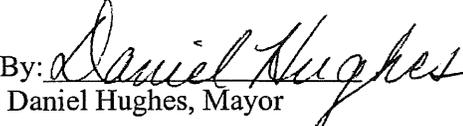
Howard Rynearson	<u>aye</u>
Daniel Hughes	<u>aye</u>
Bill Thomas	<u>aye</u>
W. H. "Bill" Van Duzer	<u>aye</u>
Terry Cain	<u>aye</u>

DULY PASSED AND ENACTED this 3<sup>rd</sup> day of February, 2003.

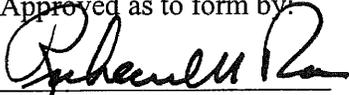
ATTEST:

TOWN OF FORT MYERS BEACH

By:   
Marsha Segal-George, Town Clerk

By:   
Daniel Hughes, Mayor

Approved as to form by:

  
Richard V.S. Roosa, Town Attorney

**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, January 12, 2010**

**I. CALL TO ORDER**

Meeting was called to order at 9:05 AM by Chairperson Joanne Shamp. All members were present:

Rochelle Kay  
Alan Mandel  
Bill Van Duzer  
Carleton Ryffel  
Charles Moorefield

Staff present: LPA Attorney Anne Dalton; Community Development Director Dr. Frank Shockey.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION**-Ms. Kay

**IV. MINUTES**

A. Minutes of December 15, 2009

**Motion: Mr. Van Duzer moved to approve the minutes, as corrected below.**

**Seconded by Ms. Kay; Mr. Ryffel pointed out a discrepancy in the use of the word “for” instead of “to” on page 10;**

**Vote: Motion passes 6-0 with the correction.**

**V. PUBLIC HEARINGS**

A. SEZ2008-003 Richard Parking Lot Hearing and VAR2008-0002

Ms. Dalton swore in the witnesses. Ms. Shamp called for the Affidavit of Publication and Dr. Shockey confirmed that it appeared in the News-Press on Jan. 2, 2010. Chair asked for disclosure of any ex-parte communications: Mr. Ryffel said he “ran into John (Richard) on the beach” and they talked for a few minutes a several months ago about the application.

Ms. Deborah Drake, representing Mr. Richard, addressed the LPA and asked for a continuance until October 12, 2010. Ms. Shamp asked for a reason for the request and Ms. Drake responded “economics.”

Dr. Shockey agreed that the applicant is entitled to this continuance but commented about the amount of time requested. Ms. Dalton added that the members might want to consider having the hearing before the current members' terms expire.

Ms. Shamp asked for **public comment**. No comment, but this was held open.

**Motion: Mr. Ryffel moved to approve the continuance to October 12, 2010 at 9:00 am.**

**Seconded by Mr. Mandel;**

**Vote: Motion passed 6-0.**

This hearing is continued to October 12, 2010 at 9:00 AM.

## **VI. ADMINISTRATIVE AGENDA**

### **A. Discussion of Language for Ordinance 09-09**

Dr. Shockey gave a brief background noting that this item was brought to a hearing at the last meeting and that it has to do with non-movable refuse containers and fences surrounding them. He added that there are 2 sections of the Code being addressed here, one being refuse container screening and fence heights, and exceptions to the limits on fence height so that fences could be tall enough to screen the containers. Another change that was heard previously was to require movable and non-movable containers to have lids to keep animals out. This hearing was continued to February 9, 2010 but Dr. Shockey put some language together to try to address the concerns raised in December, to clarify that containers must be fully screened up to the full height of the container, and that these changes were not to allow that the fences could be shorter than the containers. He suggested the LPA look at the draft and, if suitable, he could have any additional changes that might be necessary ready for the continued hearing in February.

Mr. Van Duzer agreed that this is a good idea and that the limit to the height of the enclosure should be adjusted so that all enclosures are sufficient in height to conceal the container.

Ms. Kay said she approved of the wording.

Mr. Ryffel asked if this wording would allow fences at heights higher than 6 feet if containers were taller than 6 feet. Dr. Shockey explained that the fence section gives exceptions to the fence heights and but the screening requirement attempts to clarify that whatever the means used to conceal the container must be tall enough to screen the container up to its full height. Mr. Ryffel pointed out that the last sentence in the draft "but must not exceed 6 feet in height" seems contrary to that. Dr. Shockey explained that this is a change to the section that limits fence heights; if the LPA wants to recommend allowing screening fences to be even taller than 6 feet, they could discuss this policy, but up to this point the discussion had been that fences for screening could be up to 6 feet even if in the front yard. There was further discussion about the general heights limits on fences and the requirements to screen refuse

containers using fences or some other means. Mr. Ryffel suggested investigating the sizes of containers available so that they can better set these limits. He then referred to Sec. 6-11b, wherein it allows using vegetation as a screen and said there are no limitations as to the height and maintenance issues involved with vegetations as an alternative. Dr. Shockey said that there are restrictions on types of vegetation elsewhere in the Code but that the idea of this section is to simply require that there be screening of some kind that is adequate. More discussion ensued about this and the restrictions for vegetation.

Mr. Mandel referred to Sec. 34-1744c, where it is stated that you can't be "more than 42" high in the front yard" and gives exceptions. He asked if those exceptions meant if you have a larger one, you could go up to 6 feet in the front. Dr. Shockey agreed that that was the purpose of the recommended change.

Mr. Moorefield asked if it would be easier to just require that these containers not be visible from the street rather than so many requirements and then the exceptions. Dr. Shockey explained that without the specifics, people will have different interpretations of what is acceptable.

Mr. Van Duzer suggested trying to re-work the specifics and the language so that this is not so involved. He agreed that the vegetation option must have restrictions, too, and if this is to make a permanent change to the LDC, it needs to be looked at again with some more time.

Ms. Shamp opined that this cannot get much simpler than what Dr. Shockey has prepared, pointing out that the members are saying they want it simple but then add their own ideas as to additional restrictions that should be included. She likes the general limit of 6 feet for all fences because it keeps all fences uniform and does not block views. She also added that if a fence needs to be higher than 6 feet to conceal the container, vegetation or some other alternative must be used instead of an even taller fence, eliminating the opportunity for residents to use the screening requirement as an excuse to have very tall fences. She accepts the draft language, as is.

Mr. Mandel suggested using the word "native" to the area about vegetation.

Mr. Ryffel suggested other ways that vegetation and decorative garden architecture could be used for this type of screening without building fences.

## **VII. ADJOURN- LPA, RECONVENE AS HPB**

**Motion: Mr. Kay moved to adjourn as the LPA and reconvene as the HPB.**

**Seconded by Mr. Ryffel;**

**Vote: Motion passes 6-0.**

Ms. Kay called the HPB meeting to order at 9:40AM and advised that the program to put up the first 3 plaques will be on Jan. 19, 2010 at 3:00 PM. Ms. Shamp added that

the names of the LPA members will be on the back of the programs.

### VIII. HPB MEMBER ITEMS OR REPORTS

#### A. Discussion of the 2010 budget

Ms. Kay said that the report is not ready yet, as Ms. Shamp added that the resolution to accompany it is not quite done. Ms. Dalton interrupted that Ms. Schober is present and will address this item.

Theresa Schober reported that Mr. Smith advised her that there are several businesses downtown that would like historical signage to run on San Carlos Blvd. and said that she realized this was also a desire of the HPB. Her staff is writing grant proposals now for signage and that this could become a kind of package with the Town's sign requests to alleviate the costs. She feels that this is a good way for the HPB to be more involved with the businesses and some of the signage that the LPA already intended to install could be paid for in part by grant funds. There was discussion about the different locations for these interpretive signs and what they might say.

Dr. Shockey suggested having Ms. Schober be the conduit to bring the information from this board and the HAC together to present all of it and she could then determine what funding is available, for what and how. More discussion ensued regarding types of signs, content, regulations, etc. Mr. Ryffel asked what kind of signs these would be and how they would be displayed. Ms. Kay referred to some photos she had of similar signs she had seen in Boulder, CO and offered them as an example of the sort of thing that is being proposed. Ms. Kay volunteered to work with Ms. Schober on this.

Ms. Schober mentioned that Newton House final inspections are in progress and Town Council will tour it in early February.

Ms. Shamp explained, particularly to address Mr. Ryffel's earlier question, the first group of plaques, which are called "Historic Designation," and said the next group is "Historic Recognition," and there are plans for a walking tour as well.

**Motion: Mr. Van Duzer moved to adjourn the HPB and reconvene as the LPA.**

**Seconded by Ms. Shamp;**

**Vote: Motion passes 6-0.**

Meeting adjourned at 10:00 AM.

### IX. ADJOURN AS HPB- RECONVENE AS LPA

Ms. Shamp reconvened the LPA at 10:01 AM, all members still present.

### X. LPA MEMBER ITEMS AND REPORTS

Mr. Moorefield – nothing to report.

Mr. Mandel – nothing to report.

Mr. Ryffel – nothing to report.

Ms. Shamp – congratulated Dr. Shockey for being named permanent Community Director.

Ms. Kay – nothing to report.

Mr. Van Duzer – nothing to report.

**XI. LPA ATTORNEY ITEMS**

Reported that Cathie Lewis has been named as Public Works Director.

**XII. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Nothing to report.

**XIII. LPA ACTION ITEMS**

**Resolutions to Town Council:**

- Animal Control-long term – Ms. Kay: February 1, 2010 at 9:00 AM
- Gulfview/ Vacation, continuation-December 21, 2009: Dr. Shockey reported that the Council passed the vacation ordinance
- Pink Shell- expected to be continued to Jan. 19 at 4:00 PM-Ms. Shamp
- Alcoholic beverages-COP expansion on the beach-presentation to Council – 2<sup>nd</sup> meeting in Feb. (February 16)
- Jack Green resolution Feb. 1 at 9:00 AM- Ms. Kay

**Continued LPA hearings:**

- Shipwreck – continued to Oct. 12, 2010
- Refuse Containers – continued to Feb. 9, 2010

**Future Work Activites:**

- Present residential connection standard, report on pending consultant recommendations Feb. 9
- Storm Water-pending; Dr. Shockey/Kay/Van Duzer-TBD
- Seasonal Parking report on pending consultant recommendations Feb. 9
- HPB budget-Feb. 9, 2010
- HPB Vistas – Budget Proposal – Ms. Kay

**XIV. PUBLIC COMMENT**

None.

**XV. ADJOURNMENT**

**Motion: Mr. Ryffel moved to adjourn.**

**Seconded by Ms. Kay;**

**Vote: Motion passes 6-0.**

Adjourned at 10:14 AM.

**Next meeting February 9, 2010 at 9:00 AM**

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Joanne Shamp, LPA Chair

- End of document

ORDINANCE No. 00-16

AN ORDINANCE AMENDING THE TOWN OF FORT MYERS BEACH CODE OF ORDINANCES CHAPTER 78, TOWN OF FORT MYERS BEACH SPECIAL EVENTS ORDINANCE; SECTION THREE: PERMIT REQUIRED; SECTION FOUR: PERMIT APPLICATION; PROVIDING AUTHORITY; AMENDMENT TO CHAPTER 78 SECTION FOUR: PERMIT APPLICATION; PROVIDING SEVERABILITY; AND EFFECTIVE DATE.

IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH AS FOLLOWS:

SECTION 1. Authority. This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapter 166, Florida Statutes, and other applicable provisions of law.

SECTION 2. AMENDMENT. Chapter 78 SECTION THREE., of the ordinance establishing the Town of Fort Myers Beach Special Events Ordinance is hereby amended to read as follows:

78. SECTION THREE: PERMIT REQUIRED

No person, corporation, partnership, or other organization shall advertise, conduct, maintain, or sell or furnish tickets for more than six events in one calendar year ~~an event~~ within the boundaries of the Town of Fort Myers Beach and no such event shall be held unless and until that person or entity has obtained a permit from Town of Fort Myers Beach to conduct such event.

SECTION 3. AMENDMENT. Chapter 78 SECTION FOUR., of the ordinance establishing the Town of Fort Myers Beach Special Events Ordinance is hereby amended to read as follows:

78. SECTION FOUR: PERMIT APPLICATION

No person, corporation, partnership, or other organization shall advertise, conduct, maintain, or sell or furnish tickets within the boundaries of the Town of Fort Myers Beach

An application shall be made on a standard application form, approved by the Town Manager or designee, for an event permit. The application form may be obtained from Town Hall. At least twenty-one (21) days prior to the scheduled commencement of the event, or prior to January 1, if the event is to be held during the season (February through April), the completed application with descriptive plans for all arrangements

must be submitted along with the applicable fee if any. The applicant shall comply with any and all conditions set forth in the application and as required by the Town Manager or designee, including but not limited to contacting and making sufficient and acceptable arrangements with the following agencies:

- (a) Lee County Sheriff's Department.
- (b) Fort Myers Beach Fire Department
- (c) Any/or other agencies deemed appropriate or necessary by the Town Manager or designee.

Pursuant to these provisions, the Town Manager or designee is provided authority to prepare said application form and revise same from time to time as needed.

SECTION 4. SEVERABILITY. If any one of the provisions of this ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or shall for any reason whatsoever be held invalid, then such provision shall be null and void and shall be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this ordinance.

SECTION 5. EFFECTIVE DATE. This ordinance shall take effect immediately upon its adoption.

The foregoing ordinance was enacted by the Town Council upon a motion by Council Member Murphy and seconded by Council Member Cain and, upon being put to a vote, the result was as follows:

Anita T. Cereceda	<u>aye</u>
Daniel Hughes	<u>aye</u>
Garr Reynolds	<u>aye</u>
Ray Murphy	<u>aye</u>
Terry Cain	<u>aye</u>

DULY PASSED AND ENACTED this 6<sup>th</sup> day of November, 2000.

ATTEST:

By: Marsha Segal-George  
Marsha Segal-George, Town Clerk

TOWN OF FORT MYERS BEACH

By: Daniel Hughes  
Daniel Hughes, Mayor

Approved as to form by:

Richard V.S. Roosa  
Richard V.S. Roosa, Town Attorney

Anne Dalton, Esquire  
2044 Bayside Parkway  
Fort Myers, Florida 33901  
(239) 337-7900

## Memorandum

**To:** Chair, Vice Chair, LPA Members, Town of Fort Myers Beach  
**CC:** Town Manager, Community Development Director, Town Clerk  
**Date:** July 3, 2009  
**Subject:** Draft Open Alcoholic Beverage Container Ordinance/Legal  
Comments

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Pursuant to the direction of the LPA, below are legal comments regarding the draft Open Alcoholic Beverage Container Ordinance which is attached hereto for LPA review. It contains a watermark of "070309" to distinguish it from the last draft presented for LPA review.

1. **Definition of Beach.** (Section 4. Definitions)
  - The LPA is currently reviewing the Beach Furniture Ordinance. Please keep in mind that Ordinance 07-03, which is the beach furniture ordinance previously passed by the Town Council on April 2, 2007, contains its own definition of "Beach," which is different from this definition.
2. **Town Council Approval** (Section 5 (c) COP, Resolution Procedure, conditions)
  - This Town Council approval process must be consistent with the Special Events Ordinance requirements. If this is changed, the Special Events Ordinance (and any parts of the LDC Special Events requirements) must be reviewed.

**TOWN OF FORT MYERS BEACH  
ORDINANCE NO. 09-\_\_**

**AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; DEFINITIONS; CONSUMPTION OR POSSESSION OF ALCOHOLIC BEVERAGES ON A BEACH, PUBLIC AREA, OR SEMI-PUBLIC PARKING LOT; EXCEPTIONS; PENALTY; PROVIDING SEVERABILITY; REPEALING CLAUSE AND REPEALING ORDINANCE NO. 96-05; AND PROVIDING EFFECTIVE DATE.**

WHEREAS, Article VIII, Section 2 of the Constitution of the State of Florida and Chapter 166 of the Florida Statutes provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and exercise any power for municipal purposes except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter empowers the Town to adopt, amend, or repeal such ordinances and resolutions as may be required for the proper governing of the Town; and

WHEREAS, the Town Council finds that there is a public need affecting life, health, public peace, safety, security, welfare and property of persons inside the municipal limits of the Town so as to require the Town to pass regulations and restrictions regarding consumption or possession of alcoholic beverages on a beach, public area or semi-public parking lot and further that such passage is needed for the effective administration and operation of the Town.

**IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:**

**SECTION 1: Incorporation of “Whereas” Clauses.**

The above “Whereas” clauses are hereby incorporated by reference.

**SECTION 2: Authority, Title and Citation.**

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law. It will hereafter be known and cited as the “TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE.”

### **SECTION 3. Finding of Necessity.**

The Town Council finds that the passage of this Ordinance regulating open alcoholic beverage containers is necessary for the effective administration and operation of the Town and the health, safety, security and welfare of the residents, business owners, visitors and the general public within the Town.

### **SECTION 4. Definitions.**

For the purpose of this Ordinance the following terms, phrases, words, and their derivations have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural.

**Alcoholic beverage** means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law, Chapters 561 through 565, 567, and 568, Florida Statutes.

**Beach** means the land between the mean high and mean low water lines owned by the State of Florida and the zone of unconsolidated sand extending landward from the mean high water line to the place where there is a marked change in material or physiographic form or the line of permanent vegetation, usually the effective limit of storm waves; including any beach areas owned by the town or Lee County, and any beach area that has arisen upon it a right of customary use by the public or a public easement, prescriptive or otherwise; and the foreshore of tidal navigable waters.

**Container** means any bottle, can, cup, glass, or other receptacle.

**Open container** means any container of alcoholic beverage that has been opened, has its seal broken, had its contents partially removed, and is not located in the locked glove compartment, locked trunk, or other locked non-passenger area of a vehicle, or from which consumption is capable immediately.<sup>1</sup> This definition is intended to accord with the definition in Section 316.1936 Florida Statutes.

**Public area** means an area open to the public, including any auditorium, beach, bridge, building, canal, causeway, dock, lake, lagoon, marina, museum, open space, park, parkway, pier, playground, pool, preserve, range, recreational facility and/or field, roadway, semi-public parking lot, sidewalk, stream, waterway, and abutting lands and adjacent littoral waters, and all rights-of-way and public service facilities located on grounds, buildings, and structures that are under the

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<sup>1</sup> A bottle of wine that has been resealed and is transported pursuant to F.S. § 564.08 is not an open container under the provisions of F.S. § 316.1936.

jurisdiction, control, and administration of the town, special district, county, state, or federal government, within the municipal limits of the town.

**Semi-public parking lot** means any area wherein motor vehicles are parked by the public in conjunction with any business, enterprise, commercial, or noncommercial establishment, office building, or multiple-family building.

## **SECTION 5. Consumption or Possession of Alcoholic Beverages on a Beach, Public Area, or Semi-Public Parking Lot; Exemptions.**

(a) **General prohibition in public areas.** Consuming, using, or selling any alcoholic beverage, or manually possessing any open container of any kind that contains any alcoholic beverage while on or within any public area, or while on or within any vehicle located in a public area is prohibited. It is further prohibited for any intoxicated person to enter or remain in any public area.

(b) **Exceptions.** The following activities are not subject to the prohibitions of subsection (a) of this Section:

- (1) A person under a written contract with the town to allow sales and service of beer and wine may distribute, and persons of age not prohibited by the patron age provisions of Division 5, Article IV, Chapter 34 of the Land Development Code or other Town ordinance or state law, may consume such permitted beer and wine only within the licensed premises designated by the town without violating the provisions of this Ordinance.
- (2) The consumption or possession of an alcoholic beverage in an open container, in a public area specifically authorized and approved by the town for outdoor seating or a special event pursuant to the Land Development Code or other Town ordinance or state law.
- (3) Notwithstanding any other provision of law, an alcoholic beverage establishment licensed to sell wine on the premises may permit a patron to remove one unsealed bottle of wine for consumption off the premises if the patron has purchased a full course meal and consumed a portion of the bottle of wine with such meal on the licensed premises. A partially consumed bottle of wine that is to be removed from the licensed premises must be securely resealed by the licensee or its employee before removal from the licensed premises. The partially consumed bottle of wine must be placed in a bag or other container that is secured in a manner such that it is visibly apparent if the bag or other container has been subsequently opened or tampered with, and a dated receipt for the bottle of wine and full course meal must be provided by the licensee and attached to the container. If transported in a motor vehicle, the container with the resealed bottle of wine must be placed in a locked glove compartment, a locked

trunk, or the area behind the last upright seat of a motor vehicle that is not equipped with a trunk or glove compartment capable of being locked.

- (4) A person engaged only in picking up empty beverage containers for purpose of collecting the value of the empty containers or litter control.
- (5) A passenger of a:
  - a. vehicle in which the driver is operating the vehicle pursuant to a contract to provide transportation for passengers and such driver holds a valid commercial driver's license with a passenger endorsement issued in accordance with the requirements of Ch. 322 Florida Statutes; or
  - b. bus in which the driver holds a valid commercial driver's license with a passenger endorsement issued in accordance with the requirements of Ch. 322 Florida Statutes; or
  - c. self-contained motor home that is in excess of 21 feet in length.
- (6) Any wine in the possession of a minister, pastor, priest, rabbi or other official of a religious organization that is to be used solely during religious services.
- (c) **Resolution procedure, conditions.** Notwithstanding the prohibition in subsection (a) of this section, the town council may approve, by resolution, the sales or service and consumption on the premises of alcoholic beverages in a public area for a one-time event. The entity making application for the resolution must secure a temporary permit or license authorized by Florida Statutes § 561.422. All beverages so approved must not be served in glass or other breakable containers and the director may place further restrictions or limitations on the special event.

#### **SECTION 6. Penalty.**

Any person convicted of violation of Section 5 of this Ordinance may be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail for a period not to exceed 60 days, or both. Such fine and imprisonment will apply to each such offense. If said violation involves the operation or occupation of a motor vehicle in violation of Section 316.1936 Florida Statutes, such person will also be guilty of a non-criminal moving traffic violation, punishable as provided in Ch. 318 Florida Statutes.

#### **SECTION 7. Severability.**

If any one of the provisions of this Ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or should for any reason whatsoever be held invalid, then such provision will be null and void and will be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this Ordinance.

**SECTION 8. Repealing Clause.**

Ordinance 96-05 is specifically repealed by this Ordinance. All other town ordinances or parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby superseded and repealed.

**SECTION 9. Effective Date.**

This Ordinance will become effective immediately upon its adoption.

The foregoing was enacted by the Town Council upon a motion of Council Member \_\_\_\_\_ and seconded by Council Member \_\_\_\_\_ and, upon being put to a vote, the result was as follows:

Larry Kiker, Mayor \_\_\_\_\_  
Herb Acken, Vice Mayor \_\_\_\_\_  
Tom Babcock \_\_\_\_\_  
Jo List \_\_\_\_\_  
Bob Raymond \_\_\_\_\_

DULY PASSED AND ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

ATTEST: TOWN OF FORT MYERS BEACH, FLORIDA

By: \_\_\_\_\_ By: \_\_\_\_\_  
Michelle Mayher, Town Clerk Larry Kiker, Mayor

Approved as to form by:

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

**Exhibit A**

**FORT MYERS BEACH LAND DEVELOPMENT CODE**

**CHAPTER 34 ZONING DISTRICTS, DESIGN STANDARDS, AND NONCONFORMITIES**

**ARTICLE IV. SUPPLEMENTAL REGULATIONS**

**DIVISION 5. ALCOHOLIC BEVERAGES**

**Sec. 34-1261. Definitions.**

For purposes of this division and when referred to elsewhere in this chapter, certain terms or phrases shall have the following meaning:

*Alcoholic beverage*

*Beach* – means an area of sand along the Gulf of Mexico that extends landward from the mean low-water line to the place where there is a marked change in material or physiographic form, or to the line of permanent vegetation, usually the effective limit of storm waves.

*Beach or bay access* - means a right of way or easement that provides at least pedestrian access to beaches, bays, canals, or wetlands.

*Beer, wine, and liquor*

*EC (Environmentally Critical) Zoning District* – designates beaches and significant wetlands whose preservation is deemed critical to the Town of Fort Myers Beach through the Comprehensive Plan. The district includes beaches that have been designated in the “Recreation” category on the Future Land Use (FLU) map. When used in this division EC Zoning District only refers to beaches within the Recreation category on the FLU map, excluding the area surrounding and including the Little Estero Critical Wildlife Area.

*Full course meals*

*Kitchen, commercial*

*Liquor license*

*Park,*

*Public beach* – means any beach which is below mean high-water lines; is owned by the town or county; has arisen upon it a right of customary use by the public; has arisen upon it a public easement, prescriptive or otherwise; or is the fore shore of tidal navigable waters, that is the land between the high-water mark and the low-water mark, and is owned by the state.

*Sale of*

## Exhibit A

### Sec. 34-1264. Sale or service for on-premises consumption

#### (g) *Expansion of area designated for permit.*

The area designated for an alcoholic beverage permit cannot be expanded without filing a new application for an alcoholic beverage permit in accordance with the requirements contained in this chapter. The new application must cover both the existing designated area as well as the proposed expanded area. All areas approved must be under the same alcoholic beverage permit and subject to uniform rules and regulations.

(1) Expansion into EC Zoning District. Only a lawfully existing permitted establishment with previously permitted alcoholic beverage consumption may expand their area designated for an alcoholic beverage permit into an adjacent EC Zoning District under the same ownership by Administrative Approval. In the instance of new permits, wherein there is no established permitted alcoholic beverage permit adjacent to the EC Zoning District, those new establishments and the request to expand into the EC Zoning District shall only be permitted by Special Exception. Approval to expand into the EC Zoning District, either by Administrative Approval or Special Exception, shall not encroach into public beach access and only permits service and consumption. Requests for expansion associated with outdoor patios, porches, decks, etc must submit a separate request for such items consistent with this and other chapters of the land development code.

- a. The area of expansion must be under the same ownership as the area currently designated for an alcoholic beverage permit. The existing establishment with the alcoholic beverage permit must be immediately adjacent to the EC zoning district.
- b. Patrons of these permitted establishments may not bring their own coolers within the expanded permit area in the EC Zoning District, nor may they consume alcohol, other than that sold to them by the permitted establishment. It is the responsibility of the property and business owner to control consumption within the expanded area. Violation of this provision may be grounds for revocation of the permit for the expanded area.
- c. Alcohol and food served in the EC Zoning District, may only be served in bio-degradable or compostable plastic cups containers, which meet or exceed ASTM D 6400-99. No glass, aluminum or other non-biodegradable material may be utilized for alcohol or food service. Violation of this provision may be grounds for revocation of the permit for the expanded area.
- d. The Permittee shall be responsible for maintaining the EC Zoning District, within the area of the expanded permit, ensuring that it is free of litter and debris. Violation of this provision may be grounds for revocation of the permit for the expanded area.
- e. The Permittee shall be responsible for installing signage that advises patrons, that alcohol may not leave the area of the EC Zoning District in which it was purchased. It is the responsibility of the property and business owner to control consumption within the expanded area. This condition will allow the applicant the right to place one sign at each property line abutting a property under different ownership. The sign must be removed and stored appropriately each night and is limited to 5 feet in height and 8 square feet of sign copy area per sign face, with only two sign faces per sign allowed. The signs content shall be limited to conveying the information that no alcohol may leave the property and no alcohol may enter the property. Signs meeting the language and size requirements can be ordered and obtained from the Town of Fort Myers Beach for a fee of \$XX.XX
- f. Hours of service for the expanded area in the EC Zoning District shall be limited to, between the hours of 11:00AM and sunset, except for those additional hours granted by a Special Events Permit or more restrictive hours as a condition of Special Exception

## Exhibit A

approval. The property and business owner are responsible for ensuring patrons move from the EC Zoning District to the primary establishment after sunset should they wish to continue service of food or alcohol after sunset. Violation of this provision may be grounds for revocation of the permit for the expanded area.

- g. All terms and conditions for the area currently designated for alcohol beverage permit, as established in a previously granted approval, shall remain in full force and effect, and in the instance of conflicts with conditions for the expanded area established herein, the more restrictive shall prevail within the expanded area.
- h. In the instance of new permits, wherein there is no established permitted alcoholic beverage permit adjacent to the EC Zoning District, those new establishments shall only be permitted by Special Exception and the request to expand area into the EC Zoning District may only be accomplished by Special Exception.
- i. Entertainment within the expanded area in the EC Zoning District may only be accomplished by Special Exception or Special Events Permit, unless granted by prior Special Exception. Violation of this provision may be grounds for revocation of the permit for the expanded area.
- j. The area of expansion is limited to that area within the property lines, under same ownership, from the currently permitted area to no closer than 50 feet from the shoreline.
- k. No additional parking shall be required for the area of expansion in the EC Zoning District. Requests for expansion that include land area outside of the EC Zoning District must meet the parking requirements of this chapter.
- l. Separate permit(s) for beach furniture rental will be required.
- m. Applicant shall annually renew their approval for expansion of service into EC through a Certificate of Use Permit.
- n. Applicant shall provide a valid Certificate of Insurance covering the expanded area of for an alcoholic beverage permit in the EC Zoning District. The Certificate of Insurance shall be updated annually with the annual renewal.
- o.
- ~~p. In the instance wherein the applicants desires to expand the designated permitted area in the EC Zoning District beyond the area under same ownership and onto adjacent property(s) in the EC Zoning District, under different ownership, this may only be accomplished by Special Exception granting the such right and by an annually renewed Temporary Use Permit. In the event the applicant obtains a Special Exception, but fails to annually renew the Temporary Use Permit, the right of use of the expanded area conveyed by the Special Exception shall cease. Further, the applicant must demonstrate a valid leasehold interest for the adjacent property.~~

## Exhibit A

### FORT MYERS BEACH LAND DEVELOPMENT CODE

#### CHAPTER 34 ZONING DISTRICTS, DESIGN STANDARDS, AND NONCONFORMITIES

#### ARTICLE III. ZONING DISTRICT REGULATIONS

#### DIVISION 4. CONVENTIONAL ZONING DISTRICTS

#### Section 34-652. EC (Environmentally Critical) zoning district

*Need to include all sections/language in between that were not changed.*

*(d) Permitted uses. In the EC district, no land or water use shall be permitted by right except for those uses and developments permitted by the Fort Myers Beach Comprehensive Plan in wetlands, beaches, or critical wildlife habitats, as applicable, including:*

- (1) Boating, with no motors permitted except electric trolling motors.
- (2) Fishing
- (3) Removal of intrusive exotic species or diseased or dead trees, and pest control.
- (4) Hiking or nature study, including pedestrian boardwalks and dune crossovers.
- (5) Outdoor education, in keeping with the intent of the district.

(6) Recreation activities, residential accessory uses, and resort accessory uses that are performed outdoors. These activities and uses include passive recreation and active recreation that requires no permanent structures or alteration of the natural landscape (except as may be permitted by special exception (see 6-366 and subsection (e) below). Any temporary structure used in conjunction with such uses must comply with all provisions of this code (for instance see Chapters 14 and 27). Artificial lighting may not be installed in the EC zoning district unless approved by a special exception or as a deviation in the planned development rezoning process (see 6-366 and 14-76)

(7) Wildlife management, as wildlife preserves.

(8) Expansion of area designated for the service of alcoholic beverages, as established and regulated in Section 34-1264(g)(1).

## Exhibit A

We need to include an amendment to the fee schedule;

1. Administrative Approval of COP in EC Zoning District= \$4,000
2. Annual Certificate of Use Approval for COP in EC Zoning=\$1,000
3. Special Exception for COP adjacent to EC= \$8,000

DRAFT

Anne Dalton, Esquire  
2044 Bayside Parkway  
Fort Myers, Florida 33901  
(239) 337-7900

## Memorandum

**To:** Chair, Vice Chair, LPA Members, Town of Fort Myers Beach  
**CC:** Town Manager, Community Development Director, Town Clerk  
**Date:** July 3, 2009  
**Subject:** Draft Liquor License Ordinance/Legal Comments

---

Pursuant to LPA direction, below are legal comments on the referenced draft ordinance which is attached and which carries a watermark of "070309".

1. **Definitions of "place of worship" and "religious facilities"** (Section 4 Definitions, page 3):
  - These definitions are currently located in LDC Chapter 34- 2 . The LDC will need to be concurrently modified if these definitions are changed in this ordinance.
  - It is recommended that staff or the consultant review the impact that consolidating these two definitions would have on the remainder of the LDC, in the hope that they can be consolidated into one definition for ease of use.
  - It is recommended that these definitions be broadened out to include other forms of worship in addition to church or synagogue, such as mosques, for example.
  - The current definition makes a distinction between "place of worship" having instruction for classes of 100 or less children during the week, and "religious facilities" having instruction for classes for more than 100 children during the week.
  - The definition for "place of worship" carries over the LDC distinction of classes for 100 or less children, while the definition of "religious facilities" includes classes for over 100 children during the week. If the LPA recommends, and Town Council adopts, a new ordinance which incorporates this older language, the legislative history in this adoption process must set forth the basis for a distinction between over 100 and under 100 children.
  - The definition of "religious facility" needs to be clarified in that only religious assisted living facilities are encompassed by this definition.
2. **Hours of business** (Section 5. Hours of Business during which sales or service, consumption and occupancy are prohibited):
  - The LPA has not yet officially taken a position regarding altering the hours of sales or service (subsection a) or the hours of consumption and occupation (subsection b). Accordingly, I have not yet done any research on the legal implications of altering previously-granted COP

approvals which are shortened by the legislative process. In general, the Town has the ability to pass ordinances changing the rules under which businesses can operate, but if the LPA decides to move forward with a recommendation of shortened hours, I will provide a legal opinion on this subject upon request.

3. **Prohibited locations** (Section 6. Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions)
  - This language tracks current LDC Section 34-1264 (b), except that it is more limiting as to dwelling units (the LDC restriction is as to “a dwelling unit under separate ownership, except when approved as part of a planned development; the proposed ordinance does not contain the “planned development” language)
  - The LPA and Town Council may wish to develop legislative history as to why the 500 foot prohibitions apply to a dwelling unit under separate ownership and another alcoholic beverage establishment. It would also be a good idea to have on the record why this prohibition applies to a child day care center, park, place of worship or religious facility, although presumably the same rationale which caused the state to prohibit alcoholic beverage establishments within 500 feet of a school (FS 562.45) would apply to the day care centers, etc.
4. **Hotel/Motel Bars** (Section 6 (c) (2)(c) Alcoholic beverage establishments, Exceptions, hotel/motels)
  - The language regarding sales or service only to patrons of the hotel/motel or resort, plus associated signage, should be reviewed to ensure it is consistent with current Town practices.
5. **Whereas Clauses.** I’ve added various “Whereas” clauses for LPA review.
6. **LDC Modifications**
  - It is imperative that the LDC provisions which are inconsistent with this ordinance be concurrently revised, to avoid confusion.

**TOWN OF FORT MYERS BEACH  
ORDINANCE NO. 09-\_\_**

**AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH LIQUOR LICENSE RESTRICTION ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; DEFINITIONS; HOURS OF BUSINESS DURING WHICH SALES OR SERVICE, CONSUMPTION, AND OCCUPANCY ARE PROHIBITED; ALCOHOLIC BEVERAGE ESTABLISHMENTS; PROHIBITED LOCATIONS; MEASURING DISTANCES; EXCEPTIONS; PENALTIES; SEVERABILITY; REPEALING CLAUSE AND REPEALING ORDINANCE NO. 96-06; AND PROVIDING EFFECTIVE DATE.**

WHEREAS, Article VIII, Section 2 of the Constitution of the State of Florida and Chapter 166 of the Florida Statutes provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and exercise any power for municipal purposes except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter empowers the Town to adopt, amend, or repeal such ordinances and resolutions as may be required for the proper governing of the Town; and

WHEREAS, the Town Council finds that there is a public need affecting life, health, public peace, safety, security, welfare and property of persons inside the municipal limits of the Town so as to require the Town to pass regulations and restrictions regarding liquor licenses within the Town and further that such passage is needed for the effective administration and operation of the Town.

**IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:**

**SECTION 1: Incorporation of "Whereas" Clauses.**

The above "Whereas" clauses are hereby incorporated by reference.

**SECTION 2: Authority, Title and Citation.**

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law. It will hereafter be known and cited as the "TOWN OF FORT MYERS BEACH LIQUOR LICENSE RESTRICTION ORDINANCE."

### SECTION 3. Finding of Necessity.

The Town Council finds that there is a public need affecting life, health, public peace, safety, security, welfare and property of persons inside the municipal limits of the Town so as to require the Town to pass regulations and restrictions regarding liquor licenses within the Town and further that such passage is needed for the effective administration and operation of the Town.

### SECTION 4. Definitions.

For the purpose of this Ordinance the following terms, phrases, words, and their derivations have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural.

**Alcoholic beverage** means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law.

**Alcoholic beverage establishment** means any establishment within the municipal limits of the Town that meets all local zoning requirements, possesses all municipal and county permits required by law, and is currently licensed by the division of alcoholic beverages and tobacco for the sales or service of alcoholic beverages for consumption off the licensed premises, on the licensed premises, or both.

**Bar** means an operation the primary activity of which is the sales or service of alcoholic beverages for consumption on the premises.

**Beverage Law** means chapters 561 through 565, 567, and 568 of the Florida Statutes.

**Day care center, child** means a facility or establishment that provides care, protection, and supervision for six or more children unrelated to the operator and that receives consideration for any of the children receiving care, whether or not operated for profit. This definition does not include public or nonpublic schools that are in compliance with the Compulsory School Attendance Law, Ch. 322 Florida Statutes. The term "child day care center" is synonymous with the terms "preschool" and "nursery school."

**Dwelling unit** means a room or rooms connected together that could constitute a separate, independent housekeeping establishment for a family, for owner occupancy, or for rental or lease on a weekly, monthly, or longer basis as specified for various zoning districts in the Land Development Code, as amended from time to time, and is physically separated from any other rooms or dwelling units that may be in the same structure, and that contains sleeping and sanitary facilities and a kitchen.

**Full course meals** means food items available on a standard menu that include soups, salads, side orders, entrées, non-alcoholic beverages, and desserts.

**Hotel/motel** means a building, or group of buildings on the same premises and under single control, that are kept, used, maintained, or advertised as, or held out to the

public to be, a place where sleeping accommodations are supplied for consideration to transient guests for periods of one day or longer.

**Hotel bar** means a bar operated in connection with any hotel/motel or multiple-family building with more than 100 units, operated by the same owner or management, licensed by the state for, and engaged primarily in, sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation of the hotel business not prohibited by this Ordinance.

**Hours of operation** means the posted hours that an establishment is open to the public for business within the limitations on hours of business established by this Ordinance.

**Licensed premises** means not only rooms where alcoholic beverages are stored or sold by the licensee, but also all other rooms in the building which are so closely connected therewith as to admit free passage from rooms where alcoholic beverages are stored or sold by the licensee to other rooms over which the licensee has some dominion or control and also includes all of the area embraced within the sketch appearing on or attached to the application for the license involved and designated as such on said sketch, in addition to that area included or designated by general law. This definition is intended to accord with the definition in the Beverage Law.

**Membership organization** means an organization operating with formal membership requirements with the intent to pursue common goals or activities.

**Package goods** means any container of alcoholic beverages.

**Package store** means an alcoholic beverage establishment licensed by the state where alcoholic beverages and package goods are sold only in sealed containers for consumption off the premises.

**Parcel of land** means real property capable of being described with such definiteness that its location and boundaries may be established, that is designated by its owner or developer as land to be used or developed as a unified whole, or that has been used as a unified whole.

**Park** means a recreational area open to the public that serves the immediately surrounding neighborhood, entire community, or larger area, including all preserves, open spaces, playgrounds, recreation facilities and fields, museums, auditoriums, ranges and buildings, lakes, streams, canals, lagoons, waterways, pools, causeway bridges, roadways, marinas, piers, and abutting lands and adjacent littoral waters, that are used for recreational purposes, or as parks, and the pertinent rights-of-way presently under or hereafter acquired and placed under the jurisdiction, control, and administration of the Town, and all public service facilities located on grounds, buildings, and structures in the Town that are under the control of or assigned for upkeep, maintenance, or operation by the Town.

**Person** means any individual, association, corporation, estate, firm, limited partnership, partnership, trust, or other legal entity.

**Place of worship** means a structure or structures designed primarily for accommodating an assembly of people for the purpose of religious worship, including but not limited to related religious instruction, church, or synagogue ministries involving classes for 100 or less children during the week, and other church or synagogue sponsored functions that do not exceed the occupancy limits of the building.

**Premises** means any lot, area, tract, or parcel of land.

**Religious facilities** means religious-related facilities and activities that may include, but are not limited to, bus storage facilities or areas, convents, rectories, monasteries, retreats, church or synagogue ministries involving classes for more than 100 children during the week, and assisted living facilities.

**Restaurant** means an establishment engaged primarily in the sales or service of food and beverages in a ready-to-consume state.

**Restaurant, bona fide** means a restaurant that is also an alcoholic beverage establishment that:

(a) is engaged primarily in the service of food and non-alcoholic beverages, where the sales or service of alcoholic beverages is incidental to the sale and service of food and non-alcoholic beverages; and

(b) meets all local zoning requirements, and possesses all municipal and county permits required by law; and

(c) is currently and lawfully licensed by the division of hotels and restaurants of the department of business and professional regulation; and

(d) offers and serves full course meals with full kitchen facilities and food preparation staff capable of preparing and serving full course meals continuously during all hours of operation; and

(e) has a customer service area consisting of tables and chairs, or customer counters, and kitchen facilities, restroom facilities, pantries, and storage room(s) that, aggregated together, comprise no less than 75 percent of the gross floor area, and that are adequate to accommodate the service of full course meals; and

(f) has a sufficient total number of seats or chairs at tables, counters, and bars within the customer service area to accommodate the full occupant load as determined by the town in accordance with the provisions of the Florida Building Code and the Florida Fire Code or successor codes.

This definition is intended to accord with the definition in the Beverage Law.

**Restaurant bar** means a bar operated in direct connection with a bona fide restaurant and by the same owner or management, licensed by the state for sales or service of alcoholic beverages under the Beverage Law for consumption on the premises during the hours of operation not prohibited by this Ordinance.

**School** means an educational institution run by a public agency, a church or synagogue, or a not-for-profit organization.

**SECTION 5. Hours of business during which sales or service, consumption, and occupancy are prohibited.**

(a) **Sales or service.** The sales or service of alcoholic beverages on any licensed premises of an alcoholic beverage establishment is prohibited between the following hours:

- (1) 12 midnight on Monday and 7:00 a.m. on Monday.
- (2) 12 midnight on Tuesday and 7:00 a.m. on Tuesday.
- (3) 12 midnight on Wednesday and 7:00 a.m. on Wednesday.
- (4) 12 midnight on Thursday and 7:00 a.m. on Thursday.
- (5) 12 midnight on Friday and 7:00 a.m. on Friday.
- (6) 1:30 a.m. on Saturday and 7:00 a.m. on Saturday.
- (7) 1:30 a.m. on Sunday and 7:00 a.m. on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above. [on April 28, 2009, the LPA suggested that this subsection be removed and the provisions of subsection (b) below be the only limitations on hours of business.]

(b) **Consumption and occupation of establishments licensed for consumption on the premises.** The consumption of alcoholic beverages on and occupation of any alcoholic beverage establishment licensed for on the premises consumption is prohibited between the following hours:

- (1) 12:30 a.m. on Monday and 7:00 a.m. on Monday.
- (2) 12:30 a.m. on Tuesday and 7:00 a.m. on Tuesday.
- (3) 12:30 a.m. on Wednesday and 7:00 a.m. on Wednesday.
- (4) 12:30 a.m. on Thursday and 7:00 a.m. on Thursday.
- (5) 12:30 a.m. on Friday and 7:00 a.m. on Friday.
- (6) 2:00 a.m. on Saturday and 7:00 a.m. on Saturday.
- (7) 2:00 a.m. on Sunday and 7:00 a.m. on Sunday.
- (8) On legal holidays established by state law, the hours of prohibition are the same for the days on which such holidays fall as for subsection (6), above.

Alcoholic beverage establishments are prohibited from opening or remaining open to the public for business or to allow patrons, customers, or persons other than employees and vendors to remain on such licensed premises during the hours specified above.

(c) **More limited hours of operation.** Owners or operators of alcoholic beverage establishments or other lawful businesses regulated by this Ordinance, for business or other reasons, may choose more restrictive hours of operation than provided by this Ordinance. Nothing in this Ordinance will be construed to prevent an alcoholic beverage establishment from posting hours of operation more restrictive than those provide herein.

**SECTION 6. Alcoholic beverage establishments; prohibited locations; measuring distances; exceptions.**

(a) **Prohibited locations.** Alcoholic beverage establishments are prohibited within 500 feet of:

- (1) A school; [required by § 562.45 of the Beverage Law].
- (2) A child day care center, park, place of worship, or religious facility;
- (2) A dwelling unit under separate ownership; and
- (3) Another alcoholic beverage establishment.

(b) **Measuring distances.** Distances must be measured from the nearest point on the perimeter boundary line of the parcel of land on which the alcoholic beverage establishment is located, in a straight horizontal line, to the nearest point on the perimeter boundary line of the parcel of land on which the prohibiting use is located.

(c) **Exceptions.**

(1) *Bona fide restaurants*, provided:

- a. The bona fide restaurant is in full compliance with the requirements of the state division of hotels and restaurants of the department of business and professional regulation; and
- b. The bona fide restaurant serves full course meals at all times during its hours of operation; and
- c. If the licensed premises includes a bar, only a restaurant bar is used and the sales or service of alcoholic beverages is only to patrons ordering meals or waiting to be seated at tables, and the restaurant bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The restaurant bar must be directly connected with the dining room and must be only a service bar for patrons of such restaurant. Stools are permitted at the restaurant bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package goods from a restaurant bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the restaurant is

not actually engaged in and open to the public for the service of full course meals; and

- d. The bona fide restaurant continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(2) *Hotel/motels and resorts*, provided:

- a. The hotel/motel or resort is not located within 500 feet of a school.
- b. The hotel/motel or resort contains at least [Option 1]: 100[Additional Option 2]: 50 units and any alcoholic beverage establishment(s) are under the same roof or on the same premises under unified control; and
- c. If the licensed premises includes a bar, only a hotel bar is used and the sales or service of alcoholic beverages is only to patrons of the hotel/motel or resort, and the hotel bar is located so that there is no indication from the outside of the building and any associated structures that alcoholic beverages are available on the premises. The hotel bar must be directly connected with and ancillary to the hotel/motel or resort. Stools are permitted at the hotel bar and alcoholic beverages must be sold by the drink only. A package store or the sale of package goods from a hotel bar is prohibited on the licensed premises. The sale of alcoholic beverages is prohibited when the hotel/motel or resort is not actually operating and open to the public as a hotel/motel or resort; and
- d. The hotel/motel or resort and all alcoholic beverage establishment(s) continue to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(3) *Membership organizations*, provided:

- a. The membership organization is not located within 500 feet of a school;
- b. The sales or service of alcoholic beverages is only to members and member-accompanied guests of the membership organization, and there is no indication from the outside of the building and any associated structures that alcoholic beverages are served on the premises; and
- c. The membership organization continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

- (4) *Nonconforming uses*. Any alcoholic beverage establishment lawfully operating on licensed premises prior to July 1, 1999 is exempt from the provisions of subsection (a) of this section, but is subject to the provisions for nonconforming uses in the Town Land Development Code, as amended, as long as it continues to comply with all applicable laws, regulations, and other definitional and regulatory requirements of the Land Development Code.

(5) *Other; town council approval required*.

- a. *Distance from schools.* Except for a bona fide restaurant, a resolution approving the location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a school will be required prior to issuance of a use permit. In addition to the considerations and findings required for rezonings by Chapter 34 of the Land Development Code, prior to approval the local planning agency will review and make a recommendation and the town council must find that the location promotes the public health, safety, and general welfare of the community in accordance with § 562.45, of the Beverage Law.
- b. *Distance prohibition from all other uses.* Except for a bona fide restaurant, hotel/motel or resort, membership organization, or lawfully existing nonconforming use complying with the requirements of this Ordinance, a special exception in accordance with the requirements of the Land Development Code is required prior to issuance of a use permit for location of an alcoholic beverage establishment within 500 feet of a parcel of land containing a place of worship, religious facility, child day care center, park, dwelling unit under separate ownership, or another alcoholic beverage establishment.

The proceedings for such special exception must be in conformance with the provisions of Florida Statutes § 166.041(3)(c). These restrictions will not be construed to prohibit the issuance of special event permits as provided for in § 561.422 of the Beverage Law, the Land Development Code, and all other applicable regulations.

#### **SECTION 7. Penalties.**

Any person convicted of violation of Section 5 of this Ordinance may be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail for a period not to exceed 60 days, or both. Such fine and imprisonment will apply to each such offense. If said violation involves the operation or occupation of a motor vehicle in violation of Section 316.1936 Florida Statutes, such person will also be guilty of a non-criminal moving traffic violation, punishable as provided in Ch. 318 Florida Statutes.

#### **SECTION 8. Severability.**

If any of the provisions of this Ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or should for any reason whatsoever be held invalid, then such provision will be null and void and will be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this Ordinance.

#### **SECTION 9. Repealing Clause.**

Ordinance 96-06 is specifically repealed by this Ordinance. All other ordinances or parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby superseded and repealed.

#### **SECTION 10. Effective Date.**

This Ordinance will become effective immediately upon its adoption.

The foregoing was enacted by the Town Council upon a motion of Council Member \_\_\_\_\_ and seconded by Council Member \_\_\_\_\_ and, upon being put to a vote, the result was as follows:

Larry Kiker, Mayor \_\_\_\_\_  
Herb Acken, Vice Mayor \_\_\_\_\_  
Tom Babcock \_\_\_\_\_  
Jo List \_\_\_\_\_  
Bob Raymond \_\_\_\_\_

DULY PASSED AND ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

ATTEST:  
FLORIDA

TOWN OF FORT MYERS BEACH,

By: \_\_\_\_\_ By: \_\_\_\_\_  
Michelle Mayher, Town Clerk Larry Kiker, Mayor

Approved as to form by:

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

Anne Dalton, Esquire  
2044 Bayside Parkway  
Fort Myers, Florida 33901  
(239) 337-7900

## Memorandum

**To:** Chair, Vice Chair, LPA Members, Town of Fort Myers Beach  
**CC:** Town Manager, Community Development Director, Town Clerk  
**Date:** July 3, 2009  
**Subject:** Draft Open Alcoholic Beverage Container Ordinance/Legal  
Comments

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Pursuant to the direction of the LPA, below are legal comments regarding the draft Open Alcoholic Beverage Container Ordinance which is attached hereto for LPA review. It contains a watermark of "070309" to distinguish it from the last draft presented for LPA review.

1. **Definition of Beach.** (Section 4. Definitions)
  - The LPA is currently reviewing the Beach Furniture Ordinance. Please keep in mind that Ordinance 07-03, which is the beach furniture ordinance previously passed by the Town Council on April 2, 2007, contains its own definition of "Beach," which is different from this definition.
2. **Town Council Approval** (Section 5 (c) COP, Resolution Procedure, conditions)
  - This Town Council approval process must be consistent with the Special Events Ordinance requirements. If this is changed, the Special Events Ordinance (and any parts of the LDC Special Events requirements) must be reviewed.

**TOWN OF FORT MYERS BEACH  
ORDINANCE NO. 09-\_\_\_**

**AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; DEFINITIONS; CONSUMPTION OR POSSESSION OF ALCOHOLIC BEVERAGES ON A BEACH, PUBLIC AREA, OR SEMI-PUBLIC PARKING LOT; EXCEPTIONS; PENALTY; PROVIDING SEVERABILITY; REPEALING CLAUSE AND REPEALING ORDINANCE NO. 96-05; AND PROVIDING EFFECTIVE DATE.**

WHEREAS, Article VIII, Section 2 of the Constitution of the State of Florida and Chapter 166 of the Florida Statutes provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and exercise any power for municipal purposes except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter empowers the Town to adopt, amend, or repeal such ordinances and resolutions as may be required for the proper governing of the Town; and

WHEREAS, the Town Council finds that there is a public need affecting life, health, public peace, safety, security, welfare and property of persons inside the municipal limits of the Town so as to require the Town to pass regulations and restrictions regarding consumption or possession of alcoholic beverages on a beach, public area or semi-public parking lot and further that such passage is needed for the effective administration and operation of the Town.

**IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:**

**SECTION 1: Incorporation of "Whereas" Clauses.**

The above "Whereas" clauses are hereby incorporated by reference.

**SECTION 2: Authority, Title and Citation.**

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law. It will hereafter be known and cited as the "TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE."

### SECTION 3. Finding of Necessity.

The Town Council finds that the passage of this Ordinance regulating open alcoholic beverage containers is necessary for the effective administration and operation of the Town and the health, safety, security and welfare of the residents, business owners, visitors and the general public within the Town.

### SECTION 4. Definitions.

For the purpose of this Ordinance the following terms, phrases, words, and their derivations have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural.

**Alcoholic beverage** means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law, Chapters 561 through 565, 567, and 568, Florida Statutes.

**Beach** means the land between the mean high and mean low water lines owned by the State of Florida and the zone of unconsolidated sand extending landward from the mean high water line to the place where there is a marked change in material or physiographic form or the line of permanent vegetation, usually the effective limit of storm waves; including any beach areas owned by the town or Lee County, and any beach area that has arisen upon it a right of customary use by the public or a public easement, prescriptive or otherwise; and the foreshore of tidal navigable waters.

**Container** means any bottle, can, cup, glass, or other receptacle.

**Open container** means any container of alcoholic beverage that has been opened, has its seal broken, had its contents partially removed, and is not located in the locked glove compartment, locked trunk, or other locked non-passenger area of a vehicle, or from which consumption is capable immediately.<sup>1</sup> This definition is intended to accord with the definition in Section 316.1936 Florida Statutes.

**Public area** means an area open to the public, including any auditorium, beach, bridge, building, canal, causeway, dock, lake, lagoon, marina, museum, open space, park, parkway, pier, playground, pool, preserve, range, recreational facility and/or field, roadway, semi-public parking lot, sidewalk, stream, waterway, and abutting lands and adjacent littoral waters, and all rights-of-way and public service facilities located on grounds, buildings, and structures that are under the

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<sup>1</sup> A bottle of wine that has been resealed and is transported pursuant to F.S. § 564.08 is not an open container under the provisions of F.S. § 316.1936.

jurisdiction, control, and administration of the town, special district, county, state, or federal government, within the municipal limits of the town.

**Semi-public parking lot** means any area wherein motor vehicles are parked by the public in conjunction with any business, enterprise, commercial, or noncommercial establishment, office building, or multiple-family building.

## **SECTION 5. Consumption or Possession of Alcoholic Beverages on a Beach, Public Area, or Semi-Public Parking Lot; Exemptions.**

(a) **General prohibition in public areas.** Consuming, using, or selling any alcoholic beverage, or manually possessing any open container of any kind that contains any alcoholic beverage while on or within any public area, or while on or within any vehicle located in a public area is prohibited. It is further prohibited for any intoxicated person to enter or remain in any public area.

(b) **Exceptions.** The following activities are not subject to the prohibitions of subsection (a) of this Section:

- (1) A person under a written contract with the town to allow sales and service of beer and wine may distribute, and persons of age not prohibited by the patron age provisions of Division 5, Article IV, Chapter 34 of the Land Development Code or other Town ordinance or state law, may consume such permitted beer and wine only within the licensed premises designated by the town without violating the provisions of this Ordinance.
- (2) The consumption or possession of an alcoholic beverage in an open container, in a public area specifically authorized and approved by the town for outdoor seating or a special event pursuant to the Land Development Code or other Town ordinance or state law.
- (3) Notwithstanding any other provision of law, an alcoholic beverage establishment licensed to sell wine on the premises may permit a patron to remove one unsealed bottle of wine for consumption off the premises if the patron has purchased a full course meal and consumed a portion of the bottle of wine with such meal on the licensed premises. A partially consumed bottle of wine that is to be removed from the licensed premises must be securely resealed by the licensee or its employee before removal from the licensed premises. The partially consumed bottle of wine must be placed in a bag or other container that is secured in a manner such that it is visibly apparent if the bag or other container has been subsequently opened or tampered with, and a dated receipt for the bottle of wine and full course meal must be provided by the licensee and attached to the container. If transported in a motor vehicle, the container with the resealed bottle of wine must be placed in a locked glove compartment, a locked

trunk, or the area behind the last upright seat of a motor vehicle that is not equipped with a trunk or glove compartment capable of being locked.

- (4) A person engaged only in picking up empty beverage containers for purpose of collecting the value of the empty containers or litter control.
- (5) A passenger of a:
- a. vehicle in which the driver is operating the vehicle pursuant to a contract to provide transportation for passengers and such driver holds a valid commercial driver's license with a passenger endorsement issued in accordance with the requirements of Ch. 322 Florida Statutes; or
  - b. bus in which the driver holds a valid commercial driver's license with a passenger endorsement issued in accordance with the requirements of Ch. 322 Florida Statutes; or
  - c. self-contained motor home that is in excess of 21 feet in length.
- (6) Any wine in the possession of a minister, pastor, priest, rabbi or other official of a religious organization that is to be used solely during religious services.
- (c) **Resolution procedure, conditions.** Notwithstanding the prohibition in subsection (a) of this section, the town council may approve, by resolution, the sales or service and consumption on the premises of alcoholic beverages in a public area for a one-time event. The entity making application for the resolution must secure a temporary permit or license authorized by Florida Statutes § 561.422. All beverages so approved must not be served in glass or other breakable containers and the director may place further restrictions or limitations on the special event.

#### **SECTION 6. Penalty.**

Any person convicted of violation of Section 5 of this Ordinance may be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail for a period not to exceed 60 days, or both. Such fine and imprisonment will apply to each such offense. If said violation involves the operation or occupation of a motor vehicle in violation of Section 316.1936 Florida Statutes, such person will also be guilty of a non-criminal moving traffic violation, punishable as provided in Ch. 318 Florida Statutes.

#### **SECTION 7. Severability.**

If any one of the provisions of this Ordinance should be held contrary to any express provision of law or contrary to the policy of express law, although not expressly prohibited, or against public policy, or should for any reason whatsoever be held invalid, then such provision will be null and void and will be deemed separate from the remaining provisions of this ordinance, and in no way affect the validity of all other provisions of this Ordinance.

**SECTION 8. Repealing Clause.**

Ordinance 96-05 is specifically repealed by this Ordinance. All other town ordinances or parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby superseded and repealed.

**SECTION 9. Effective Date.**

This Ordinance will become effective immediately upon its adoption.

The foregoing was enacted by the Town Council upon a motion of Council Member \_\_\_\_\_ and seconded by Council Member \_\_\_\_\_ and, upon being put to a vote, the result was as follows:

Larry Kiker, Mayor \_\_\_\_\_  
Herb Acken, Vice Mayor \_\_\_\_\_  
Tom Babcock \_\_\_\_\_  
Jo List \_\_\_\_\_  
Bob Raymond \_\_\_\_\_

DULY PASSED AND ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

ATTEST: TOWN OF FORT MYERS BEACH, FLORIDA

By: \_\_\_\_\_ By: \_\_\_\_\_  
Michelle Mayher, Town Clerk Larry Kiker, Mayor

Approved as to form by:  
\_\_\_\_\_  
Anne Dalton, Esquire  
Town Attorney

Anne Dalton, Esquire  
2044 Bayside Parkway  
Fort Myers, Florida 33901  
(239) 337-7900

## Memorandum

**To:** Chair, Vice Chair, LPA Members, Town of Fort Myers Beach  
**CC:** Town Manager, Community Development Director, Town Clerk  
**Date:** July 3, 2009  
**Subject:** Draft Open Alcoholic Beverage Container Ordinance/Legal  
Comments

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Pursuant to the direction of the LPA, below are legal comments regarding the draft Open Alcoholic Beverage Container Ordinance which is attached hereto for LPA review. It contains a watermark of "070309" to distinguish it from the last draft presented for LPA review.

1. **Definition of Beach.** (Section 4. Definitions)
  - The LPA is currently reviewing the Beach Furniture Ordinance. Please keep in mind that Ordinance 07-03, which is the beach furniture ordinance previously passed by the Town Council on April 2, 2007, contains its own definition of "Beach," which is different from this definition.
2. **Town Council Approval** (Section 5 (c) COP, Resolution Procedure, conditions)
  - This Town Council approval process must be consistent with the Special Events Ordinance requirements. If this is changed, the Special Events Ordinance (and any parts of the LDC Special Events requirements) must be reviewed.

**TOWN OF FORT MYERS BEACH  
ORDINANCE NO. 09-\_\_\_**

**AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; FINDING OF NECESSITY; DEFINITIONS; CONSUMPTION OR POSSESSION OF ALCOHOLIC BEVERAGES ON A BEACH, PUBLIC AREA, OR SEMI-PUBLIC PARKING LOT; EXCEPTIONS; PENALTY; PROVIDING SEVERABILITY; REPEALING CLAUSE AND REPEALING ORDINANCE NO. 96-05; AND PROVIDING EFFECTIVE DATE.**

WHEREAS, Article VIII, Section 2 of the Constitution of the State of Florida and Chapter 166 of the Florida Statutes provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and exercise any power for municipal purposes except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter empowers the Town to adopt, amend, or repeal such ordinances and resolutions as may be required for the proper governing of the Town; and

WHEREAS, the Town Council finds that there is a public need affecting life, health, public peace, safety, security, welfare and property of persons inside the municipal limits of the Town so as to require the Town to pass regulations and restrictions regarding consumption or possession of alcoholic beverages on a beach, public area or semi-public parking lot and further that such passage is needed for the effective administration and operation of the Town.

**IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:**

**SECTION 1: Incorporation of “Whereas” Clauses.**

The above “Whereas” clauses are hereby incorporated by reference.

**SECTION 2: Authority, Title and Citation.**

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapters 163 and 166, Florida Statutes, and other applicable provisions of law. It will hereafter be known and cited as the “TOWN OF FORT MYERS BEACH OPEN ALCOHOLIC BEVERAGE CONTAINER ORDINANCE.”

### SECTION 3. Finding of Necessity.

The Town Council finds that the passage of this Ordinance regulating open alcoholic beverage containers is necessary for the effective administration and operation of the Town and the health, safety, security and welfare of the residents, business owners, visitors and the general public within the Town.

### SECTION 4. Definitions.

For the purpose of this Ordinance the following terms, phrases, words, and their derivations have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural.

**Alcoholic beverage** means distilled spirits and all beverages containing one-half (1/2) of one percent (1%) or more alcohol by volume. This definition is intended to accord with the definition in the Beverage Law, Chapters 561 through 565, 567, and 568, Florida Statutes.

**Beach** means the land between the mean high and mean low water lines owned by the State of Florida and the zone of unconsolidated sand extending landward from the mean high water line to the place where there is a marked change in material or physiographic form or the line of permanent vegetation, usually the effective limit of storm waves; including any beach areas owned by the town or Lee County, and any beach area that has arisen upon it a right of customary use by the public or a public easement, prescriptive or otherwise; and the foreshore of tidal navigable waters.

**Container** means any bottle, can, cup, glass, or other receptacle.

**Open container** means any container of alcoholic beverage that has been opened, has its seal broken, had its contents partially removed, and is not located in the locked glove compartment, locked trunk, or other locked non-passenger area of a vehicle, or from which consumption is capable immediately.<sup>1</sup> This definition is intended to accord with the definition in Section 316.1936 Florida Statutes.

**Public area** means an area open to the public, including any auditorium, beach, bridge, building, canal, causeway, dock, lake, lagoon, marina, museum, open space, park, parkway, pier, playground, pool, preserve, range, recreational facility and/or field, roadway, semi-public parking lot, sidewalk, stream, waterway, and abutting lands and adjacent littoral waters, and all rights-of-way and public service facilities located on grounds, buildings, and structures that are under the

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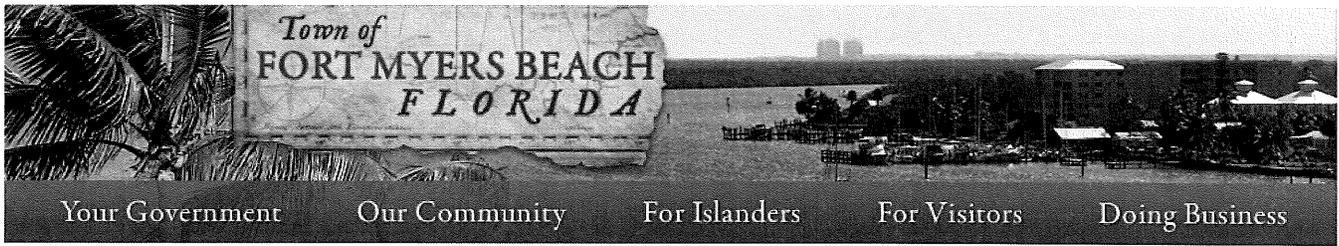
Larry Kiker, Mayor \_\_\_\_\_  
Herb Acken, Vice Mayor \_\_\_\_\_  
Tom Babcock \_\_\_\_\_  
Jo List \_\_\_\_\_  
Bob Raymond \_\_\_\_\_

DULY PASSED AND ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

ATTEST: TOWN OF FORT MYERS BEACH, FLORIDA

By: \_\_\_\_\_ By: \_\_\_\_\_  
Michelle Mayher, Town Clerk Larry Kiker, Mayor

Approved as to form by:  
\_\_\_\_\_  
Anne Dalton, Esquire  
Town Attorney



Search the site...

You are here: [Home](#) > [Your Government](#) > [Advisory Committees](#) > [Local Planning Agency](#) > October 27



**October 27**

**FORT MYERS BEACH  
LOCAL PLANNING AGENCY (LPA)**  
Town Hall – Council Chambers  
2523 Estero Boulevard  
Fort Myers Beach, Florida  
**October 27, 2009**

- Contact Us
- Request for Action
- Bay Oaks
- How Do I...?
- Notify Me
- Weather & Tidal Info
- Emergency Prep

**AGENDA** [all time frames are informational and approximate]

**10:30 AM**

- I. **Call to Order**
- II. **Pledge of Allegiance**
- III. **Invocation**
- IV. **Reorganization of LPA**
  - A. Elect Chair **10 minutes**
  - B. Elect Vice-Chair **10 minutes**
- V. **Minutes**
  - A. Minutes of September 29, 2009 **5 minutes**
- VI. **Administrative Agenda**
  - A. LDC Chapter 34, Article IV, Division 26 language discussion (including seasonal parking provisions in LDC Section 34-2022) **30 minutes**
- VII. **Adjourn as LPA and reconvene as Historic Preservation Board**
- VIII. **Reorganization of HPB**
  - A. Elect Chair **10 minutes**
  - B. Elect Vice-Chair **10 minutes**
  - C. Selection of HPB representatives to Historic Advisory Committee **10 minutes**
- IX. **HPB Member Items or Reports** **15 minutes**
  - A. "Vistas" sign cost estimates **5 minutes**
- X. **Adjourn as Historic Preservation Board and reconvene as LPA**
- XI. **LPA Member Items and Reports** **10 minutes**
  - A. Stormwater study ETA **5 minutes**
- XII. **LPA Attorney Items** **5 minutes**
- XIII. **Community Development Director Items** **15 minutes**
  - A. Scheduling of future LPA meetings
- XIV. **LPA Action Item List Review** **10 minutes**
- XV. **Public Comment**

**Adjourn no later than 4:00 P.M.**

**Next Meeting:** November 10, 2009, 10:30 AM

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**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, October 27, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 10:35 AM by Chairperson Dennis Weimer. All members were present:

Dennis Weimer  
Rochelle Kay  
Alan Mandel  
Bill Van Duzer  
Joanne Shamp  
Carleton Ryffel

Staff present: LPA Attorney Anne Dalton; Community Development Director Dr. Frank Shockey and Town Manager Jack Green. There were no members of the press or public present.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION-Mr. Weimer**

**IV. REORGANIZATION OF THE LPA**

Mr. Kay and Mr. Mandel are to serve new terms, as appointed by the Town Council. Ms. Dalton also pointed out that Mr. Weimer's term was also extended by Council, through December 7, 2009.

**A. Election of New Chair**

Ms. Dalton led the meeting in the vote for this position.

Mr. Weimer nominated Ms. Shamp; Mr. Mandel passed; Mr. Van Duzer passed; Ms. Kay passed; Mr. Ryffel passed; Ms. Shamp nominated Mr. Van Duzer; Mr. Van Duzer declined the nomination. Ms. Shamp then passed on an alternate nomination.

**Ms. Dalton called for a vote on the first nomination, of Ms. Shamp for Chair:**

**Vote: Ms. Shamp was elected Chair unanimously.**

**B. Election of Vice Chair**

Ms. Shamp asked for assistance from Ms. Dalton in this nomination and voting

procedure.

Ms. Dalton called for the nominations for Vice Chair:

Ms. Kay nominated Mr. Van Duzer; Mr. Ryffel also nominated Mr. Van Duzer; Ms. Shamp nominated Mr. Van Duzer; Mr. Weimer passed; Mr. Mandel passed; Mr. Van Duzer nominated Mr. Ryffel, but Mr. Ryffel declined the nomination. Mr. Van Duzer then passed on an alternate nomination.

**Ms. Dalton called for a vote on the first nomination, of Mr. Van Duzer for Vice Chair:**

**Vote: Mr. Van Duzer was elected Vice Chair unanimously.**

## **V. APPROVAL OF MINUTES**

**Motion: Mr. Van Duzer moved to adopt the minutes of September 29, 2009, as recorded.**

**Seconded by Mr. Mandel;**

**Mr. Weimer pointed out that the official transcriptions should now reflect the change of Chair; so noted.**

**Mr. Ryffel referred to the bottom of page 5 of those minutes, wherein he made a motion to include a 10 ft. buffer and asked if this was part of the official motion.**

**Ms. Dalton advised that this would be a discussion later.**

**Vote: Motion passed 6-0.**

## **VI. ADMINISTRATIVE AGENDA**

### **A. LDC Chapter 34, Article IV, Div. 26-Seasonal Parking-Language discussion**

Ms. Shamp asked Dr. Shockey to comment. Dr. Shockey stated that this draft language has been revised, with Ms. Dalton's help, and he referred to the informational packets, starting with the references in the language to specific types of parking lot details. These have been replaced by a more general reference that would require them to be in compliance with state law. The seasonal parking section has been revised to remove the provision for the 3 year long-term, temporary permit, as requested by the LPA, and replaced with one general permit for the 8 month period that can occur annually. He stated that there is language at the end of Sec. 34-2022, sub. C, to address the buffer requirements, tweaked by Ms. Dalton.

Mr. Ryffel asked Dr. Shockey to clarify this, which he did to satisfaction. Mr. Ryffel asked for explanation of "visual screen," but seemed to understand it to mean a fence or vegetation. He then referred to the second item in Ms. Dalton's memo, about the environmental impact of painting bare sand or grass and opined that this was "going a little bit overboard." Dr. Shockey explained that the concern here was regarding eventual runoff of any chemical paint when immersed with water. There was some discussion about painting the ground, etc. for parking spaces and Mr. Ryffel suggested dropping the "paint" part.

Mr. Van Duzer stated that he is concerned about the handicap spaces and how they would be delineated, as well as enforcement of that. He suggested removing that requirement completely. Dr. Shockey explained that the Town must require some specific things for new construction applications and there is already a standard that delineates when these requirements apply. Mr. Van Duzer pointed out that to comply,

there must be special surfaces for the handicap spaces as well. Dr. Shockey agreed and Mr. Van Duzer asked why the lot owners couldn't just use a sign to notify that their lot has no available spaces. Ms. Dalton added that taking out the time limits could actually make these lots permanent, which would then require them to conform to all of the requirements that the existing permanent lot have.

Mr. Ryffel stated that commercial buildings that put in parking are required to have a certain number of handicap spots per number of total spaces. He added that these seasonal lots are not required parking, but rather voluntary spaces over and above any commercial development. He feels that this would eliminate the requirement for handicap spaces since this parking itself is not required parking. Mr. Mandel asked staff if there was a specification that goes along with this ADA requirement for parking spaces. Dr. Shockey said that there are standards for new construction and standards for alterations and cautioned that this issue is actually only dealing with very small alterations in vacant lots that are used as parking lots, surfaced with grass where "construction" and "alterations" might not be proposed. Ms. Dalton agreed that this issue be researched with other beach communities as the question: if you have a free-standing lot, do you need to have an ADA parking area? There was more discussion about this.

Mr. Weimer stated that he agrees with the legal research to be sure the Town is in compliance and suggested that there be a "disabled space" requirement that stipulates what is needed in each situation. He recalled that the Newton property designated the handicap space by installing a blue-painted bumper in one space as well as a sign on the parking meter. Ms. Shamp agreed that painting posts, etc. would be a better alternative to painting the ground. She asked if there was a consensus to further research this before the LPA makes a decision. Mr. Ryffel opined that putting a disclaimer on a property would be a red flag for someone to bring suit, and didn't like the idea of requiring anyone to post a disclaimer. He also felt that researching is the best next step so that the town is clear as to what is absolutely required and what is not, especially on a sand parking lot. The consensus was that Ms. Dalton should research whether there is an ADA requirement for this type of lot; then, if there is, are there specifics as to the requirements. Also, the disclaimer question should be answered.

Mr. Van Duzer agreed with the language that "all parking lots require permits." He then referred to Sec. 34-2014, Parking Plan, wherein it states that "a parking plan is required for all uses except single family and 2 family dwelling units." He feels that a plan should be required for all uses, in view of the other new permitting requirements coming soon. Dr. Shockey explained that this language is in here because the section is specifically addressing parking lots so these regulations do not apply to single family homes. Discussion ensued about the LDC changes pertaining to residential driveways, parking, etc., which are being considered and how that may be affected. Mr. Weimer asked if there was a way to be sure that keeping the wording the way it is will not negatively impact any decisions made with regard to new construction of single family homes in the future. Dr. Shockey explained how each is different and that this wording should not have any impact on the private

homes. Ms. Dalton agreed that this part should be taken out because there is specific mention in most areas of parking lots and, she feels that if this is left in, it could create an ambiguity between two different provisions of the code. Mr. Weimer suggested just having the code state “a parking plan is required for all parking lots...” but Dr. Shockey explained that there are also times when other businesses need to submit parking plans and they may not necessarily be “parking lots.” Ms. Shamp stated the consensus as follows: removal of the words “except single family residences and two-family dwelling units.” She asked for a show of hands to remove those words; 4 hands were raised.

Mr. Van Duzer referred to page 7 and said he was concerned about the wording, suggesting that it be changed as recommended by Ms. Dalton.

Discussion ensued about the steps and requirements for someone to have a seasonal parking lot today.

Ms. Shamp asked if there was a consensus to follow the recommendation of the attorney regarding page 1, Sec. 34-2011b1, changing the wording to “all seasonal parking lots require permits...” A show of hands indicated there was a consensus. She also asked for consensus on the suggestion by Mr. Weimer that the same wording be used to make it consistent with what was already agreed to. A consensus was met for this issue too.

Ms. Shamp referred to page 7 and the requirements for buffering and asked if this wording protects adjoining properties to be able to see when people are pulling out of their driveways. Dr. Shockey stated that there is specific language requiring residents to comply with the visibility triangle, and he read the parts of the section. Ms. Shamp was concerned about code enforcement and pointed out that there is no requirement in this draft for an initial inspection. She asked if there is some mechanism for an inspection for initial compliance and, after Dr. Shockey basically advised that there is nothing concrete, she asked if the LPA felt that this was necessary. There was a consensus that stating in the regulation that an inspection is required would not be necessary.

Mr. Ryffel asked Dr. Shockey if there was a buffer requirement for along the road. Dr. Shockey referred him to the section addressing this. He also asked if the only place allowed for a seasonal parking lot is in the area zoned commercial. He said that the language has been adjusted to address that, adding that the lots are also allowed in planned development areas and zoning districts where the use is listed specifically, such as the “limited retail” group in Table 34-1. Mr. Ryffel added a suggestion for the handicap space issue, suggesting that there be a stipulation wherein the handicap space becomes required after the parking lot becomes permanent instead of seasonal.

Ms. Shamp asked for a consensus regarding bringing this back once more before moving to a hearing so that it can be revised and discussed again in a casual setting before final vote to move ahead with specific recommendations; all were in favor.

**Motion: Mr. Van Duzer moved to adjourn as the LPA and Reconvene as the HPB.  
Seconded by Mr. Ryffel;**

**Vote: Motion passed 6-0.**

**VII. ADJOURN AS LPA; RECONVENE AS HPB**

Adjourned as LPA at 11:55 am

**VIII. REORGANIZATION OF THE HPB**

**A. Election of Chair**

Ms. Dalton asked for nominations. Ms. Shamp nominated Ms. Kay; Mr. Ryffel passed; Ms. Kay passed; Mr. Van Duzer passed; Mr. Mandel passed and Mr. Weimer passed.

**Ms. Dalton called for a vote on the first nomination, of Ms. Kay for the position of Chair.**

**Vote: Ms. Kay was unanimously elected Chair.**

**B. Election of Vice Chair**

Mr. Weimer passed; Mr. Mandel passed; Mr. Ryffel passed; Mr. Van Duzer nominated Ms. Shamp; Ms. Kay passed; Ms. Shamp nominated Mr. Van Duzer, who declined. Ms. Shamp then passed.

**Ms. Dalton called for a vote on the first nomination, of Ms. Shamp for the position of Vice Chair.**

**Vote: Ms. Shamp was unanimously elected Vice Chair.**

Ms. Kay called the meeting to order at 12:00 Noon and called for the appointment of new members to the Historic Advisory Committee.

**C. Appointment of additional members**

**Motion: Mr. Weimer moved to appoint Ms. Kay, Ms. Shamp and Mr. Van Duzer as the HPB representatives to the HAC and reincorporate the four members of the HAC from the Historical Society (Roxie Smith, AJ Bassett, Fran Santini and Jack Underhill).**

**Seconded by Ms. Kay.**

**Vote: Motion passed 6-0.**

Ms. Shamp discussed the minutes from the May meeting of the HAC. She reported that they had discussed the HAC input to the HPB's budget. She said that they discussed ideas and prioritizing the projects planned for the future, such as installation of the current plaques; media coverage of all items addressed by the group; establishing walking tours; updating the Comp Plan; developing a vista on Old San Carlos and the proposed cost for that, as well as design; additional goals were discussed and planned for action over the next 4 years (refer to minutes).

Ms. Shamp stated that these goals and budgeting items should be available for members to review and hopefully comment on at the next meeting.

Mr. Van Duzer commented that the report was well done and Mr. Weimer agreed, adding that it should go forward to the Council regarding future budget. Ms. Shamp suggested that she revise the report a bit and prepare it to distribute and discuss at the

next meeting, possible even form a resolution then based on the report.

**Motion: Mr. Weimer moved to adjourn as the HPB and reconvene as the LPA;  
Seconded by Ms. Shamp.**

**Vote: Motion passed 6-0**  
Meeting adjourned at 12:20 PM

#### **IX. ADJOURN AS HPB; RECONVENE AS LPA**

Ms. Shamp reconvened the meeting at 12:20 PM with all members present.

#### **X. LPA MEMBER ITEMS AND REPORTS**

Dr. Shockey asked if Mr. Van Duzer or Ms. Kay had any update about the storm water study. Ms. Kay agreed with Mr. Van Duzer that there be no action until they receive the report from the engineers. Cathy Lewis addressed the meeting and said that she has a meeting next week with the engineers who have drafted the study but she didn't have an exact date as to when the report would be ready to present.

Ms. Kay asked if the fishing pier will be public and if, and when, it will be open. Dr. Shockey said that he didn't know when this would be proposed but thought that it may involve LPA decision on some issues involving the pier.

Mr. Weimer congratulated Ms. Shamp on her appointment as Chair and reminded her of a few meeting responsibilities, such as updating the Action List at the end of the meeting. In view of this he advised that part of the planning for the list involved responsibilities defined in the latest meetings with the Town Manager and Mayor, to include periodic meetings with Town Council in workshops. He also reminded that the PnP mandates that the LPA must appoint a member to attend the M&P meetings. Mr. Mandel had been the representative for the M&P and he volunteered to continue in this capacity. (Short pause for Ms. Dalton to confer with Mr. Mandel).

Ms. Dalton advised the LPA that Mr. Mandel was a Town Council candidate so there are specifics to his role which must be addressed. She shared with Mr. Mandel, and he requested that she advise the LPA also, that the role of this liaison must be very clearly defined about what kinds of roles does that person have and not have. She said this is important because the M&P meetings do not take public comment, so there could be candidates in the audience who may not be there as with the opportunity to comment and/or their roles can become unclear, opening the door for elections or ethics complaints. Ms. Shamp asked if there were any specific roles that were of concern to Ms. Dalton. She said that she would be concerned about the quasi-judicial issue; the council discussing a matter which may then move forward to a hearing. Discussion ensued regarding the role of the representative.

Ms. Shamp asked for a motion to continue the current appointment of Alan Mandel as the LPA representative to the M&P, with an alternate, and that the function of the representative is to engage in M&P in budget discussions that are concerns to CIP; to not participate in topics of discussion that may come before the LPA in quasi-judicial proceedings; to discuss budgetary items and long term planning so as to be able to report to the LPA for its CIP planning. There is also an understanding that there be a workshop scheduled in the future to further define the role of the representative in the M&P process with Town Council.

**Motion:** Mr. Weimer so moved with the addition of Ms. Shamp as the alternate to Mr. Mandel as the representative;

**Seconded** by Mr. Van Duzer.

**Vote:** Motion passed 6-0

Mr. Mandel continued to report on his meeting with the town manager and the Mayor. He said that they wanted him to relay to the LPA that they only needed the LPA's recommendations as to whether or not people on the beach can have open containers of alcoholic beverages. Mr. Weimer commented that no matter what they were looking for, every COP that has come before the LPA about this ended up being an in depth discussion of hours of operation, inside/outside seating, etc. and he cautioned that the LPA as a body must deal with the whole issue.

#### **XI. LPA ATTORNEY ITEMS**

Nothing to report.

#### **XII. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Dr. Shockey addressed the meeting and discussed scheduling future LPA meetings. He said that they had agreed to cancel the meeting scheduled just before Thanksgiving and 2 meetings were penciled in for December, between 12/8 and 12/22. He asked if the members felt it would be best to continue meeting twice a month for the upcoming year or just meet once a month, and keep the option open to expand when necessary. Ms. Shamp asked who favored meeting once a month and 5 out of 6 were in favor. Mr. Weimer opposed. She then asked what day of the week would be best. Ms. Shamp suggested that they keep to the second Tuesday of the month for regular meetings and then the fourth Tuesday as the additional meeting, if needed. All agreed. She then asked for schedules for November and December of 2009 and decided that 11/10 and 12/15 would be the last meetings for 2009. January 12, 2010 is the scheduled meeting for January. After that, the schedule follows as the second Tuesday of each month. Dr. Shockey promised to create a memo containing the dates for the upcoming year.

#### **XIII. LPA ACTION ITEMS**

##### **Hearings:**

- Animal Control-long term - Mr. Mandel: TBD

- Gulfview - Vacation-TBD
- Pink Shell-12/7/09 Mr. Weimer or Ms. Kay

**Continued LPA hearings:**

- Shipwreck - Jan. 12, 2010

**Future Work Activites:**

- Present ROW resolution to Council-11/10/09; Ms. Shamp
- Storm Water-pending; Dr. Shockey/Kay/Van Duzer
- Seasonal Parking- 12/15/09; final review
- Alcoholic Beverages-Dr. Shockey/Mr. Weimer; 11/10/09 (Discussion ensued and it was decided that a statement be drafted to the Council saying that the LPA, in its consideration of the consultant’s report, did not deem that expansion of open container onto additional properties would not be appropriate...or something to that effect. Ms. Dalton will draft the statement for the next meeting.)
- HPB Vistas – Budget Proposal - Ms. Shamp; 11/10
- Discussion of the role of the representative to the M&P – TBD
- Discussion about moving the LPA meetings to 9:00 AM or a different day – Dr. Shockey

**XIV. PUBLIC COMMENT**

No further comments.

Ms. Shamp asked for a motion to adjourn.

**Motion: Mr. Mandel moved to adjourn.**

**Seconded by Mr. Ryffel;**

**Vote: Motion carried 6-0.**

**XV. ADJOURNMENT**

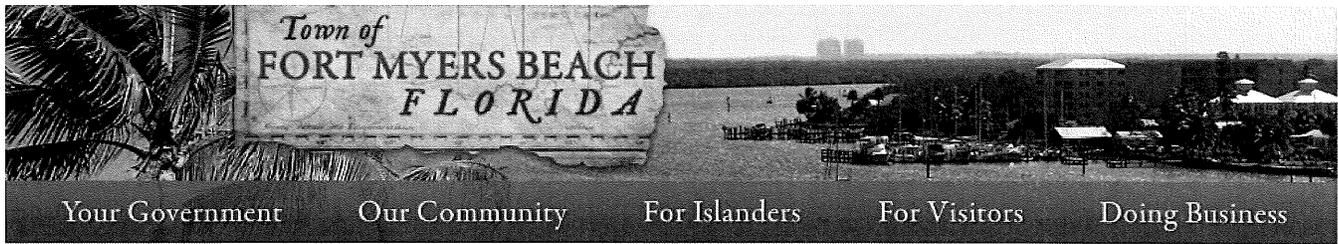
Adjourned at 1:30 PM.

**Next meeting November 10, 2009 at 10:30 AM**

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Joanne Shamp, LPA Chair

- End of document



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## November 10, 2009

FORT MYERS BEACH  
**LOCAL PLANNING AGENCY (LPA)**  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
**November 10, 2009**

### AGENDA [all time frames are informational and approximate]

**10:30 AM**

I. **Call to Order**

II. **Pledge of Allegiance**

III. **Invocation**

IV. **Administrative Agenda**

- A. [Discussion of residential ROW connections](#) **30 minutes**
- B. [Recommendations to Council regarding alcoholic beverage regulations](#) **30 minutes**

V. **Adjourn as LPA and reconvene as Historic Preservation Board**

- VI. **HPB Member Items or Reports**
  - A. Historic Preservation budget development **15 minutes**

VII. **Adjourn as Historic Preservation Board and reconvene as LPA**

VIII. **LPA Member Items and Reports** **10 minutes**

IX. **LPA Attorney Items** **5 minutes**

X. **Community Development Director Items** **15 minutes**

- Contact Us
- Request for Action
- Bay Oaks
- How Do I...?
- Notify Me
- Weather & Tidal Info
- Emergency Prep

A. Review calendar of LPA meetings, 12/2009 through 11/2010

XI. LPA Action Item List Review

10 minutes

XII. Public Comment

Adjourn no later than 4:00 P.M.

Next Meeting: December 15, 2009, 9:00 AM

**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, November 10, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 10:42 AM by Chairperson Dennis Weimer. All members were present:

Joanne Shamp  
Dennis Weimer  
Rochelle Kay  
Alan Mandel  
Bill Van Duzer  
Carleton Ryffel

Staff present: LPA Attorney Anne Dalton; Community Development Director Dr. Frank Shockey. There were no members of the press or public present.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION**-Ms. Kay

**IV. ADMINISTRATIVE AGENDA**

**A. Discussion of the Residential ROW Connections**

Mr. Van Duzer reported that he and Ms. Shamp met with Cathy Lewis to discuss this issue. Ms. Lewis drafted the document presented to the LPA. Ms. Shamp asked for LPA comments.

Mr. Mandel complimented the report and agreed with the draft. Mr. Van Duzer commented on the portion which refers to permit application fees and pointed out what he thought was an error regarding stake-out of the property. He stated that the fee would not include that but rather the inspection of the stake out. The correction would be that the permit fee would not include the stake-out itself but only the inspection of it. He also commented about the “hold harmless” clause and questioned the need for it in the LDC. Ms. Dalton agreed that it does not need to be in the LDC. Ms. Kay referred to page 2 about “expiration exceptions- permits for apron driveways to be constructed as part of a residential house, construction is exempted” and asked why this particular item is exempted from the expiration exception. Mr. Van Duzer explained and short discussion ensued.

Mr. Ryffel had comments regarding page 3 and commented that the draft is a good job. He referred to the top of the page, specifically the word “separation,” and

thought that it was not needed. He was confused by the wording pertaining to driveway aprons and the distance involved, and stated that the draft does not a method for measuring that distance. Mr. Weimer agreed and some discussion ensued about a method of measure for this.

Ms. Dalton asked if the draft was meant as a policy direction, with staff crafting the exact language. She commented as well about the variance measurement item. Mr. Van Duzer advised that this is just that, a draft for direction. Ms. Dalton then reserved comment for a later time but added that the draft was well done and commended Ms. Shamp and Mr. Van Duzer.

Dr. Shockey commented about the policy about the separation between driveway connections and intersections, pointing out that there are always exceptions and the policy should be in place for that process to be handled administratively, making it easier for the applicant. He also had some comments and concerns about the dimensions of the apron and driveway and a discussion ensued. It was clarified that that 20% referred to in the draft is the maximum, with a minimum of 10%.

Ms. Dalton asked if the LPA will allow the driveway aprons to be made of porous material. Mr. Van Duzer said that this was discussed but that this draft was not the proper place to address this. Mr. Ryffel suggested that that the measurements should include the distance from the centerline of the driveway to the side property line. After clarification, he retracted this suggestion.

Ms. Shamp commented about “permitting process” on page 1, and is concerned about the use of the word “maintenance” there. There was some discussion about the general maintenance of the driveways.

Ms. Shamp asked for public comment; no public comment. She asked for a general consensus to guide Dr. Shockey for moving ahead with the draft. The first item was the permit fees and Mr. Van Duzer recommended changing page 1 as he previously mentioned. All other members agreed to change the wording. On page 2, #G, “hold harmless” clause, the recommendation was to make reference to an addendum but not to set it out specifically; again, all members agreed. On page 3, remove the word “separation” and then renumbering of 2, 3 4 and 5; all members agreed. As mentioned earlier by Mr. Ryffel, the measuring of the driveway dimensions to be reconsidered by Dr. Shockey. The administrative procedures for variances on narrow lots were discussed and it was agreed that there should be something in place for this; all members agreed. The last point was review of wording regarding handling non-conforming issues; all members agreed.

B. Recommendations to Council regarding Alcoholic Beverage Regulations (Resolution 2009-24)

Ms. Shamp thanked Dr. Shockey for his work on this and asked him to address the meeting. Dr. Shockey referred to the consultant’s report, included in the packets, and stated that it points out that the Town’s LDC contains policy that has not actually been reviewed by the Council but follows the county’s regulations in place at the time LDC Chapter 34 was adopted. He explained that there are things in those guidelines that typically do not actually apply to the beach and that much of it is outdated, needing revision. He said that the Council had specifically asked what the LPA would

recommend about possibly allowing COP on the beach and whether this is something the LPA wants to take action on or let it stay as is. Ms. Dalton referred to a comment about inconsistency between the LDC and state law and pointed out that the state law supersedes Town ordinance.

Ms. Shamp asked for a general consensus for direction of the resolution as a whole. There was a majority consensus that the expansion of COP onto the beach should not be allowed, and Ms. Shamp then asked for individual comments.

Mr. Ryffel said that he would like to see an exemption for the Times Square area and he suggested changing the language in the second page, wherein it states “now therefore be it resolved that the LPA recommends that the Town Council of FMB...” where it has “does and does not,” to say “restrict or not restrict.” Ms. Dalton helped clear this up and there was brief discussion about it.

Mr. Van Duzer said he is in favor of moving this on.

Mr. Mandel stated that the concern was the lack of consistency in handling the issue of approving COP uses in the past and said this should be handled as a whole package, not just the question of COPs on the beach. He feels that the resolution they are talking about would only address a piece of that. Ms. Shamp agreed but reminded that Council advised there were other groups handling some of the other issues such as noise.

Mr. Weimer commented that he is in favor of this resolution but agrees that this only addresses a specific issue. He too realizes that the LPA should be working on additional issues to fairly address the problem.

Ms. Shamp added that this would be taking a step in creating the policy.

She asked Ms. Dalton if the LPA has the authority to continue to establish the policy further. Ms. Dalton researched this.

Ms. Kay disagreed and feels that the LPA has been trying to look at the whole thing as a package and fix it when it is an issue that needs to be revised one piece at a time.

Mr. Van Duzer understands that the Council wants the LPA to take one item at a time, as directed by them, give their recommendations and send it back to be looked at by them. He agrees that this is the way it should be done.

Ms. Dalton now referred to the LDC sections which apply to the authority to establish the policy, as she read the sections. She then explained what each section means to the LPA authority and responsibilities and reminded that the code does not preclude the LPA from initiating policy, but that if not given specific direction to do so by the Council, then it may turn out to be unnecessary effort. Discussion ensued regarding authority, consultants, etc.

Mr. Weimer stated that this item has been on the agenda for more than 2 years, to review the LDC modifications that had not yet been addressed. Last year there was a consultant actually hired to take a look and give recommendations, with additional items included by the town manager at the time. He said the initiative came from the Town Council, originally, over 2 years ago.

Ms. Shamp asked for public comment; no public comment.

**Motion: Ms. Kay moved to accept the resolution, changing the words on the second page**

wherein it states “whereas the LPA finds that the expansion of the on premises consumption of alcoholic beverages onto the gulf beaches does not protect remaining natural resources and does not preserve the small town character of the Town, and does not protect residential neighborhoods against commercial intrusions, and therefore would not accord the comprehensive plan objectives, etc.” “Now therefore be it resolved that the LPA recommends that the Town Council for the Town of Fort Myers Beach does restrict further expansion of on premises consumption of alcoholic beverages on the gulf beaches in the Town of Fort Myers Beach.”

**Seconded by Mr. Weimer;**

**Vote: Motion passed 5-1 with Mr. Mandel opposing.**

**V. ADJOURN AS LPA; RECONVENE AS HPB**

Adjourned as LPA at 11:52 am

**Motion: Mr. Weimer moved to adjourn as the LPA and reconvene as the HPB.**

**Seconded by Mr. Van Duzer;**

**Vote: Motion passed 6-0**

Ms. Kay called the meeting to order at 11:52 with all members present.

Ms. Kay advised the Historic Committee will meet next week to discuss the next step on the plaque program and other ongoing matters. She also reported that there is no news regarding budget suggestions they are developing.

With no further comment, the meeting was adjourned.

**Motion: Mr. Van Duzer moved to adjourn as the HPB and reconvene as the LPA;**

**Seconded by Mr. Weimer;**

**Vote: Motion passed 6-0**

Meeting adjourned at 11:54 PM

**VI. ADJOURN AS HPB; RECONVENE AS LPA**

Ms. Shamp reconvened the meeting at 11:54 PM with all members present.

**VII. LPA MEMBER ITEMS AND REPORTS**

Mr. Weimer, nothing to report.

Mr. Mandel, nothing to report.

Mr. Van Duzer asked if anyone has applied for the available positions on the LPA.

Ms. Dalton advised that there is an item about this on the Council agenda but didn't know exactly what it means, whether it is a placeholder or if there are actually applicants. Mr. Van Duzer said he had 3 interested people and wanted to follow up with them. After checking, Ms. Dalton advised that Chuck Moorefield has applied and is under consideration.

Ms. Kay, nothing to report.

Mr. Ryffel, nothing to report.

Ms. Shamp asked Dr. Shockey about the Newton demolition item on the Council agenda. He said this is a part of the process for demolition that the HPB included as a condition in the resolution for the certificate of appropriateness and the Council will

be looking at taking that step.

### **VIII. LPA ATTORNEY ITEMS**

Nothing to report except that the next meeting will be the Christmas lunch. Ms. Kay will do an ornament for the LPA for the trees.

### **IX. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Dr. Shockey reported that he put together a schedule of LPA meeting dates and times, second Tuesday of the month at 9:00 AM from now on, except the next meeting on December 15, which is the third Tuesday.

### **X. LPA ACTION ITEMS**

#### **Resolutions to Town Council:**

- Animal Control-long term - Mr. Mandel: January 4, 2010
- Gulfview TBD sometime after vacation ordinance
- Vacation ordinance, continuation of first hearing-December 21, 2009 at 6:30 PM
- Pink Shell-12/7/09 at 9:00 AM - Mr. Weimer or Ms. Kay
- Alcoholic beverages-COP expansion on the beach-Ms. Kay

#### **Continued LPA hearings:**

- Shipwreck - Jan. 12, 2010

#### **Future Work Activites:**

- Resolution LPA 2009-XX Recognition of Dennis Weimer's service
- Present ROW resolution to Council-2/9/2010
- Storm Water-pending; Dr. Shockey/Kay/Van Duzer-TBD
- Seasonal Parking- 12/15/09; final review
- Alcoholic Beverages-Dr. Shockey/Mr. Weimer (Discussion ensued as to whether or not to proceed on the other items in this issue other than the COP on the beach – Ms. Shamp polled the members to see who agrees that this should be removed from the list unless asked to proceed by Council. All agreed to temporarily remove this item until directed by Council.
- HPB Vistas – Budget Proposal - Ms. Shamp; 12/15/09

### **XI. PUBLIC COMMENT**

Mr. Melsek expressed his disappointment in the LPA's "timidity" in not continuing with the COP discussion. He stated that the LPA has a responsibility to recommend these changes for the beach and he was especially concerned with the issue of the noise connected with this problem. He opined that the LPA should address this.

Ms. Shamp asked for a motion to adjourn.

**Motion: Mr. Ryffel moved to adjourn.**

**Seconded by Ms. Kay;**

**Vote: Motion carried 6-0.**

### **XII. ADJOURNMENT**

Adjourned at 12:17 PM.

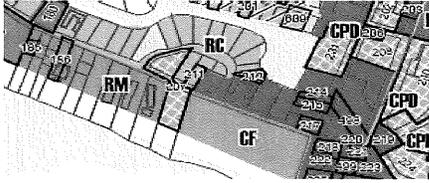
**Next meeting December 15, 2009 at 9:00 AM**

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Joanne Shamp, LPA Chair

- End of document

**Town of Fort Myers Beach  
Department of Community Development**



**MEMORANDUM**

To: Local Planning Agency  
CC: Anne Dalton, LPA Attorney  
Jack Green, Interim Town Manager  
From: Frank Shockey, Interim Community Development Director  
Date: November 5, 2009  
RE: Recommendations to Town Council regarding alcoholic beverage uses

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The LPA has been working on developing some recommendations for amendments to LDC Chapter 34, Article IV, Division 5 (alcoholic beverages). After the recent joint LPA and Town Council meeting, the direction desired by Council for such amendments remained somewhat unclear except that there was some expression of desire for a recommendation regarding the possibility of an amendment to allow for consumption-on-premises uses on the sandy beach (i.e. in the EC (Environmentally Critical) zoning district) seaward of licensed establishments.

A former Town Manager commissioned an in-depth study of this question by a consultant. The report was presented to the LPA last year and was redistributed to the LPA and Town Council for the recent joint meeting. The report contains some valuable information that should be considered in any recommendation and any decision regarding the matter of amending the LDC to allow consumption-on-premises uses on the sandy beach. The consultant's discussion of the various factors related to this question is on pages 1 through 26 of the report. LPA and Town Council should consider these factors in deciding whether to make such a policy change, even if some outweigh others in the end.

In addition, the consultant's summary on pages 40 through 42 of the report highlights some changes that seemed prudent considerations at the time, such as amending the LDC to fit actual policy of the Town Council and conform to Florida Beverage Law. Even if no policy changes are desired and most establishments are still to be required to seek public hearing approval, at minimum the regulations should be made to conform to Florida Beverage Law.

# **Policy Considerations and Options: Consumption of Alcoholic Beverages**

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Potential Modifications to the Town of Fort  
Myers Beach Regulations for Off- and On-  
Premises Consumption of Alcoholic  
Beverages

Report to the Town of Fort Myers Beach Local Planning Agency

November 2008

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## Introduction

The Town of Fort Myers Beach ("Town") recently consulted with Murphy Planning ("Consultant") to research and review provisions of the Town's Comprehensive Plan ("Plan") and Land Development Code ("LDC"). The Town initially requested the Consultant to investigate the possibilities of permitting businesses licensed for on-premises consumption of alcoholic beverages ("COP") and having frontage on the Gulf beaches to extend this approved COP use onto the sandy beach. This initial request included investigating possible performance measures to address potential problems associated with extending this use. This request also included exploring procedural options for expeditiously curtailing the privilege and the opportunity to profit commercially from such extended use in the event a permit-holder failed to perform in accordance with the adopted performance measures. **Section 2 of this Report addresses these issues**

Subsequent to the Town's Local Planning Agency ("LPA") meeting of October 14, 2008, the initial request was expanded to include providing a comprehensive review of the Town's regulation of alcoholic beverages, including the Town's Plan, LDC, and the State of Florida's regulations on alcohol they apply to the Town. **Section 3 of this Report summarizes the Consultant's research and review of the relevant regulations. Section 4 summarizes options for the Town to consider regarding these issues.** After the Town determines a general policy direction, the Consultant is committed to assisting the Town by drafting an amending ordinance including regulatory options for determination and adoption by Town Council following review and recommendations by the LPA.

Regulatory issues associated with alcoholic beverages predate the founding of the United States. These issues include: sales, service, taxation, manufacturing, quality, distribution, licensure, bonding, conveyance, packaging, locations associated with consumption, associated businesses, possession, age of consumption, under-age consumption, alcoholism, and a period in this country's history know simply as "Prohibition". A pantheon of federal regulations address much of this subject-matter, as does a sizable body of Florida state law encompassing six chapters of Florida Statutes ("Florida Beverage Law"). However weighty these state and federal regulations may be, a number of policy determinations and options are relegated to local governments in Florida under their inherent Home Rule authority, Police Powers, and by state statute. In light of this background, the Town is wise to approach this subject matter cautiously and comprehensively. The Consultant is grateful for the opportunity to assist the Town in this effort.

October 14, 2008

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Section  
**2**

## **On-Premises Consumption of Alcoholic Beverages on the Gulf Beaches**

### Review of Relevant Policies and Regulations

#### **Threshold Regulatory Considerations**

A threshold issue the Town may wish to consider prior to revising or adopting any additional land use regulations is the regulations' consistency or "accordance" with the Town's adopted Comprehensive Plan ("Plan"). Florida is a "Plan is law" state, which means that the provisions and prohibitions adopted in the Plan are legally binding on both the Town and all persons subject to the Town's jurisdiction. The provisions of the Plan are formulated as adopted Goals, Objectives, and Policies based on background planning research that precedes them in the Plan. Prior to the Plan's lawful effectiveness, the Plan is reviewed by the Florida Department of Community Affairs for consistency with the State Comprehensive Plan. Local regulations that are inconsistent with the Goals, Objectives and Policies in the Plan are legally prohibited. Public or private development that is inconsistent with the Plan cannot be approved.<sup>1</sup> Whenever the requirements or provisions of the Plan are in conflict with any other regulations, the most restrictive requirements apply.<sup>2</sup>

The Town adopts regulatory ordinances to effectuate the requirements and provisions of the Plan. The majority of these regulations are subsequently codified and published in the Fort Myers Beach Land Development Code ("LDC"). When considering amendments to the LDC, the Town Council is required to consider the Plan and the recommendations of the LPA.<sup>3</sup> In making recommendations on LDC amendments to Town Council, the LPA has a duty to review the proposed changes for consistency with the Plan.<sup>4</sup> For these reasons, consistency with the Plan is a significant threshold consideration in the matter of expanding on-premises consumption of alcoholic beverages ("COP") onto the Gulf beaches.

<sup>1</sup> See Fort Myers Beach Land Development Code [hereinafter LDC] § 1-11(c)(1); Town of Fort Myer Beach Comprehensive Plan [hereinafter Plan] p. 1—2; Florida Statutes [hereinafter F.S.] § 163.3161(5).

<sup>2</sup> See LDC § 1-11(c)(2).

<sup>3</sup> See *id.* § 34-83(2).

<sup>4</sup> See *id.* § 34-120(4).

If the Town determines that the expansion of COP onto the Gulf beaches is *inconsistent* with the Plan, then that use cannot be expanded by amending provisions in the LDC. In that case, i.e., if the Town were determined to make such a change, the Plan itself would need to be amended as a preliminary step to allow such a provision. However, plan amendments proceed through a statutory process that is, by design, thoroughly complex and time-consuming. Comprehensive land use planning came as a legislative response to Florida's explosive growth in the second half the Twentieth Century. Were county and municipal comprehensive plans able to be rapidly and easily changed, the legislature's intention to manage would be vitiated. The requirement of comprehensive planning came to the Town of Fort Myers Beach as a result of municipal incorporation. Incorporation came, in no small part, as a result of popular frustration with Lee County's poor management of commercial expansion on Estero Island.<sup>5</sup>

### **Existing Conditions**

The Gulf beaches are primarily within the "Recreation" Future Land Use Map ("FLUM") category established in the Plan. The use of the Gulf beaches for COP exists currently at a very few locations. There is little if any information to indicate if, when, or how this use was ever approved at these locations, but in most instances it predates incorporation of the Town and adoption of the Plan and LDC. If this use of the Gulf beaches is *not consistent* with the Plan, then the existing uses could remain only as a non-conforming use,<sup>6</sup> barring the adoption of a provision to amortize or "sunset" the non-conforming use<sup>7</sup> or amend the Plan. However the Town decides to move forward, the focus should further the goals, objectives, and policies of the Plan and favor a level playing field for all businesses.

### **Land Use Planning Considerations**

If the use of the Gulf beaches for COP is *consistent* with the Plan, the next issue for determination by the Town is whether the expansion of this use at other properties is prohibited by current LDC provisions. If *not* prohibited by the LDC, then the next issue would be how to permit such expansion to assure that the expansion is compliant with the LDC and other applicable regulations. If changes to the LDC were to be necessary, the Town may wish to consider any potentially negative ramifications from such changes. In developing this policy, the Town may wish to establish other requirements to address potential problems that could arise from such an expanded use, such as litter, noise, underage consumption, consistent property maintenance, etc. This Report discusses these issues in greater detail below.

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<sup>5</sup> See Plan 1—1, 4—2, 26-29, OBJECTIVE 4-B, POLICY 4-B-1; see also Plan 4—2, 7—15 (discussing issues associated with the development of the Diamondhead resort).

<sup>6</sup> See LDC §§ 34-3202(c), 3241-46.

<sup>7</sup> See *id.* § 34-3204.

## Consistency Considerations

### **Plan Considerations and Guidance: Alcoholic Beverages**

The Plan says little of substance regarding the consumption of alcoholic beverages. As part of the overall discussion of transportation problems, the Plan recognizes that alcohol factors into careless speeding at the south end of the island.<sup>8</sup> The Plan also explains that approximately 38 percent of the fees paid for state issued alcoholic beverages licenses is returned to the Town by the state Division of Alcoholic Beverages and Tobacco in accordance with Florida Statutes §561.342.<sup>9</sup> Finally, as part of intergovernmental coordination, the Plan notes that the state Department of Children and Families directs services to special needs populations including people with alcohol or drug dependency.<sup>10</sup>

The LDC has several pages of provisions regarding alcoholic beverages.<sup>11</sup> These regulations are derived primarily from the Lee County Land Development Code.<sup>12</sup> These provisions were adopted upon incorporation of the Town and revised only for scribes' considerations prior to the adoption of the entirety of LDC Chapter 34 in 2003. Prior to this Report, these regulations have not been reviewed by the Town for policy considerations, consistency with the Florida Beverage Law, or internal consistency with the other provisions of the LDC. A review and discussion of the LDC alcoholic beverage regulations is provided in Section 3 this Report.

### **Plan Considerations and Guidance: Gulf Beaches**

The Gulf beaches factor significantly throughout the Plan, as an important natural resource that should be preserved,<sup>13</sup> and for providing "incomparable recreational and environmental benefits"<sup>14</sup> that should be carefully managed to increase both recreational and environmental benefits.<sup>15</sup> The majority of the Gulf beaches—one major focus of this Report—is within the "Recreation" Future Land Use Map (FLUM) category, which includes all of the Gulf beaches seaward of the 1978 Coastal Construction Control Line (CCCL).<sup>16</sup> The application of this FLUM category does not affect any party's ownership rights to the beach.<sup>17</sup>

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<sup>8</sup> See Plan 7—2.

<sup>9</sup> See *id.* 11—9.

<sup>10</sup> See *id.* 14—12.

<sup>11</sup> See LDC §§ 34-1261-64.

<sup>12</sup> Compare *id.* with Lee County Land Development Code §§ 34-1261-64.

<sup>13</sup> See Plan POLICY 4-A-5

<sup>14</sup> *Id.* POLICY 4-A-6.

<sup>15</sup> See *id.* POLICY 4-A-6.

<sup>16</sup> See *id.* POLICY 4-B-8.

<sup>17</sup> See *id.* 4—40.

The vision for the future of the Town of Fort Myers Beach is a result of the beautiful natural surroundings of beaches and dunes, wildlife habitat, historic and archaeological sites, boating opportunities, and places for people to come together for recreation, visiting, dining, and shopping within the park-like setting of the entire island. The Community Design Element describes how the town can ensure that the physical components of the community (natural areas, open spaces, buildings, streets, paths) can work together to achieve a coherent whole, reinforcing and enhancing its small-town character and as a place where permanent residents coexist comfortably with tourism. Policies emphasize walkability, promote streets as the neighborhood realm, plan for interconnected foot paths throughout the island, and improve linkages to the town's natural resources and active recreation areas. These linkages and "people-gathering places" become part of the town's system of recreation, open space, and cultural amenities.<sup>18</sup>

## **Future Land Use Element**

POLICY 4-B-8 provides that the Recreation FLUM category is "applied to public parks, schools, undevelopable portions of Bay Beach, and those parts of the Gulf beaches that lie seaward of the 1978 [CCCL]."<sup>19</sup> "Allowable uses are parks, schools, libraries, bathing beaches, beach access points, and related public facilities."<sup>20</sup> POLICY 4-B-12 establishes limitations on land uses for purposes of the Plan. This policy states: "Recreational uses include beaches, parks, playgrounds, and similar uses."<sup>21</sup>

The importance of the FLUM and FLUM categories cannot be overstated. The intent of the FLUM categories provided in Objective 4-B is to:

**— Reduce the potential for further overbuilding through a new [FLUM] that protects remaining natural and historic resources, preserves the small-town character of Fort Myers Beach, and protects residential neighborhoods against commercial intrusions.**<sup>22</sup>

Because the use of the Gulf beaches under consideration is neither specifically allowed nor prohibited, the policy considerations with regard to Objective 4-B involve determining whether expansion of COP to areas of the Gulf beaches within the Recreation FLUM category is consistent with the Plan or whether that expansion would be further development inconsistent with the Plan. This consideration involves the evaluation of whether such use could and would:

1. protect remaining natural resources, and
2. preserve the small-town character of the Town, and

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<sup>18</sup> *Id.* 10—1.

<sup>19</sup> *Id.* POLICY 4-B-8.

<sup>20</sup> *Id.* POLICY 4-B-8.

<sup>21</sup> *Id.* POLICY 4-B-12.

<sup>22</sup> *Id.* OBJECTIVE 4-B.

3. protect residential neighborhoods against commercial intrusions.<sup>23</sup>

This evaluation is discussed in greater detail below in this Report. In addition to evaluating the consistency of the expanded use with the “Recreation” FLUM category, the Town may wish to evaluate its consistency with the FLUM categories of the properties that might benefit from the availability of this expanded use. This Report also discusses this matter.

As noted above, the majority of the Gulf beaches are located within the Recreation FLUM category, but the businesses that are currently allowed COP operate within buildings located in other FLUM categories. The majority are within the “Pedestrian Commercial” FLUM category, but others are located in the “Boulevard” and “Mixed Residential” FLUM categories. The adjacent FLUM categories are discussed below in the section of this Report discussing protecting residential neighborhoods from commercial intrusions.

### **Protecting Natural Resources**

Florida Law requires that local governments in coastal areas adopt Coastal Management Elements as part of their comprehensive plans. The Town’s Coastal Management Element is contained in Chapter 5 of the Plan. GOAL 5, the primary goal of the Coastal Management Element is:

**To keep the public aware of the potential effects of hurricanes and tropical storms and to plan a more sustainable redevelopment pattern that protects coastal resources, minimizes threats to life and property, and limits public expenditures in areas subject to destruction by storms.**<sup>24</sup>

In furtherance of this Goal, Objective 5-D specifically addresses the Gulf beaches, requiring the Town to conserve and enhance the shoreline of Estero Island to counter natural erosion, and reducing negative man-made impacts on beaches and dunes.<sup>25</sup>

Plan POLICY 5-E-7 minimizes the potential for land use conflicts between waterfront uses and other land uses by establishing priorities for development and redevelopment of the shoreline.<sup>26</sup> Future development or redevelopment of shoreline land uses must ensure compatibility with surrounding lands and provide proper buffering where needed.<sup>27</sup> To determine consistent land uses for a site, POLICY 5-E-7 requires the Town give priority to water-dependent land uses in the following order

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<sup>23</sup> See *id.*

<sup>24</sup> *Id.* GOAL 5.

<sup>25</sup> See *id.* OBJECTIVE 5-D.

<sup>26</sup> See *id.* POLICY 5-E-7.

<sup>27</sup> See *id.*

- Conservation uses[;]
- Water-dependent uses such as marinas which are available for use by the general public;
- Recreational uses; and
- Other uses that are compatible with the surrounding neighborhood.<sup>28</sup>

To further the Goal, Objectives, and Policies of the Coastal Management Element of the Plan, the Town may wish to require any proposal to expand the use of COP onto the Gulf beaches to include provisions to further:

1. a more sustainable redevelopment pattern that protects coastal resources, minimizes threats to life and property, and limits public expenditures in areas subject to destruction by storms;
2. conserve and enhance the shoreline of Estero Island by increasing the amount of dunes, renourishing beaches to counter natural erosion, and reducing negative man-made impacts on beaches and dunes;
3. ensure compatibility with surrounding lands and provide proper buffering where needed; and
4. prioritize conservation uses; water-dependent uses available for use by the general public; recreational uses; and other users that are compatible with the surrounding neighborhood—in that order.<sup>29</sup>

With regard to the Gulf beaches, numerous provisions in the Conservation Element of the Plan favor the preservation and restoration of the low, vegetated dunes that historically occupied the area subject to active gain or loss of sand because of the sea or wind.<sup>30</sup> "Many of the dunes at Fort Myers Beach have been removed by development or by continuing management practices that inhibit their restoration by natural processes."<sup>31</sup>

Some practices that have been forbidden in many coastal communities are still common at Fort Myer Beach. For instance, dunes sometimes recreate themselves even when they have been removed during the development process. This restoration ought to be valued and assisted, but many property owners at Fort Myers Beach continually destroy the re-emerging dunes. This activity destroys sea turtle nesting habitat and eliminates a natural blockage that protects upland property from extreme tides, in addition to eliminating a valued scenic resource.<sup>32</sup>

<sup>28</sup> See *id.*

<sup>29</sup> See generally *id.* GOAL 5, OBJECTIVE 5-D, POLICY 5-3-7.

<sup>30</sup> See *id.* 6—27, 29, 37, 43-44; OBJECTIVE 6-E, POLICY 6-H-5, POLICY 6-J-1, POLICY 6-J-3.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* 6—29. <sup>32</sup> *Id.* 6—27.

<sup>32</sup> *Id.* 6—37.

A potential means of balancing the increased intensity of use resulting from expanding the area for COP to the Gulf beaches would be a reciprocal requirement that the property owner protect and improve the beach with native vegetative buffers between the pedestrian foot-traffic along the public beach. This would also serve to separate this adult-oriented COP activity from families with children transiting the beach who might be averse to such activities.

### **Preserving the Small-Town Character of Fort Myers Beach**

Much has been made of the Town's "small-town character," but it isn't always easy to describe it in definitive terms. The Plan's Community Design Element (Chapter 3) "reinforces"

the small-town character of Fort Myers Beach, a place where permanent residents coexist comfortably with tourism. The policies reflect an appropriate balance among neighborhood needs, economic vitality, and tourist development, and the balance between the need to move cars and all other types of movement (on foot or by bicycle or boat).<sup>33</sup>

The background material for the Future Land Use Element (Chapter 4) speaks of "overwhelming" the small-town character with density multipliers that are too high.<sup>34</sup>

GOAL 4 of the Plan is:

**To keep Fort Myers Beach a healthy and vibrant "small town," while capitalizing on the vitality and amenities available in a beach-resort environment and minimizing the damage that a hurricane could inflict.**<sup>35</sup>

In furtherance of GOAL 4, OBJECTIVE 4-A: SMALL-TOWN CHARACTER requires the Town to:

Maintain the small-town character of Fort Myers Beach and the pedestrian-oriented "public realm" that allows people to move around without their cars even in the midst of peak-season congestion.<sup>36</sup>

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<sup>32</sup> *Id.* 6—44.

<sup>32</sup> *See id.* POLICY 6-J-1.

<sup>32</sup> *See id.* POLICY 6-J-3.

<sup>32</sup> *Id.* 6—43.

<sup>33</sup> *Id.*, p. 3—1.

<sup>34</sup> *Id.*, p. 4—22.

<sup>35</sup> *Id.* GOAL 4.

<sup>36</sup> *Id.* OBJECTIVE 4-A.

To achieve this objective, certain policies follow to specifically address how new development can maintain and contribute to the pedestrian-oriented public realm in order to preserve that “small-town” character:

POLICY 4-A-1 provides: “Maintaining the town’s current ‘human scale’ is a fundamental redevelopment principle. POLICY 4-A-2 states:

The Town of Fort Myers Beach values its vibrant economy and walkable commercial areas. Through this plan, the town will ensure that new commercial activities, when allowed, will contribute to the pedestrian-oriented public realm.<sup>37</sup>

POLICY 4-A-3 requires the Town to “protect residential neighborhoods from intrusive commercial activities” and references Policies 4-C-2 and 4-C-3.<sup>38</sup> This aspect is discussed in greater detail below the heading devoted to protecting residential neighborhoods.

POLICY 4-A-4 identifies as “undesirable” development trends that inhibit easy walking access to the beach, which is important as a “key element of the town’s human scale.”<sup>39</sup> Obviously a development trend that promotes or improves easy walking access to the beach would be desirable. If expanding COP onto the Gulf beaches will further GOAL 4 and OBJECTIVE 4-A in this manner, that would be an important determination. This may involve some dimensional provisions, as referenced in POLICY 4-A-8i.<sup>40</sup>

POLICY 4-A-5 harkens back to the importance of protecting the Town’s many important natural resources despite its urbanized character. “Preservation of those resources is of the highest importance and is a frequent theme throughout this plan.”<sup>41</sup> This is discussed in greater detail above in this Report, but it bears additional consideration that in accordance with POLICY 4-A-5, the enhancements discussed under the topic of “protecting natural resources” further preserve the Town’s “small-town” character.

POLICY 4-A-6 states:

The beaches provide incomparable recreational and environmental benefits to the town; careful management of the beach, including renourishment when necessary, can increase both. Frequent beach accesses are essential to the

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<sup>37</sup> *Id.* POLICY 4-A-1.

<sup>38</sup> *See id.* POLICY 4-A-3. This policy is discussed in greater detail below in the section on protecting residential neighborhoods from commercial intrusions.

<sup>39</sup> *Id.* POLICY 4-A-4.

<sup>40</sup> *See id.* POLICY 4-A-8i.

<sup>41</sup> *Id.* POLICY 4-A-5

town's character and shall be maintained and expanded where possible.<sup>42</sup>

This policy also bolsters the possibilities discussed under the “protecting natural resources” topic, above.

POLICY 4-A-8 provides some “nuts and bolts” type direction for the Town. It requires the Town establish “clear and consistent rules and processes that govern private and public development” and incorporate these rules and processes into an illustrated LDC.<sup>43</sup> Given the inconsistencies that Town staff and the LPA have identified, the Town’s request for this Report and the review from which it results is a timely undertaking in furtherance of the Plan.

POLICY 4-A-8 requires that the LDC define permitted uses and describe the dimensions needed to implement the Plan.<sup>44</sup> If the Town considers expanding COP to areas of the Gulf beaches, the Town may wish to consider appropriate dimensional requirements to assure that the Plan Goals, Objectives, and Policies this LDC change will further are established.

POLICY 4-A-8 requires the Town to ensure “the availability of public facilities at the levels of service specified in this plan concurrently with the impacts of development,” referring the reader to the Capital Improvements Element for a summary of these levels of service and guidelines for the town’s Concurrency Management System.<sup>45</sup> The potential demand for additional vehicular traffic and associated parking that could likely result from expanding COP onto area of the Gulf beaches is discussed below under the heading: “LDC Considerations”.

### **Protecting Residential Neighborhoods from Commercial Intrusions**

Given the mixed-use nature of the Town’s existing inventory of buildings and uses, it’s hard to go anywhere in the Town without being within shouting distance of a residential use. This situation is not unusual in mature coastal resort communities. These close proximities also raise issues with private rights to the “quiet enjoyment” of residential property versus the perceived property value and potential economic gain sought by expanding commercial uses.

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<sup>42</sup> *Id.* POLICY 4-A-6.

<sup>43</sup> *See id.* POLICY 4-A-8.

<sup>44</sup> *Id.* POLICY 4-A-8i.

<sup>45</sup> *See id.* POLICY 4-A-8vi.

The Plan's Future Land Use Element recognizes that commercial expansion and intrusion is a common problem in many mature resort communities—not just Fort Myers Beach—and if improperly approached such intrusions can threaten existing residential areas.<sup>46</sup> In examining the issue, the background for the Future Land Use Element asks, “How much more commercial is too much? Or is it the *type* of commercial, or its physical form, that is the problem?”<sup>47</sup> In response the Plan identifies:

The most difficult conflicts in potential commercial development lie along Estero Boulevard from the Key Estero Shops to Donora Boulevard. Commercial uses catering to tourists that might extend into this area from Times Square have the potential to conflict with residential areas, and with the civic uses that are making this the center of the island for residents.<sup>48</sup>

The Future Land Use Element of the Plan probably states the polarizing potential of this situation best:

Successful resort communities attract increasing numbers of merchants who cater to tourists and day visitors. Residents often fear that commercial development will continue to expand into previously residential areas and result in more commercial space than is needed to serve the peak capacity of residents and visitors.

New commercial establishments can interfere with the “private realm” of a community (the personal spaces in and around homes and condominiums). At the same time, these establishments often contribute little or nothing to a community’s “public realm,” which includes streets, sidewalks, and plazas where residents and visitors interact. The town can insist on the protection of its private realms and the enhancement of its public realm when evaluating proposals for new commercial development.<sup>49</sup>

Because any expansion of COP onto the Gulf beaches is *new* commercial development, the operative sentence in the caption bears repeating: “The Town can insist on the protection of its private realm and the enhancement of its public realm when evaluating proposals for new commercial development.”<sup>50</sup>

**Commercial Uses and New Commercial Development.** In developing the Plan the Town reached a consensus on commercial uses<sup>51</sup> and new policies for commercial development in the Town.<sup>52</sup> These Town policies for commercial development are promulgated in Plan POLICY 4-C-2 and POLICY 4-C-3.

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<sup>46</sup> See *id.* 4–2.

<sup>47</sup> *Id.* (emphasis in original).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* 4–26.

<sup>50</sup> *Id.* (emphasis supplied).

<sup>51</sup> See *id.* 4–27.

<sup>52</sup> See *id.* 4–28-29.

POLICY 4-C-2 provides that commercial intensity in any FLUM category is limited by provisions of the Plan and the LDC. POLICY 4-C-2 requires standards in the LDC to encourage more intense commercial uses only in the “Pedestrian Commercial” FLUM category. POLICY 4-C-2 requires the LDC to specify maximum commercial intensities using floor-area-ratios (“FAR”), and allows higher FAR for properties in the “Pedestrian Commercial” FLUM category.<sup>53</sup>

POLICY 4-C-3 addresses commercial locations, and requires the Town to apply certain principles when evaluating proposals for new or expanded commercial uses in categories where they are permitted. In relevant respect, these principles provide:

- The LDC will specify the permitted form and extent for new or expanded commercial uses in the “Pedestrian Commercial” category, and establish a streamlined approval process.<sup>54</sup>
- In the “Mixed Residential” category, commercial uses are limited to lower-impact uses such as offices, motels, and public uses, and must be sensitive to nearby residential uses, complement any adjoining commercial uses, contribute to the public realm as described in the Plan, and meet the design concepts of the Plan and the LDC. It provides that landowners may seek commercial zoning changes only through the public hearing zoning planned development process.<sup>55</sup>
- In the “Boulevard” category, where mixed-use development including some commercial uses may be permissible, landowners may seek commercial zoning changes only through the public hearing zoning planned development process. Proposals must be sensitive to nearby residential uses, complement any adjoining commercial uses, contribute to the public realm as described in the Plan, and meet the design concepts of the Plan and the LDC.<sup>56</sup>
- Shopping and services for residents and overnight guests are strongly preferred over shopping and services that will attract additional day visitors during peak-season congestion.<sup>57</sup>
- Shopping and services that contribute to the pedestrian character of the town are strongly preferred over buildings designed primarily for vehicular access.<sup>58</sup>

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<sup>53</sup> *Id.* POLICY 4-C-2.

<sup>54</sup> *See id.* POLICY 4-C-3ii.

<sup>55</sup> *See id.* POLICY 4-C-3iii.

<sup>56</sup> *See id.* POLICY 4-C-3iv.

<sup>57</sup> *See id.* POLICY 4-C-3va.

<sup>58</sup> *See id.* POLICY 4-C-3vb.

- The neighborhood context of proposed commercial uses is of paramount importance. The sensitivity of a proposed commercial activity to nearby residential areas can be affected by: the type of commercial activities (such as traffic to be generated, hours of operation, and noise); the physical scale (such as the height, and bulk of proposed buildings); and the orientation of the buildings and parking.<sup>59</sup>

Policy 4-C-3 prohibits commercial activities that will intrude into a residential neighborhood because of their type, scale, or orientation.<sup>60</sup>

## Conclusion

In exploring a policy to expand COP onto the Gulf Beaches, the Consultant advises the Town to make a threshold determination of the uses consistency with the Plan. If the Town determines the use is *inconsistent* with the Plan, the use may not be provided through modifications to the LDC, but will require amendment of the Plan itself to go forward. If the Town determines the use is *consistent* with the Plan, the use may be provided through modifications to the LDC.

In approaching this consistency determination, the Plan provides little guidance on the COP use, but much with regard to the natural resource of the Gulf beaches and overall compatibility with other land uses in the Town. For areas in the "Residential" FLUM category, the Plan requires the Town to determine if this expanded use will:

- (1) protect natural resources;
- (2) preserve the small-town character of the Town; and
- (3) protect residential neighborhoods against commercial intrusions.

In considering the Town's policy toward this expanded COP use with regard to the Gulf beaches, the Plan requires the Town to

- (a) ensure compatibility with surrounding lands and provide proper buffering where needed;
- (b) further a more sustainable redevelopment pattern that protects coastal resources, minimizes threats to life and property, and limits public expenditures in areas subject to destruction by storms;

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<sup>59</sup> See *id.* POLICY 4-C-3vi.

<sup>60</sup> See *id.*

(c) conserve and enhance the shoreline of Estero Island by increasing the amount of dunes, renourishing beaches to counter natural erosion, and reducing negative man-made impacts on beaches and dunes;

(d) ensure compatibility with surrounding lands and provide proper buffering where needed; and

(e) prioritize conservation uses, water-dependent uses available for use by the general public, recreational uses, and other users that are compatible with the surrounding neighborhood—in that order.

In considering the Town's policy toward this expanded use with regard to preserving the small-town character of the Town, the Plan requires the Town to

(a) determine that expanded COP uses will contribute to the pedestrian-oriented public realm;

(b) determine that expanded COP uses will protect and preserve important natural resources;

(c) determine that expanded COP uses will not inhibit easy walking access to the Gulf beaches;

(d) determine that public facilities to support the demands of impacts associated with expanded COP uses will be available concurrently with its expansion;

(e) provide clear and consistent rules and processes to govern the expansion of COP uses onto the Gulf beaches with appropriate dimensional requirements.

In considering the Town's policy toward this expanded COP use with regard to protecting residential neighborhoods from commercial intrusion, the Plan requires the Town to

(a) specify in the LDC the permitted form and extent for new or expanded COP uses in conjunction with the "Pedestrian Commercial" FLUM category, and establish a streamlined approval process;

(b) assure that any expansion in the "Mixed Residential" FLUM category is sensitive to nearby residential uses, complements any adjoining commercial uses, contributes to the public realm as described in the Plan, and meets the design concepts of the Plan and the LDC; the Town must also provide procedural protection comparable to the public hearing process;

(c) assure that any expansion in the "Boulevard" FLUM category is sensitive to nearby residential uses, complements any adjoining commercial uses, contributes to the public realm as described in the Plan, and meets the design concepts of the Plan and the LDC; as in the "Mixed Residential" FLUM category, here to, the Plan requires the Town provide procedural protections comparable to the public hearing process;

(d) determine the expanded use will prefer residents and overnight guests rather than attract additional day visitors during peak-season congestion;

(e) assure the expansion will contribute to the pedestrian character of the Town;

(f) assure that the expanded use will be sensitive to nearby residential areas; and

(g) prohibit commercial activities that will intrude into a residential neighborhood because of their type, scale, or orientation.

Finally, if the Town determines expanding COP onto the Gulf beaches is consistent with the provisions of the Plan, the Town may wish to establish certain requirements to address potential problems that may arise from this expansion.

## **LDC Considerations**

Once the Town has addressed the threshold Plan considerations, the next step in the process to expand COP onto the Gulf beaches involves maintaining consistency with the current requirements of the LDC. This step includes reviewing the requirements of the zoning district in which the use is proposed for expansion. It also includes considering relevant supplemental regulations and any additional considerations important to the successful expansion of the use. These considerations are reviewed in detail below.

### **EC (Environmentally Critical) Zoning District**

Following the adoption of the Plan provisions discussed above, the Town adopted a new LDC to implement the Plan, as required by the Plan. As part of the Town's new LDC, new zoning districts were established and a new

zoning map was approved.<sup>61</sup> Among these new zoning districts established by the LDC was the EC (Environmentally Critical) zoning district.

Gulf beaches and significant wetlands whose preservation is deemed critical to the Town through the Plan are designated EC zoning on the official zoning map.<sup>62</sup> This includes all Gulf beaches that have been designated in the "Recreation" category on the FLUM.<sup>63</sup> These include all portions of the Gulf beaches seaward of the 1978 CCCL, as discussed above in the section on the "Recreation" FLUM category. LDC §34-620(f)(3) prohibits development seaward of the 1978 CCCL (referencing Plan Policy 5-D-1.v.), except for minor structures as provided in §34-1575.

The Town's intent of zoning certain lands EC is:

to prevent a public harm by precluding the use of land for purposes for which it is unsuited in its natural state and which injures the rights of others or otherwise adversely affects a defined public interest.<sup>64</sup>

Under the LDC, allowable uses of land are allocated to and provided for in LDC Tables 34-1 and 34-2.<sup>65</sup> While the allowable uses in most conventional zoning districts are categorized into use groups and sub-groups in LDC Tables 34-1 and 34-2, the row in LDC Table 34-2 for the EC district references LDC §34-652(d) and (e).<sup>66</sup> LDC §34-652(d) addresses uses permissible by right; subsection (e) addresses uses and structures permissible by special exception.<sup>67</sup>

LDC § 34-652(d) provides:

In the EC district, no land or water use shall be permitted by right except for those uses and developments permitted by the Fort Myers Beach Comprehensive Plan in wetlands, beaches, or critical wildlife habitats, as applicable, including:<sup>68</sup>

boating,<sup>69</sup> fishing,<sup>70</sup> removal of certain vegetation and pest control,<sup>71</sup> hiking and nature study,<sup>72</sup> outdoor education,<sup>73</sup> and wildlife management.<sup>74</sup> None of

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<sup>61</sup> See generally Ord. 03-03 (adopting the new LDC Ch. 34); see also LDC § 34-611, 614

<sup>62</sup> See LDC § 34-652(a).

<sup>63</sup> See *id.* § 34-652(a)(1).

<sup>64</sup> *Id.* § 34-652(b).

<sup>65</sup> See *id.* § 34-621; see also *id.* § 34-620 (regarding uses not specifically listed) and § 34-3241-46 (regarding non-conforming uses).

<sup>66</sup> See *id.* Table 34-2.

<sup>67</sup> See *id.* §§ 34-652(d), (e).

<sup>68</sup> *Id.* §34-652(d) (emphasis supplied).

<sup>69</sup> See *id.* § 34-652(d)(1) ("with no motors permitted except electrical trolling motors.").

<sup>70</sup> See *id.* § 34-652(d)(2).

<sup>71</sup> See *id.* § 34-652(d)(3).

<sup>72</sup> See *id.* § 34-652(d)(4) ("including pedestrian boardwalks and dune crossovers.").

<sup>73</sup> See *id.* § 34-652(d)(5) ("in keeping with the intent of the district.").

<sup>74</sup> See *id.* § 34-652(d)(7) ("as wildlife preserves.").

these allowable uses appears to include an opportunity for expansion of COP onto the Gulf beaches in the EC zoning district.

However, an additional provision of LDC § 34-652(d), subsection (6) provides:

Recreational activities, residential accessory uses, and resort accessory uses that are performed outdoors. These activities and uses include passive recreation and active recreation that requires no permanent structures or alteration of the natural landscape (except as may be permitted by special exception (see §6-366 and subsection (e) below)[)]. Any temporary structure used in conjunction with such uses must comply with all provisions of this code (for instance, see chapters 14 and 27). Artificial lighting may not be installed in the EC zoning district unless approved by special exception or as a deviation in the planned development rezoning process.<sup>75</sup>

LDC §34-652(e) provides uses that Town Council may permit by special exception in the EC zoning district, but this list is limited to

1. a noncommercial nature study center and its customary accessory uses;<sup>76</sup> and
2. a single-family residence and its customary accessory uses at a maximum density of one dwelling unit per twenty acres.

Given the restricted nature of the listed uses, COP on the Gulf beaches in the EC zoning district does not seem to be approvable by Town Council through the special exception process as provided in LDC §34-652(e). It may, however, bear examination of the by-right uses listed in LDC §34-652(d)(6).

The term “**recreational activities**” is not defined by the LDC. As such, it is a policy decision for the Town to determine if COP aligned with commercial uses is a recreational activity within the provision of LDC §34-652.

**Resort accessory use** is limited to a resort, that is, a mixed-use facility for transient guests with at least 50 units and providing food service, outdoor recreational activities, and/or conference facilities for their guests.<sup>77</sup>

LDC §34-652(f) references additional regulatory requirements in other sections of the LDC. The relevant provisions are discussed in greater detail below.

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<sup>75</sup> *Id.* § 34-652(d)(6).

<sup>76</sup> *Id.* § 34-652(e)(2).

<sup>77</sup> See generally *id.* § 34-2 (defining Resort and Resort accessory use).

## Beach and Dune Management

Beach and dune management is a significant aspect of the “Recreation” FLUM category, and thus to the EC zoning district. LDC Chapter 14, Article I<sup>78</sup> provides definitions and regulations concerning the Gulf beaches. The purpose and intent of these provisions is to encourage a steward-like attitude toward the Town’s most valuable asset, the beach, and to preserve and improve the condition of that asset as a place for recreation, solitude, and preservation of beach vegetation and marine wildlife.<sup>79</sup> Article I includes regulations to address destruction and diminishment of the dune or beach system,<sup>80</sup> trash and litter,<sup>81</sup> beach furniture and equipment,<sup>82</sup> beach raking and the Town’s wrack line policy,<sup>83</sup> vehicular traffic on the beach,<sup>84</sup> the dune system,<sup>85</sup> enforcement,<sup>86</sup> restoration standards for dune vegetation alteration violations,<sup>87</sup> and special events on the beach.<sup>88</sup> The Town may find the section on special events on the Gulf beaches most instructive on the issue of COP on the Gulf beaches.

LDC §14-11(a) provides:

Special events on the beach are any social, commercial, or fraternal gathering for the purpose of being entertained, instructed, viewing a competition, or any other reason that would bring them [sic] together in one location that normally would not include such a concentration of people on or near the beach.

These special events, however, are clearly “temporary, short-term activities,” that may include sporting events, festivals, competitions, organized parties (e.g., weddings), promotional activities, concerts, film events, and gatherings under tents.<sup>89</sup> These provisions devote a great deal of attention to the application process to assure no adverse impacts will be visited on the Gulf beaches.<sup>90</sup> This includes protections for sea turtles and native vegetation.<sup>91</sup>

Because the issue of expanding COP onto the Gulf beaches is more akin to a permanent use than the temporary use nature of special events on the beach as addressed in LDC § 14-11, these provisions are probably not directly on

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<sup>78</sup> See *id.* §§ 14-1-11.

<sup>79</sup> See *id.* § 14-2.

<sup>80</sup> See *id.* § 14-3.

<sup>81</sup> See *id.* § 14-4.

<sup>82</sup> See *id.* § 14-5.

<sup>83</sup> See *id.* § 14-6.

<sup>84</sup> See *id.* § 14-7.

<sup>85</sup> See *id.* § 14-8.

<sup>86</sup> See *id.* § 14-9.

<sup>87</sup> See *id.* § 14-10.

<sup>88</sup> See *id.* § 14-11.

<sup>89</sup> LDC §14-11(b)

<sup>90</sup> See *id.* § 14-11(c) and (d).

<sup>91</sup> See *id.*

point, but are instructive as to the nature of considerations when looking to uses compatible with land within the EC zoning district.

### **Coastal Zone Regulations**

LDC §§ 34-1571 through 1577 implements the Plan goals, objectives and policies addressing development as it relates to the preservation, protection, enhancement, and restoration of the natural resources of the Town.<sup>92</sup> These include the Gulf beaches.<sup>93</sup> All areas proposed for development or rezoning are subject to the general as well as the specific regulations set forth in these sections.<sup>94</sup> Except in instances of overriding public interest, private land development or the expansion of existing facilities on the sandy beaches that are designated in the “Recreation” FLUM category is prohibited.<sup>95</sup>

### **Zoning Summary**

It appears from this analysis that while the Plan does not provide for use of the “Recreation” FLUM category for expansion of permitted COP, it doesn’t clearly prohibit it. The EC zoning district established by the LDC to implement the Plan coincides with the “Recreation” category on the FLUM. Unlike the possibly more open language of the Plan this EC zoning district is extremely restrictive in the uses it allows, both by right and special exception. LDC §34-1574 specifically prohibits private land development or the expansion of existing facilities on the beaches in the “Recreation” FLUM category “except in instances of overriding public interest.” The use of the Gulf beaches currently provided for in the LDC most analogous to the expansion of COP is possibly the specially permitted temporary events on the beach provided for in LDC §14-11. But this provision clearly does not contemplate anything more than a temporarily permitted special event. In order to best make the finding and conclusions necessary to justify the expansion of COP uses onto the Gulf beaches, the Town may wish to amend the LDC to clearly indicate that this expansion is consistent with the Plan. The processes for doing so and their related considerations are reviewed below.

### **Supplementary Considerations**

In addition to the zoning regulations discussed in the preceding section of this Report, the Town may wish to consider certain supplementary provisions that will help to effectuate whatever policy the Town decides on the expansion of COP onto the Gulf beaches. The supplementary consideration address LDC provisions for the process(es) for approval of this expanded use, provisions addressing outdoor seating, entertainment, and parking requirements

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<sup>92</sup> See *id.* § 34-1571.

<sup>93</sup> See *id.* § 34-1571(1)c.

<sup>94</sup> See *id.* § 34-1572.

<sup>95</sup> See *id.* §34-1574.

## **Processes for Approval**

From the preceding review and discussion, the Town may decide that the most clear-cut approach to allowing expansion of COP onto the Gulf beaches is for Town Council to amend the LDC to so provide. Part of that process will require a finding that the provision for such use is consistent with the Plan. As reviewed above, several sections of the LDC will need to be amended to make the provision for this use clearly and internally consistent with the existing language of the LDC.

Procedurally, Town Council, as a policy decision, will determine if the use would be of-right, or if the process for approval of the expanded use would be through an administrative or public hearing process, or some combination of the three alternatives. Adequate provisions for limiting the extent and intensity of the use and disciplinary procedures for improper activities, in conjunction with the use, will assure that the expanded use has no potential to harm the public interest in the natural resources of the Gulf beaches, in keeping with the goals, objectives, and policies of the Plan. Potential areas for consideration are discussed below in greater detail in conjunction with additional LDC considerations regarding regulation of alcoholic beverages.

## **Outdoor Seating**

The expansion of COP also would entail associated seating. Necessarily, the expansion of COP onto the Gulf beaches would occur outdoors as the Town and the State of Florida drastically restrict construction on the Gulf beaches. This associated seating, then, would be outdoors on the Gulf beaches.

The LDC currently requires any establishment that provides outdoor seating areas for its patrons consuming alcoholic beverages to apply to have this use approved through the special exception public hearing process.<sup>96</sup> LDC § 34-1264(a)(2) provides a limited exception for any restaurant not within 500 feet of a church, school, day care center, park, or dwelling unit to be approved administratively, but the criteria are extremely difficult—if not impossible—to satisfy through administrative review and contemporary cases have proceeded through the public hearing zoning special exception process.<sup>97</sup> Depending how the deliberations on potential expansion of COP progress, and what approval procedures are selected, the Town may wish to reconsider this requirement with regard to the Gulf beaches. The additional seating area also triggers related parking requirements that are discussed in greater detail below.

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<sup>96</sup> See *id.* § 34-1264(a)(2).

<sup>97</sup> See *id.*

## Entertainment

One reason the Town has consistently employed the public hearing process when considering requests to expand COP into outdoor areas is the additional potential for negative impacts on the neighboring property owners. Nowhere is the right to “quiet enjoyment” in real property more zealously defended than in residential neighborhoods. As noted earlier, the Town has very few areas where residential dwelling units aren’t close by commercial businesses with COP, so the potential for negative impacts resulting from outdoor expansion are inherent to any application for expanded use.

The public hearing process protects public and private rights to due process in land use decision-making. Everyone affected has an opportunity to be heard and the decision-making body or bodies are afforded an opportunity to hear from everyone affected prior to rendering a decision.

Alcoholic beverages are a legally controlled substance. As the LPA recently rightly observed, the consumption of alcoholic beverages often induces relaxed inhibitions and louder and more boisterous behavior than would normally be the case. People want to party and people on vacation may be more inclined than normal to “cut loose”. Add to this situation entertainment, particularly “live” entertainment where the entertainer has a “message” as it were, and can modulate the volume of amplification equipment and the situation is likely to “increase in intensity”. As the music volume amplifies, the volume of the patrons’ conversation does likewise. In an indoor situation this can better be contained within the building, though not always. However, in an outdoor situation, particularly one proximate to water bodies, the ability to attenuate the sound waves is more problematic. In such situations, buffers are often required to address the problem.

As discussed below in greater detail, the Florida Beverage Law specifically provides that the Town may enact ordinances regulating the type of entertainment and conduct permitted in any establishment licensed for COP.<sup>98</sup> Except for limited specific legislation by the Town in ordinances and the LDC, the issue of entertainment and other conduct has been addressed by the Town on a case by case basis through the public hearing process with mixed results.

The Town also has a noise ordinance.<sup>99</sup> The noise ordinance has proven problematic in addressing noise associated with COP for several reasons. Chiefly, because the Sheriff is delegated with responsibility for enforcement and—in the past—has utilized an informational approach to complaints rather than an evidentiary and prosecutorial approach. The specific authorization of the Sheriff as the enforcement authority precludes Town code compliance

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<sup>98</sup> F.S. §562.54(2)(b), (discussed below in the Section of the Report reviewing the state Beverage Law).

<sup>99</sup> Ord. 96-24.

officers from enforcing the noise ordinance, and typical infractions occur outside of normal Town staff working hours.

An additional problem with the effectiveness of the noise ordinance in addressing noise associated with COP is the use of decibels as measurements of sound. Town staff is not equipped with nor trained to utilize sound meters, and the Sheriff—in the past—has not always been appropriately prepared or equipped to document evidence of an infraction.

A number of possibilities for better regulation of this situation present themselves as options for the Town to consider in addressing this situation in relation to expansion of COP onto the Gulf beaches as well as Town-wide:

- An outright prohibition of amplified sound in conjunction with outdoor seating
- A limited prohibition that would apply only to “live” entertainment.
- A limitation on the hours of operation for outdoor seating (e.g., daylight hours within the licensee’s normal operating hours)
- A limitation on the hours for allowing amplified sound in conjunction with outdoor seating
- Some combination of the above.

In considering these options, the Town may consider that special events may be permitted when an opportunity presents itself that may not have been considered in the COP approval process. Several Town businesses and the Greater Fort Myers Beach Chamber of Commerce have been successfully availing themselves to this process for years with complaints from the public that have been subsequently addressed by the Town. Whatever the Town decides, it is advisable that the regulations be uniformly applied. In executing this policy, the Consultant recommends the Town balance flexibility for business operators with ease of effective compliance and enforcement. The successful outcome to be achieved in furthering the vision of the Plan is a reduction, if not elimination, of complaints from residential neighbors whose “quiet enjoyment” is disrupted by this expanded commercial intrusion.

## **Parking**

Except for an extremely limited area within the “Pedestrian Commercial” FLUM category known as “Times Square,”<sup>100</sup> automotive parking is required for every commercial use in the Town.<sup>101</sup> The LDC provides a variety of parking classifications to satisfy these parking requirements.<sup>102</sup> The minimum

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<sup>100</sup> See LDC Figure 34-6

<sup>101</sup> See *id.* § 34-2014, §34-676(a)(3).

<sup>102</sup> See *id.* § 34-2011.

number of parking spaces required varies depending on the related use,<sup>103</sup> whether the use is in a new development,<sup>104</sup> an existing development,<sup>105</sup> and whether bicycle parking is provided.<sup>106</sup> Certain reductions are also afforded depending on the use's location in the Town.<sup>107</sup>

COP licenses are most commonly issued to uses defined in the LDC as "restaurants," "bars and cocktail lounges," and "hotels and motels."<sup>108</sup> The LDC requires a greater number of parking spaces per 1000 square feet of total floor area for "restaurants"<sup>109</sup> and "bars and cocktail lounges"<sup>110</sup> than any other commercial uses. Expanding COP onto the Gulf beaches would increase the floor area associated with the related use, thus demanding additional parking spaces to comply with the LDC requirements.<sup>111</sup> GOAL 7, OBJECTIVE 7-F, related policies, and portions of Transportation Appendix A<sup>112</sup> of the Plan detail the opportunities and constraints associated with the limited inventory of automotive parking in the Town.

A policy decision to allow expansion of COP onto the Gulf beaches may wish to address the need for additional required parking spaces. Many potential locations for this expanded use are already constrained for parking and allowing the use in these areas may require amending the LDC to reduce or eliminate the associated parking requirement. Such reduction or elimination, in light of previously codified parking reductions implementing specific Plan policies, bears careful consideration as part of this decision.

### **Additional Considerations**

In addition to the relatively "known" issues discussed above regarding zoning, outdoor seating, and parking, questions are raised in association with extending COP onto the Gulf beaches. Expanding this COP use is a new consideration for the Town; therefore all potentially problematic issues associated with the expanded use can not be known. Because it does exist in a non-conforming state to some extent, however, and because there are other commercial uses of the beach with which the Town has experience, extrapolating from that experience may assist the Town in anticipating future problems potentially associated with the expansion of this use.

Property maintenance and stewardship, maintaining civility standards, and processes for approval will all likely have to be addressed through specific regulations associated with this expanded use of the Gulf beaches. For such

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<sup>103</sup> See *id.* § 34-202(d).

<sup>104</sup> See *id.* § 34-202(a).

<sup>105</sup> See *id.* § 34-202(b).

<sup>106</sup> See *id.* § 34-202(c).

<sup>107</sup> See *id.* § 34-202(a); see also §34-676(a), §34-683(m).

<sup>108</sup> See *id.* § 34-2 for definitions.

<sup>109</sup> See *id.* § 34-202(d)(2)h.

<sup>110</sup> See *id.* § 34-202(d)(2)a.

<sup>111</sup> See *id.*

<sup>112</sup> See Plan, 7-A-19 to 31

regulations to be effective they will need to lend themselves to efficient and effective code compliance and enforcement. A program of education that seeks to let everyone know what the rules are and how they apply could go a long way to accomplishing this, if Town Council decides to expand COP onto the Gulf beaches. These additional issues are addressed below.

### **Property Maintenance and Stewardship**

The Plan establishes the Town as the ultimate steward of the natural resource of the Gulf beaches. Commercial debris and trash are an existing problem on the Gulf beaches, one that increases during the winter/spring tourist season. These manufactured objects, such as cups, cans, straws, and packaging, clutter the beach and give it a “dirty” appearance to vacationers, as well as presenting a long-term problem to wildlife making a living on and along the Gulf beaches.

The LDC currently contains a minimal and somewhat random property maintenance code “to protect the comfort, health, repose, safety, and general welfare of the residents”<sup>113</sup> of the Town. This code establishes minimum standards for property maintenance and the abatement of public nuisances, supplementary to the standards established elsewhere in the LDC and ordinances.<sup>114</sup> While certain nuisances are addressed directly in LDC §6-5, which prohibits property-owners and their agents from allowing a nuisance,<sup>115</sup> subsection (b)(10) of this section provides:

Any other condition or use that constitutes a nuisance to the public [that] is continually or repeatedly maintained, the abatement of which would be in the best interest of the health, safety, and welfare of the residents of the town . . .<sup>116</sup>

. . . constitutes a nuisance.<sup>117</sup>

Arguably this is a high community standard, likely proposed and adopted as a “catch-all” provision useful for addressing a broad variety of unforeseeable problems the community could not anticipate when the maintenance code was crafted. Unfortunately, it is overly-broad and vague and depending on the application, may not withstand a challenge on such grounds.<sup>118</sup>

LDC §6-7 addresses noise by referencing Ordinance No 96-24, the Town’s Noise Ordinance, which is currently problematic as discussed briefly above with regard to outdoor seating and entertainment. Otherwise, there are no

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<sup>113</sup> LDC § 6-1(a)

<sup>114</sup> *See id.*

<sup>115</sup> *See id.* § 6-5(a).

<sup>116</sup> *Id.* § 6-5(b), § 6-5(b)(10).

<sup>117</sup> *See id.*

<sup>118</sup> Town code compliance staff reports that the code compliance special magistrate has stated as much on prior occasions when the provision was used as a basis for bringing certain complaints for publicly perceived nuisances not otherwise enumerated elsewhere in the LDC.

current LDC standards for property maintenance and stewardship that address the potential problems associated with the extension of COP onto the Gulf beaches.

As discussed below with respect to the Florida Beverage Law, nothing in state law should prevent the Town from adopting a reasonable standard or standards for maintaining the property in a specific manner. If COP is extended onto the Gulf beaches, limiting the location to table service may reduce debris to a lesser issue as employees of the business will be serving the public, though whatever service provision is considered it may be advisable to provide a requirement that the premises be maintained in a clean and sanitary, well-maintained manner at all times.

If a vegetative buffer is required to be maintained between the beach COP area and the public portion of the Gulf beach, it could also help keep debris on-site in a wind event or if a storm event suddenly cleared people from the area. A requirement for trash receptacles at any ingress/egress to the public beach may also help to limit littering. Whatever the standard it should be reasonable, desirable to the Town, and readily ascertainable and measurable by observation and from photographic evidence. Regular and random inspections by code officers for compliance with a concurrent provision for revoking the privilege for non-compliance may be helpful to assure good property stewardship for businesses with COP on the Gulf beaches.

### **Maintaining Order**

Plan Chapter 2, "Envisioning Tomorrow's Fort Myers Beach," "takes a peek into the future . . . the future the Town hopes to create by adding its efforts to all others that have shaped this community." It begins:

***Natural Environment:** "The natural features at Fort Myers Beach remain its primary yet most sensitive assets. The beaches are clean and regularly replenished with sand, and sand dunes have been recreated.*

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*"Beach-going residents and visitors select their preference of quiet beaches at Bowditch Point or lively beaches near Lynn Hall Memorial Park."<sup>119</sup>*

Plan Chapter 2 concludes:

***FORT MYERS BEACH, A LIVING PARK:** "The Town of Fort Myers Beach, through the dedicated efforts of the community, has become a living park, existing for the comfort, safety, and quality of life of its residents and the peaceful enjoyment of its visitors."*

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<sup>119</sup> Plan, 2—1.

< *"An ecologically sensitive park where visitors have learned to enjoy the unique natural amenities and to take responsibility for protecting the natural environment;*

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< *"A family-friendly park where parents and children are equally nurtured and where recreation is educational;*

< *"A semitropical island beach park where all ages enjoy the clean and safe environment;*

< *"A tranquil resort park where visitors relax in the warm island ambiance and atmosphere;*

< *"A vital community park where retired and working citizens share in a positive spirit of volunteerism to assure that future generations will have the opportunity to enjoy its magic and tranquility; and*

< *"An economically sustainable park which protects and promotes its commercial interests and where a partnership with the past provides the focus for the future."*

If the Plan vision is the order of the day, maintaining order clearly seems important. Beyond personal responsibility, code compliance and code enforcement, there is law enforcement. The Town does not have its own police force, which would normally be the municipality's preserver and protector of order. Instead, the Town contracts with the Lee County Sheriff for law and order.

In order to maintain order, the Town may wish to consider a provision by which the permit for expansion of COP onto the Gulf beaches would be annually reviewed and renewed (or not). The Town may wish to establish standards for permit revocation and prohibition to address warranted complaints. One such standard might provide that a set number of warranted responses by the Sheriff's deputies or a code compliance officers may be grounds for revocation.

### **Code Compliance/Enforcement Considerations**

Clearly drafted regulations, applications, and permit approvals are essential to ensure accurate and reasonable compliance and enforcement. As discussed above, as many considerations should be included in the regulations to avoid lengthy and inconsistent conditions of permit approval. Some of the considerations that will assist in accomplishing that end are discussed under the following heading.

### **Approved Permit Documentation**

Whatever process the Town chooses to consider applications for expanding COP onto the Gulf beaches, there should be a thorough documentation of location and operating conditions within that location. In the past, commercial use of the Gulf beaches has at times expanded beyond the approved area

depending on the season of year the associated demand and beach width reductions due to erosion. Following beach erosion resulting from storm events, this expansion has at times interfered with the public's access to and lateral transit along the public portion of the beach.

Accurate drawings of the area of the Gulf beaches associated with a given permit or other approval will ensure the Beach and Street Enforcement ("BASE") and code compliance officers can inspect businesses approved for COP expanded onto the Gulf beaches. Such inspections allow these public officials to confirm that businesses are within the extents of their approved permit.

The LDC general submittal requirements for zoning applications can be modified to establish the application requirements for an expanded outdoor seating permit. The Town may wish to eliminate any requirements unnecessary irrelevant to the requested expansion from the application, depending on the process Town Council chooses for review and approval. This information can also provide a basis for determining the amount of parking spaces required for the requested expansion and for any required buffers, etc.

### **Timing**

The only timing issues would appear to be those periods after working hours for Town staff and BASE when a business would be allowed to operate. Arrangements may be possible with the Lee County Sheriff's Office to police the use during those periods.

### **Summary**

It appears from this review that while the Plan does not provide for use of the "Recreation" FLUM category for expansion of permitted COP, it doesn't clearly prohibit it. The EC zoning district established by the LDC to implement the Plan coincides with the "Recreation" category on the FLUM. Unlike the possibly more open language of the Plan this EC zoning district is extremely restrictive in the uses it allows, both by right and special exception. LDC §34-1574 actually prohibits private land development or the expansion of existing facilities on the beaches in the "Recreation" FLUM category "except in instances of overriding public interest." The use of the Gulf beaches currently provided for in the LDC most analogous to the expansion of COP is possibly the specially permitted *temporary* events on the beach provided for in LDC §14-11. But this provision clearly does not contemplate anything more than a *temporary* special event. In order to best make the finding and conclusions necessary to support the expansion of COP uses onto the Gulf beaches, the Town may wish to amend the LDC to clearly indicate that this expansion is consistent with the Plan. The processes for doing this are reviewed below.

## Current Regulations in Regard to Sales and Service of Alcoholic Beverages

### Review of Existing Regulations and Possible Options Relevant to Local Land Use Regulations

#### Florida Beverage Law

The State of Florida “through a comprehensive system of regulatory laws, maintains preeminence in the regulation and control of alcoholic beverages.”<sup>120</sup> These regulations are codified in Title XXXIV of the Florida Statutes, Chapters 561 through 568, known collectively as “The Beverage Law”.<sup>121</sup> These chapters provide for administration<sup>122</sup> and enforcement<sup>123</sup> of the Florida Beverage Law, with additional chapters devoted specifically to “Beer”,<sup>124</sup> “Wine”,<sup>125</sup> and “Liquor”.<sup>126</sup> The concluding chapters address local options for prohibiting the sale and service of alcoholic beverages and regulatory provisions for areas where such prohibitions exist.

#### Provisions for and Limitations on Local Regulations

Fortunately for the Town, the portions of the Florida Beverage Law relevant to local land use regulation are more limited than the Florida Beverage Law itself. F.S. §562.12 regulates the time for sale of alcoholic beverages and prohibits certain uses of licensed premises. Except as provided by a county or municipal ordinance establishing other times, sales and service on licensed premises are prohibited from midnight (12:00 a.m.) to seven (7:00) a.m. the following day.<sup>127</sup>

F.S. §562.54 establishes penalties for violating the Florida Beverage Law, addresses local ordinances regulating the sale and service of alcoholic

<sup>120</sup> Op. Atty. Gen., 073-54, March 13, 1973.

<sup>121</sup> See F.S. § 562.01(6).

<sup>122</sup> See *id.* Ch. 561 (2008).

<sup>123</sup> See *id.* Ch. 562.

<sup>124</sup> See *id.* Ch. 563.

<sup>125</sup> See *id.* Ch. 564.

<sup>126</sup> See *id.* Ch. 565.

<sup>127</sup> See *id.* §562.14(1).

beverages, prohibits regulation of certain activities or business transactions, and requires nondiscriminatory treatment of licensees by local governments.

Subsection (2)(a) of F.S. §562.54 provides in pertinent part:

Nothing contained in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary regulations therefor, of any licensee under the Beverage Law within the county or corporate limits of such municipality.

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The division may not issue a change in the series of a license or approve a change of a licensee's location unless the licensee provides documentation of proper zoning from the appropriate county or municipal zoning authorities.<sup>128</sup>

Subsection (2)(b) of F.S. §562.54 specifically provides that the Town may enact ordinances regulating the type of entertainment and conduct permitted in any establishment licensed for COP, including any bottle club licensed under F.S. 561.14.<sup>129</sup> F.S. §562.54(2)(c), however, prohibits the Town from enacting any regulation of the “activities” or “business transaction” regulated under the Florida Beverage Law. This section requires that any other regulation “designed to promote and protect the general health, safety, and welfare of the public, shall treat a licensee in a nondiscriminatory manner and in a manner that is consistent with the manner of treatment of any other lawful business transacted in this state

F.S. §562.51 provides that retail alcoholic beverage establishments must comply with any applicable municipal or county ordinance regulating the presence of persons under 21 years of age on the premises of any such establishment.

## **Bottle Clubs**

Bottle clubs are licensed by the State of Florida.<sup>130</sup> Bottle clubs are defined by the Florida Beverage Law and the Florida Administrative Code as:

- a. a commercial establishment;

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<sup>128</sup> *Id.* § 562.54(2)(a) (emphasis supplied).

<sup>129</sup> *Id.*, §562.45(2)(b). Bottle clubs are discussed in more detail in the discussion of the LDC below.

<sup>130</sup> See F.S. § 561.14(6) (2008),

- b. operated for profit, whether or not a profit is actually made;
- c. where alcoholic beverages are not sold but where patrons are allowed to consume alcoholic beverages on the premises; and
- d. located in a building or other enclosed or covered structure.<sup>131</sup>

The definition specifically excludes, among other things irrelevant to the Town, *bona fide* restaurants licensed by the state whose primary business is the service of full course meals, or hotels and motels licensed by the state.<sup>132</sup>

Years ago, in the early days of the Town's incorporation, the use of bottle clubs proved problematic in Lee County.<sup>133</sup> So much so, in fact, that Lee County made all existing bottle clubs in the unincorporated areas of the County non-conforming on September 18, 1996, amortized their lawful existence as non-conformities exactly one (1) year later, and prohibited the use of bottle clubs in any zoning district in the unincorporated areas of the County.<sup>134</sup> The Lee County Land Development Code maintains language to this effect.<sup>135</sup>

The Town LDC makes no reference to "bottle clubs" of any sort. Because the provisions of the LDC regulating alcoholic beverages were modified from the Lee County Land Development Code, it may be assumed that the use is prohibited by not being defined or regulated. More likely, however, this silence may be seen as an oversight and the provisions of LDC §34-620(a) and (b) may be invoked requiring the director to decide if the use is similar to a use specified in the LDC or would require a planned development for approval.<sup>136</sup>

During the comprehensive review of the Town's regulation of alcoholic beverages, the Town may wish to consider and determine a policy on bottle clubs in order to make any such prohibition clear in the LDC rather than relying on an assumption by implication.

## The Town's Ordinances

The Town has four (4) stand-alone ordinances that address the consumption of alcoholic beverages: an alcoholic beverage establishment exposure prohibition ordinance,<sup>137</sup> an open container law,<sup>138</sup> a liquor license restriction

<sup>131</sup> See *id.* § 561.01(15) (2008), Rule 61A-3.049(1), F.A.C.

<sup>132</sup> See *id.*

<sup>133</sup> See generally DBPR, Div. of ABT v. Easy Way of Lee Co., inc. d/b/a Hollywood Underground, Case No. 99-2320, (2000), 2000 WL 248399 (Fla. Div. Admin. Hrgs.); 2000 WL 350879 (Fla. Div. Admin Hrgs.).

<sup>134</sup> See Lee County Ord. 96-17 §5.

<sup>135</sup> See Lee County Land Development Code § 34-1264.

<sup>136</sup> See LDC § 34-620(a), (b).

<sup>137</sup> See Ord. 96-03.

<sup>138</sup> See Ord. 96-05.

law,<sup>139</sup> and a parks and recreation law including a section on alcoholic beverages and controlled substances in Town Parks.<sup>140</sup> These ordinances are discussed below with recommendations for modifications the Town may find desirable and necessary. They are further referenced in the section below discussing possible issues in conjunction with the LDC.

### **Alcoholic Beverage Establishment Exposure Prohibition Ordinance**

Ordinance 96-03, makes illegal for any person licensed to sell or serve alcoholic beverages for on-premises consumption to allow people to, or for people to expose certain body parts, the exposure of which is thereby prohibited.<sup>141</sup> It provides an exception for a mother to feed her infant child.<sup>142</sup>

### **Open Alcoholic Beverage Container Ordinance**

Ordinance 96-05, one of a cadre of ordinances the Town adopted following incorporation, makes illegal the consumption, transportation, or possession of any opened alcoholic beverage on any semi-public parking lot, public street, sidewalk, parkway, beach, parking lot, or within an operated vehicle.<sup>143</sup> It provides certain exemptions for litter removal, commercial transportation by licensed liquor distributors and vendors, clergy performing religious services with wine, and licensed carriers of alcoholic beverages.<sup>144</sup> It also exempts the transportation of any open container of alcoholic beverage in “a compartment of a vehicle such as a locked glove compartment, trunk, container or other non-passenger area of a motor vehicle[.]”<sup>145</sup>

Ordinance 96-05 provides definitions for the following terms: “alcoholic beverages,” “semi-public parking lot,” “package,” and “public beach”.<sup>146</sup> §6 provides penalties for any person convicted of violation of §3. Ordinance 96-05 was subsequently amended in 1998 to correct a scrivener’s error,<sup>147</sup> and again in 1999 to provide an additional exemption to any person in a designated area attending a Town-sponsored event.<sup>148</sup>

The Town may wish to revisit Ordinance 96-05. The definitions may be problematic (e.g., the definition of “alcoholic beverages”, referencing “more than one percent (1%) of alcohol by weight” is inconsistent with that of the Florida Beverage Law, which references “one-half of 1 percent or more alcohol by volume”). Terms are used such as “compartment” that are arguably vague and problematic for enforcement. There may also be conflicts

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<sup>139</sup> See Ord. 96-06.

<sup>140</sup> See Ord. 97-5.

<sup>141</sup> See Ord. 96-03 §§3-5.

<sup>142</sup> See *id.* §6

<sup>143</sup> See Ord. 96-05 §4.

<sup>144</sup> See *id.* §5.

<sup>145</sup> *Id.* §5D.

<sup>146</sup> See *id.* §3.

<sup>147</sup> See Ord. 98-13, *see also* Ord. 98-10 (amending Ord. 96-05 with the same change on an emergency basis).

<sup>148</sup> See Ord. 99-15 §2.

with a new policy for expansion of COP onto the Gulf beach. Finally, after 12 years a comparison to comparable provisions in the state's criminal statute may be warranted to eliminate any incongruities.

### **Liquor License Restriction Ordinance**

Ordinance 96-06 restricts the sales, consumption, and service of alcoholic beverages in "any place" licensed by the state "except during the hours of 7:00 a.m. and 2:00 a.m. of the following morning every day of the week, including Sundays."<sup>149</sup> It prohibits COP within 500 feet of any church or school, "unless a special permit is first obtained from the Town Council."<sup>150</sup> It establishes a methodology for measuring the 500 feet distance.<sup>151</sup>

The Town may also wish to revisit Ordinance 96-06. There are no definitions provided. It makes no reference to F.S. §562.45, which may be prudent. The times provided are inconsistent with numerous zoning approvals restricting service times to earlier hours. The location restrictions are inconsistent with those of LDC §§ 34-1263(d) and 34-1264(b)(1). The requirement of a special permit is also inconsistent with the LDC and ignores the statutorily required findings.<sup>152</sup>

### **Parks and Recreation Ordinance**

Ordinance 97-5, among many other provisions related to parks and recreation, establishes a general prohibition against the possession, consumption, use, sales or distribution of alcoholic or intoxicating beverages and illegal substances in any park. It further prohibits anyone from entering or remaining in any park under the influence of alcohol, other intoxicants, or illegal substances. It provides an exception for a person with a written contract with the Town to sell, serve, and/or permit to be sold or served beer and wine, and for persons to consume same on the premises only at designated events. It also authorizes the Town Council to "designate by resolution for a one-time event any recreation facility" to allow the sale and consumption of alcoholic beverages following application for said resolution by a private group with a permit or license authorized by the Florida Beverage Law.<sup>153</sup> It provides that the Town Manager "may place restriction or limitation."<sup>154</sup> Ordinance 97-5 was amended in 2003 to limit the service of the alcoholic beverages to plastic containers and to clarify that the Town Manager "may place further restrictions and limitations."<sup>155</sup> Ordinance 97-5 provides no definition for alcoholic beverages, so in light of the definitional problem in Ordinance 96-05, the Town may find it wise to clarify that.

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<sup>149</sup> See Ord. 96-06 §3.

<sup>150</sup> Ord. 96-06 §4.

<sup>151</sup> See *id.*

<sup>152</sup> Cf. F.S. §562.45(2)(a).

<sup>153</sup> Ord. 97-5 §13A.

<sup>154</sup> *Id.*

<sup>155</sup> Ord. 03-01 §2.

## The Town's Land Development Code

### Article IV, Supplemental Regulations, Division 5, Alcoholic Beverages

Article IV of LDC Chapter 34 provides regulations that are supplementary to those of the rest of the chapter. Division 5 of this article includes all the Town's regulations in regard to alcoholic beverages that are codified in the LDC. It provides definitions, requires real property used for the retail sale, service, or consumption of alcoholic beverages to conform to all other applicable Town regulations. The majority of the ordinance is located in the remaining two (2) sections, which provide regulations for sales of *off-premises* and sales and service of *on-premises* consumption. Other than a scrivener's review and rectification to the rest of the LDC, these provisions are—in pertinent part—the same as those of Lee County's Land Development Code, and they have not previously been reviewed by the Town for policy, substance, or conformity with state law. These provisions are discussed below with recommendations for modifications the Town may find desirable and necessary.

#### Definitions

LDC §34-1261 provides certain definitions that are specific to Article IV, Division 5. Some of these definitions vary from those of the Florida Beverage Law and the Town may wish to revise them accordingly. In addition, the Florida Beverage Law provides additional definitions that the Town may wish to include or reference for clearer internal consistency and consistency with the state.

#### Applicable Regulations

LDC §34-1262 is a simple compliance requirement. It could be re-crafted to better state its intent and policy, but is otherwise unremarkable.

#### Sale for Off-Premises Consumption

LDC §34-1263 provides regulations for *off-premises* consumption of alcoholic beverages. In the Town, it applies primarily to retail stores selling sealed containers of alcoholic beverages to be consumed elsewhere than the real property of the seller. It requires compliance with all applicable state liquor laws, which is probably an unnecessary restatement of LDC §34-1262. It provides specific location restrictions for package stores—an undefined term.

The location restrictions for package stores expand upon the Florida Beverage Law's required 500 feet from churches and schools to include day care centers, parks, dwelling units, and other establishment engaged in the sale of alcoholic beverages. It provides a standard for measuring this

distance. It provides an exception for “coming to the nuisance,” i.e., if the subject retail store is in existence and the church or school, etc. is subsequently located within the 500 foot zone of prohibition, the provisions do not apply. It provides an exemption from the 500 foot zone for a multi-occupancy complex 25,000 square feet or larger. It provides that a planned development may seek a deviation from this required distance, but does not make a similar provision for a special exception for other zoning districts.

### **Sale or service for On-Premises Consumption**

LDC §34-1264 contains the bulk of the Town’s regulatory provisions with regard to alcoholic beverages which relate to on premises consumption. The reason for this is probably two-fold: this is the regulatory arena in which the Florida Beverage Law provides local government with its greatest extent of authority, and this is the arena in which local governments have experienced their biggest problems.

### **Approval process**

Subsections (a) and (c) detail the permit approval processes for COP. They are currently separated from each other by the location and parking requirements provided for in subsection (b). The Town may wish to combine these subsections and streamline the provisions. Certain requirements like that for lighting in LDC §34-1264(c)(1)b.2. are addressed in other sections of the LDC<sup>156</sup> and could be referenced rather than expressed. The circumstances under which the director may not administratively approve COP are broad and lend themselves to being construed broadly.<sup>157</sup> The Town may wish to give better direction on what circumstances warrant administrative approval over special exception approval.

**Outdoor Seating.** Subsection (a)(2) a.2. provides location criteria for outdoor seating as part of the special exception requirements. The Town may wish to consider removing these requirements to the subsection on location, discussed below. Concern for noise and nuisance problems associated with entertainment, both live and otherwise, have been the cause for great concern and case by case conditioning of COP approvals in the past. The Town may wish to provide specific criteria for this conduct in accordance with F.S. §562.45, discussed in the Florida Beverage Law section. Some options for the Town’s consideration are

- Provide a definition for “outdoor seating,” which is not otherwise defined in the LDC.

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<sup>156</sup> See LDC §34-1831-34.

<sup>157</sup> See *id.* §34-1264(a)(1).

- Hours of operation—loud sounds are more problematic when people are trying to sleep;
- Distance separation from residences;
- Separate or special event permitting of outdoor entertainment that may be disciplined or rescinded in a manner less cumbersome than either the code compliance enforcement process or COP revocation procedure for violations of the Noise Ordinance;<sup>158</sup>
- Buffering requirements;
- Prohibiting certain forms of entertainment;<sup>159</sup>
- Prohibiting outdoor entertainment except by special events;
- Review of regulations in other similarly situated communities for other potentially more technical approaches to measuring nuisance levels of sound and modulating them.

If the Town wishes to pursue the last consideration, the Consultant recommends pursuing this avenue in conjunction with a review of the Noise Ordinance.

### **Location**

Subsection (b) provides location requirements for COP uses. As discussed above in the section on Town Ordinances, these requirements are inconsistent with the requirements of the Town's Liquor License Restriction Ordinance. The Town may wish to modify the restrictions provided to conform to the Florida Beverage Law and for internal consistency with the LDC.

**Parking.** In addition to location requirements, subsection (b) also provides parking requirements. The Town may wish to revise this to a separate section since both *off-* and *on-premises* uses have minimum parking requirements. Any separate provision for parking in conjunction with COP on the Gulf beaches should be included here if deemed appropriate. Appropriate references to the parking reductions provided for certain properties in the Downtown zoning district may also be referenced here.

### **Temporary Permits**

Subsection (d) provides for the issuance of a one-day temporary permit for the sale of alcoholic beverages in conjunction with a special event. It limits to 12 the number that any one (1) location may be granted in any year and

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<sup>158</sup> Ord. 96-24, as amended. The Town may also wish to revisit the Noise Ordinance.

<sup>159</sup> See e.g., Ord. 96-03 (Alcoholic Beverage Establishment Exposure Prohibition)

requires a special exception hearing if more than 12 “are sought”. It provides a procedure for administrative review and determination for events lasting not longer than three (3) days, and for Town Council review and determination for events lasting not longer than 10 days.

The Town may wish to revise this subsection to conform it to the provisions of the Florida Beverage Law, the provisions of the LDC regarding special events,<sup>160</sup> and the Special Events Ordinance.<sup>161</sup>

### **Expiration of Approval**

Subsection (e) provides for the automatic expiration and nullification of approvals for COP no business operation is subsequently commenced. For existing structures, the time period is six months; for new structures it provides for a year and allows the director to grant one (1) extension up to six (6) months if construction is substantially complete. Since many of these approvals are granted as part of the zoning process, and many of the Town’s zoning cases are planned developments that have a longer window from expiration, the Town may wish to make this provision more consistent with other provisions of the LDC and the Florida Beverage Law.

### **Transfer**

Subsection (f) provides that alcoholic beverages permits are a privilege running with the land and that sale of the subject real property vests the purchaser with all rights and obligations imposed by the Town on the original permit and that the permit may not be separated from the real property. The Town may wish to modify this subsection to better conform to the Florida Beverage Law, and to provide better internal consistency. The reference to subsection (i) should be modified in conjunction with subsection (i), discussed below.

### **Expansion**

Subsection (g) requires a licensee to receive a new permit from the Town prior to expanding the area currently designated by an existing permit. Other than minor clean-ups, this subsection does not appear to be problematic.

### **Nonconformities**

Subsection (h) addresses nonconformities. It provides for continuation of a nonconforming use but requires a special exception for any expansion of that use. It provides for amortization of the non-conforming use only after abandonment of the use for a continuous nine-month period. Town Council

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<sup>160</sup> See LDC §34-2441-42.

<sup>161</sup> Ord. 98-01, as amended by Ord. 00-16.

may wish to expand the provisions for amortization to address existing non-conforming uses of the Gulf beaches or relegate this subsection to LDC Article V that deals with all other nonconformities.

### **Revocation**

Subsection (i) authorizes Town Council to revoke approvals for sales and service of alcoholic beverages, outlines the grounds for such revocation and details the process due the licensee, and required of the Town in the event grounds for revocation are found. It prohibits the Town from issuing a subsequent permit for a year after a revocation. It requires a licensee to make an affidavit itemizing sales percentages upon written demand of Town Council, and provides that failure to do so is grounds for revocation.

The Town may wish to modify much of Subsection (i) to:

1. Conform it to the Florida Beverage Law;
2. Make it a separate section that applies to the entire division instead of locating it in §34-1264.
3. Streamline the process so it can be more expeditious and less cumbersome in the event it must be employed.
4. Eliminate unnecessary or redundant provisions that are found in the existing code enforcement provisions of the LDC.
5. Improve its internal consistency.

### **Appeals**

Subsection (j) provides that the procedure for appeals of administrative decisions under this division is same as for the majority of the LDC. It is instructive, but probably redundant and unnecessary if the Town prefers to remove it. If the Town chooses to keep it, it may wish to provide that the provision be applicable to the division not just LDC §34-1264 as discussed above in the "Revocation" section of this Report.

### **Restaurants v. Bars/Cocktail Lounges**

The LDC differentiates between "restaurants" and "bars/cocktail lounges."<sup>162</sup> Subsection (k) requires alcoholic beverage sales in restaurants to be "incidental" to food service; not to exceed 49% of combined gross sales annually; require the business to keep separate books for alcohol and non-alcohol related sales, and allow the Town to inspect and audit the businesses books; make non-compliance a code violation; and provide for enforcement;

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<sup>162</sup> See LDC §34-2 for definitions of "Bar or cocktail lounge" and "Restaurant".

and address reviews for compliance for businesses open for less than 12 months. In general, these regulations follow similar regulations in the Florida Beverage Law, but not exactly. The obvious purpose is to assure that restaurants don't operate as bars or cocktail lounges when they have not been permitted as such in violation of state law and Town zoning provisions. The Town may wish to revise these regulations to conform them to the state regulations for consistency.

### **Additional Code Considerations**

Town staff and the LPA have identified additional concerns with regard to conditions placed on approvals for COP not properly addressed in the LDC. Several of these conditions have been discussed above in conjunction with the COP on the Gulf beaches and LDC review sections. A discussion of the remaining identified issues follows below.

### **Advertising**

Several past COP approvals have prohibited advertisement to be visible from various streets and other places. Without having the specific zoning resolutions or supporting case files immediately available and taking additional time to review them, the Consultant believes these conditions are based in variances from the LDC requirement for 500 feet minimum distance separation from a specific use to mitigate against commercial intrusion and a deviation from minimum parking requirements for hotel/motels containing amenities requiring additional parking that was not—or could not be—provided.<sup>163</sup>

Conditions attached to variances are difficult to foresee and are generally crafted on a case by case basis to address the unique circumstances of a unique property given certain uses. The Town may wish to investigate this further in conjunction with conforming the LDC to the Florida Beverage Law, as discussed above. It is noted that LDC §34-2020 contains various limitations on appearance that could generally be construed as limitations on “advertising,”<sup>164</sup> and it may be desirable for the Town to standardize these to the most reasonable extent possible.

### **Enclosure and Buffering Requirements**

The generally pleasant environmental conditions in the Town and on the Gulf beaches provide desirable conditions for *al fresco* activities including dining, hence a real demand for what the LDC refers to merely as “outdoor seating”

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<sup>163</sup> *Cf. id.* §34-2020(b)(2)a.3. (limiting the location of a bar or cocktail lounge within a restaurant to provide no indication from outside the building that such use is contained therein), b.2. , (limiting the location of a cocktail lounge in a hotel or motel and outside indications of such use), and d.2 (providing similar limitations on a membership organization).

<sup>164</sup> See *infra* fn. 163

areas. As noted above in the discussion on outdoor seating, this term is not clearly defined. The Town may wish to revise the LDC to clearly distinguish enclosed seating areas from outdoor seating areas. This distinction will make it easier to establish standardized buffering requirements if the Town finds that desirable.

LDC Table 10-8 provides standardized buffer requirements for certain uses. LDC Table 10-9 provides standardized buffer types employed to satisfy the requirements. The Town may wish to revise these tables to provide additional considerations for COP, particularly with regard to outdoor seating with specific buffer requirements suited for the Gulf beaches if the Town decides to explore expanding COP to those areas.

### **Outdoor Lighting**

Standardized requirements for outdoor lighting are currently provided in LDC §§34-1831 through 34-1834. Additional lighting standards required with regard to sea turtle protection are provided in Article II of LDC Chapter 14. These standards seem sufficient to address any concerns for negative impacts from lighting associated COP in absence of any specific concern for problems with these existing regulations. The Town may wish to note that much of the lighting in the Town is non-compliant with these regulations.

As new outdoor lighting is permitted, Town staff is required to assure that it complies with the lighting standards. Lighting fixtures that are replaced also must comply with the Town's current lighting standards.<sup>165</sup> LDC §34-1834 requires existing light fixtures that are not in compliance with the Town's lighting standards must be brought into compliance by January 1, 2010. The Town may wish to establish an outreach program to make property owners aware of this requirement in advance of the compliance deadline.

### **Conclusion**

The following section of this Report provides a summary and conclusions regarding modifications to the LDC and ordinances regulating sale and service of alcoholic beverages.

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<sup>165</sup> LDC §34-1834(c).

## Summary and Conclusions

### Modifying the Town's LDC and Other Regulations in Regard to Alcoholic Beverages

#### On-Premises Consumption on the Gulf Beaches

The Plan does not clearly provide for expansion of permitted COP onto the Gulf beaches, neither does it clearly prohibit it. The EC zoning district established by the LDC to implement the Plan coincides with the "Recreation" FLUM category. Unlike the possibly more open language of the Plan this EC zoning district is extremely restrictive in the uses it allows, both by right and special exception. Of the uses of the Gulf beaches currently provided for in the LDC the most analogous to COP is possibly the specially permitted *temporary* events on the beach provided for in LDC §14-11.

In order to best make the finding and conclusions necessary to support the *permanent* expansion of COP uses onto the Gulf beaches, the Town may wish to amend the LDC to clearly indicate that this expansion is consistent with the Plan.<sup>166</sup> As detailed below, the Town may wish to revise the existing regulations to address any possible negative affects associated with this expanded use. The Town may also wish to undertake a comprehensive revision of the Town's existing regulations to better conform them with the Florida Beverage Law, the LDC, and other Town regulations regarding activities associated with the sales and service of alcoholic beverages.

#### Sales and Service of Alcohol Generally

The Town's regulations with regard to alcoholic beverage sales and service have not been reviewed comprehensively since prior to incorporation. Recommendations provided below summarize possible changes the Town may wish to consider making if the Town determines to revise policies with regard to these uses.

<sup>166</sup> As discussed earlier in this Report, the Town may further wish to amend the Plan, but that change is subject to a much more extensive and time-consuming process than an LDC change.

## Town Ordinances

The Town has four (4) stand-alone ordinances that bear consideration as part of a comprehensive review of the Town's alcoholic beverage regulations. These are discussed in greater detail earlier in this Report. Though some ordinances are older and more problematic than others, the Town may wish to revise all of these ordinances to provide for a consistent definitional scheme, for accordance with the Florida Beverage Law, and for consistency with the regulations codified in the LDC.

### LDC Article IV, Division 5 Regulations

**Definitions.** The Town may wish to revise these provisions to better accord with the Florida Beverage Law and better internal LDC consistency.

**Sales for Off-Premises and Sales and Service for On-Premises Consumption.** LDC provisions for *off-premises* consumptions do not appear well-aligned with the Florida Beverage Law. The Town may wish to revise these regulations to provide such alignment. LDC provisions for on-premises consumption are exponentially more complicated and thus are discussed specifically on an issue by issue basis below.

**Approval Process.** The Town may wish to provide better direction on what circumstances warrant administrative COP approvals, as the current provisions for such approvals are limited in such a way as most requests must be directed to the public hearing special exception process for approval.

**Location.** The Town may wish to revise these provisions to conform to the Florida Beverage Law, for internal consistency with the LDC, and to better address concerns for problems associated with outdoor seating. Issues associated with outdoor seating include: an adequate definition; standardized hours of operation; distance separation from residences; appropriate approval, compliance, and revocation provisions; buffering requirements; adequate and appropriate provisions with regard to entertainment. Many of the concerns relating to outdoor seating location requirements relate to measuring and modulating associated sound levels. If the Town decides to make revisions associated with the Noise Ordinance, the Consultant recommends a sampling review of regulations in regard to these issues in other similarly situated communities in conjunction with such potential revisions.

**Parking.** The Town may wish to consider changes to the parking requirements associated with COP. The Consultant recommends that any potential changes carefully consider the potential negative affects of future reductions in the parking area required for commercial uses. Parking constraints in the Town are closely related to traffic conditions. Any revisions

should include appropriate references to the Town's existing parking requirements in other sections of the LDC.

**Temporary Permits.** The Town may wish to revise this subsection to conform to the provisions of the Florida Beverage Law, the provisions of the LDC relating to special events, and the Town's Special Events Ordinance.

**Expiration of Approval and Transfer.** The Town may wish to modify this subsection to better conform to the provisions of the Florida Beverage Law and provide for better internal LDC consistency.

**Expansion.** Though currently not problematic, the Town may wish to authorize minor clean-up revisions to better conform these subsections to the LDC generally.

**Nonconformities.** The Town may wish to expand the provisions relevant to amortization of non-conformities or remove the provisions to the division of the LDC dealing specifically with nonconformities and reference same accordingly.

**Revocation.** The Town may wish to modify much of this subsection to conform it to the Florida Beverage Law, eliminate unnecessary provisions found elsewhere in the LDC, streamline the process in the event it must be employed; make it a separate section that applies to the entire division instead of locating it within the *on-premises* provisions of §34-1264, and improve its internal consistency.

**Appeals.** The Town may wish to eliminate this subsection entirely as redundant of the relevant provisions of LDC §34-86. The provision is, however, instructive to someone who is concerned only with the Town's regulations relating to alcoholic beverages, but if the Town chooses to retain it in this division, the Consultant recommends it be removed to a separate section clearly indicating the provision's applicability to the entire division.

**Restaurants, Bars, and Cocktail Lounges.** The Town may wish to revise these provisions to conform them to the Florida Beverage Law and make any necessary modifications for internal consistency.

**Advertising.** To the extent possible, the Town may wish to provide reasonable standards for applicable to all commercial uses in close proximity to residential neighborhood to assure against commercial intrusion into these neighborhoods. Alternatively, the Town may wish to conform the current standards to be consistent to all COP-related uses. In doing so, the Town may wish to conform these regulations to the Florida Beverage Law.

**Enclosure and Buffering.** The Town may wish to revise the LDC to clearly distinguish enclosed seating areas from outdoor seating areas. The Town may also wish to revise its current buffering requirements to provide standards

for COP, particularly with regard to outdoor seating, with certain standards crafted to address expansion of COP onto the Gulf beaches.

**Outdoor Lighting.** Current standardized lighting requirement provided in the LDC appear adequate to address lighting issues raised by staff and the LPA. However, there exists within the Town non-compliant lighting fixtures that the LDC requires to be brought into compliance by January 1, 2010. The Town may wish to establish an informational outreach program to educate property owners about this requirement in advance of this compliance deadline.

## **Conclusion**

In conjunction with the Town considering expanding COP onto the Gulf beaches, the Town may wish to consider amending its general regulations regarding the sales and service of alcoholic beverages to comprehensively improve this regulatory schema. Existing provisions are substantially similar to those of Lee County and have not undergone serious reconsideration since incorporation. The existing schema includes several ordinances and an entire division of Chapter 34 of the LDC. Once the requisite policy decisions have been made, the Consultant is committed to assisting the Town by drafting an amending ordinance including regulatory options for determination and adoption by Town Council following review and recommendations by the LPA. The Consultant is grateful for the opportunity to assist the Town in this matter.

RESOLUTION OF THE LOCAL PLANNING AGENCY OF THE  
TOWN OF FORT MYERS BEACH, FLORIDA  
RESOLUTION NUMBER 2009-24

WHEREAS, the existence of the Local Planning Agency (LPA) is mandated by Florida Statutes Section 163.3174; and

WHEREAS, the Local Planning Agency is statutorily responsible under Chapter 163, Florida Statutes, and the Town of Fort Myers Land Development Code (LDC) Section 34-120 for the review of proposed land development regulations, land development codes, or amendments thereto, and for making recommendations to the Town Council with regard thereto; and

WHEREAS, LDC Section 34-112 provides that the broad objectives of town planning and the Town's creation of the LPA are to further the welfare of the citizens of the town by helping to promote a better, more helpful, convenient, efficient, healthful, safe, and attractive community environment and to insure that the unique and natural characteristics of the island are preserved; and

WHEREAS, LDC Section 34-120 provides that the functions, powers, and duties of the LPA include preparing principles and policies for guiding land use and development in the town in order to preserve the unique and natural characteristics of the island, to overcome the islands present handicaps, and to prevent or minimize future problems; and aid town officials charged with the direction of projects or improvements embraced within the comprehensive plan and generally promote the realization of the comprehensive plan; and

WHEREAS, the Town Comprehensive Plan provides that Goal 4 is "to keep Fort Myers Beach a healthy and vibrant "small town," while capitalizing on the vitality and amenities available in a beach-resort environment and minimizing the damage that a hurricane could inflict"; and

WHEREAS, the Gulf beaches factor significantly throughout the comprehensive plan as an important natural resource, the preservation of which is of the highest importance, according to Comprehensive Plan Policy 4-A-5; and

WHEREAS, Comprehensive Plan Policy 4-A-6 provides that the beaches provide incomparable recreational and environmental benefits to the town; and

WHEREAS, the vast majority of the Gulf beaches are within the "Recreation" Future Land Use Map (FLUM) category of the comprehensive plan; and

WHEREAS, the Recreation Element of the Comprehensive Plan indicates: "The vision for the future of the Town of Fort Myers Beach is a result of the beautiful natural surroundings of beaches and dunes, wildlife habitat, historic and archaeological sites, boating opportunities, and places for people to come together for recreation, visiting, dining, and shopping within the park-like setting of the entire island. The Community Design Element describes how the town can ensure that the physical components of the community (natural areas, open spaces, buildings, streets, paths) can work together to achieve a coherent whole, reinforcing and enhancing its small-town character and as a place where permanent residents coexist comfortably with tourism. Policies emphasize

walkability, promote streets as the neighborhood realm, plan for interconnected foot paths throughout the island, and improve linkages to the town's natural resources and active recreation areas. These linkages and "people-gathering places" become part of the town's system of recreation, open space, and cultural amenities"; and

WHEREAS, Objective 4-B of the Comprehensive Plan is to "reduce the potential for further overbuilding through a new future land use map that protects remaining natural and historic resources, preserves the small-town character of Fort Myers Beach, and protects residential neighborhoods against commercial intrusions"; and

WHEREAS, the LPA finds that the expansion of on-premises consumption of alcoholic beverages onto the Gulf beaches **does not** protect remaining natural resources, and **does not** preserve the small-town character of the Town, and **does not** protect residential neighborhoods against commercial intrusions; and therefore would not accord with Comprehensive Plan Objectives 4-A, 4-B, 4-C, and the applicable policies following thereunder.

NOW THEREFORE BE IT RESOLVED that the LPA **recommends** that the Town Council of the Town of Fort Myers Beach:

**does restrict** further expansion of on-premises consumption of alcoholic beverages on the Gulf beaches within the Town of Fort Myers Beach.

The foregoing Resolution was adopted by the LPA upon a motion by LPA Member Kay and seconded by LPA Member Weimer and upon being put to a vote, the result was as follows:

Joanne Shamp, Chair	<u>aye</u>	Bill Van Duzer, Vice Chair	<u>aye</u>
Carleton Ryffel	<u>aye</u>	Rochelle Kay	<u>aye</u>
Dennis Weimer	<u>aye</u>	Alan Mandel	<u>nay</u>

DULY PASSED AND ADOPTED THIS 10<sup>th</sup> day of November, 2009.

LPA of the Town of Fort Myers Beach

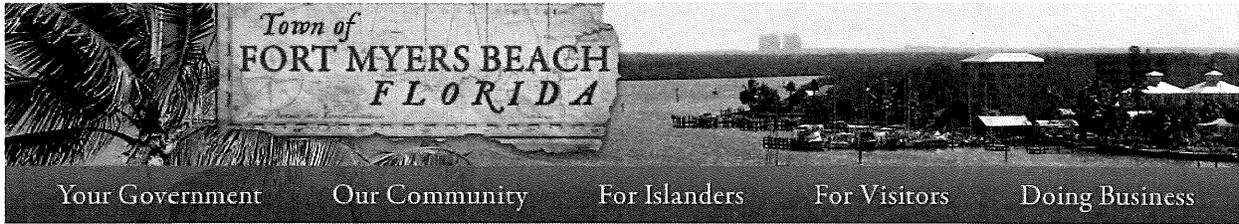
By: Joanne Shamp  
Joanne Shamp, LPA Chair

Approved as to legal sufficiency:

By: Anne Dalton  
Anne Dalton, Esquire  
LPA Attorney

ATTEST:

By: Michelle Mayher  
Michelle Mayher, Town Clerk



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**December 15, 2009**

FORT MYERS BEACH  
 LOCAL PLANNING AGENCY (LPA)  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
 December 15, 2009

- Contact Us
- Request for Action
- Bay Oaks
- How Do I...?
- Notify Me
- Weather & Tidal Info
- Emergency Prep

**AGENDA** [all time frames are informational and approximate]

- 9:00 AM
- I. Call to Order
  - II. Pledge of Allegiance
  - III. Invocation
  - IV. Welcome to New LPA Member Chuck Moorefield
  - V. Minutes 5 minutes
    - A. [Minutes of October 27, 2009](#)
    - B. [Minutes of November 10, 2009](#)
  - VI. Public Hearings
    - A. SEZ2009-0001 "Wicked Wings" COP 60 minutes  
[DRAFT RESOLUTION](#) [STAFF REPORT](#) [APPLICATION](#)
    - B. SEZ2009-0002 Taylor Recreation Commercial Recreation Facility 60 minutes  
[DRAFT RESOLUTION](#) [STAFF REPORT](#) [APPLICATION](#)
    - C. Ordinance 09-08 Amending LDC Section 34-113 (LPA Membership) 15 minutes  
[DRAFT RESOLUTION](#) [MEMO](#) [DRAFT ORDINANCE](#)
    - D. Ordinance 09-09 Amending LDC Section 6-11, 34-1744, and 34-1745 (Refuse container lids and screening) 15 minutes  
[DRAFT RESOLUTION](#) [DRAFT ORDINANCE](#)
  - VII. Administrative Agenda
    - A. LPA Resolutions of Appreciation(Shamp) 15 minutes  
[WEIMER APPRECIATION RESOLUTION](#)
    - B. Designation of LPA Representative to Town Council for CIP Purposes 10 minutes
  - NOON – LPA Holiday Luncheon
  - VIII. Adjourn as LPA and reconvene as Historic Preservation Board
  - IX. HPB Member Items or Reports
    - A. Reports from HAC meetings 15 minutes  
[HAC MINUTES 10/29/09](#) [HAC MINUTES 11/17/09](#)  
[DRAFT BUDGET PROPOSAL FOR HISTORIC PRESERVATION ACTIVITIES](#)
  - X. Adjourn as Historic Preservation Board and reconvene as LPA
  - XI. LPA Member Items and Reports 10 minutes
    - A. Former member Dennis Weimer's [e-mail](#) and [written report of statements](#) at the December 7 Town Council meeting
  - XII. LPA Attorney Items 5 minutes
  - XIII. Community Development Director Items 5 minutes
  - XIV. LPA [Action Item List Review](#) 10 minutes
    - Appointment of LPA representative for Animal Control Ordinance hearing
  - XV. Public Comment
- Adjourn no later than 4:00 P.M.
- Next Meeting: January 12, 2010, 9:00 AM

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**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Tuesday, December 15, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 9:08 AM by Chairperson Joanne Shamp. All members were present:

Joanne Shamp  
Rochelle Kay  
Alan Mandel  
Bill Van Duzer  
Carleton Ryffel  
Charles Moorefield

Staff present: LPA Attorney Anne Dalton; Community Development Director Dr. Frank Shockey.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION**-Ms. Kay

**IV. WELCOME-NEW LPA MEMBER**

Chair recognized the latest addition, Charles (Chuck) Moorefield, who gave brief background of himself.

**V. MINUTES**

A. Minutes of October 27, 2009

**Motion: Mr. Van Duzer moved to accept the minutes, as recorded;  
Seconded by Mr. Ryffel.**

**Vote: Motion passes 6-0**

B. Minutes of November 10, 2009

**Motion: Mr. Van Duzer moved to accept the minutes, as recorded;  
Seconded by Mr. Ryffel.**

**Vote: Motion passes 6-0**

**VI. PUBLIC HEARINGS**

A. SEZ2009-0001 “Wicked Wings” COP – Resolution 2009-29

Ms. Dalton swore in the witnesses. Ms. Shamp called for the Affidavit of

Advertisement and Dr. Shockey confirmed that he was holding an affidavit indicating that the ad for this hearing, and for all of the day's hearings, appeared in the News-Press on 12/3/09. Chair asked for disclosure of any ex-parte communications: Only Ms. Shamp had a site visit.

Mr. Walter Simmons, a physician, addressed the meeting and distributed photos of the property being developed as "Wicked Wings" restaurant (this was a result of the consensus of the members). He stated that his purpose today is to gain the opportunity to serve beer and wine at the restaurant.

Mr. Eric O'Gilvie, Mr. Simmons' partner, then addressed the meeting. He gave examples of the improvements to the property which benefit the community, like new fire hydrants, accessible parking, etc. He added that most of the seating is out on the deck, away from the beach, and they are also seeking a special exception for this so those seated customers can also consume beer and wine.

Mr. Moorefield asked about the applicant's parking provisions. Ms. Kay asked if the stairs lead to the patio from the beach. Mr. O'Gilvie stated that there still is direct access from the patio to the beach but assured that the restaurant would provide appropriate signs warning against taking alcoholic beverages to the beach.

Mr. Ryffel asked if the only reason the applicant was presenting this was due to a residence being within a certain amount of feet. Dr. Shockey answered and stated that the 500 ft. distance requirement is one issue. Mr. Ryffel also commented that the applicant did "a very nice job" with the property.

Ms. Shamp mentioned music and the hours of operation, and asked what the applicant's plans are for these things. The applicant replied that they intend to stay within the requirements of the town and be respectful of their neighbors; he added that the intention is not to be a music establishment but rather provide enjoyable background for guests. Mr. Simmons added that there may be a point in the future when they may serve breakfast, without alcohol, but that it would start earlier than the requested hours for alcoholic beverage service.

Ms. Shamp asked for comment from staff. Dr. Shockey gave a brief overview of the applicant's request and referred to the staff report, which also discusses the improvements that the applicant was required to make. He explained that parking requirements for the floor area of the restaurant are being met. Dr. Shockey reported on the issue of the existing deck which extends a few feet into the environmentally critical zoning district. He said if this was proposed to be newly built today, it could be allowed by special exception. There is an additional question of whether the COP can be expanded to the deck. He added that the deck was in existence prior to the establishment of the coastal setback line of 1978. He said the recommended conditions make it clear that if the deck is removed, it must be replaced in compliance rather than in the same position, even if the COP is allowed on the existing deck. Regarding the outdoor seating for outdoor consumption issue, staff is favorable towards the request. The earlier opening time for the restaurant could be allowed with a clear stipulation for a "dry" breakfast, if the LPA wished to recommend that. He added that condition #7 would require the posting of signs regarding prohibition

of alcoholic beverages on the beach and he referred to the staff report for the detailed staff recommendations. The report was entered as the staff's testimony.

Mr. Mandel asked if the music is in or outdoors and if there is amplification equipment, as well as how the hours of business relate to the noise ordinance. Dr. Shockey stated that the noise ordinance is based on the decibel level, and that the allowable level changes at a particular time of day, but the hours for a restaurant to operate need not be tied to these times. Staff's recommended condition clarifies that the noise ordinance applies.

Ms. Shamp asked if the applicant decided to serve breakfast at a different time than stated, would they need to return to the Council for a change. Dr. Shockey stated that this could be addressed at this point without having to do that, if the LPA wishes, but that the staff report and resolution currently recommend limiting the hours to the hours the applicant requested in the application.

Ms. Shamp asked for public comment. Mr. Steve Hankins, 1511 Estero Blvd., addressed the meeting. He said that he lives across the street from the applicant business and spoke in support of their efforts, saying that he feels they would do a good job with the restaurant.

Public comment closed. The applicant then thanked the LPA for considering the application and requested that the case be heard ASAP, before the approval of the minutes, to Council.

Dr. Shockey restated that the conditions recommended clearly provide that the use needs to operate as a restaurant as provided by the LDC, by definition, as an "institution that provides food service, including full course meals, and derives at least 51% of its income from the sale of food and non-alcoholic beverages." However, staff is not suggesting that they be limited to any specific type or series of state beverage license as long as they operate as a restaurant.

Testimony portion closed; Chair called for LPA comment. Mr. Ryffel referred to his desire to move approval of the staff recommendation. Mr. Mandel asked if the LPA could honor the applicant's request for hold the hearing ASAP, without waiting for minutes approval.

- Motion:** Mr. Ryffel moved to approve the recommendation and go forward with the Resolution as follows:
- 1<sup>st</sup> page: *"the LPA recommends Town Council approve the applicant's request for the special exception to permit consumption of beer and wine..."*
  - Pg. 2, bottom, *"Findings and Conclusions: 1- changed or changing conditions exist that make the requested approval appropriate;"*
  - 2- *the requested special exception is consistent with the ....Comp Plan;*
  - 3- *the requested special exception meets or exceeds all performance standards for proposed use;*
  - 4 - *the requested special exception will protect and preserve ...natural resources"*
  - 5 - *the requested special exception will be compatible with existing or planned uses and will not cause damage..."*

*6 - the requested special exception will be in compliance with the applicable general zoning...*

*7 - "the LPA directs that this matter go forward without its approved minutes"*

**Ms. Kay asked if adding the change for hours of operation should be included; Mr. Ryffel agreed about a revision to condition # 3 "Hours of Operation: Must begin no earlier than 7:00 AM and end no later than 11:00 PM daily, with alcohol service from 10:00 AM to 11:00 PM daily."**

**Seconded by Mr. Van Duzer;**

**Vote: Motion passed 6-0.**

Hearing closed.

**B. SEZ2009-0002 Taylor Recreation Facility-Resolution 2009-27**

Ms. Dalton swore in the witnesses and Dr. Shockey confirmed that the affidavit indicated that the public notice was published in the News-Press as in the previous hearing. Mr. Mandel and Ms. Shamp did have site visits but there was no other ex-parte communication.

Applicant, Joe Taylor, addressed the meeting and said that he is requesting a special exception for a water slide on a vacant lot on the beach side of Estero Blvd. He said that the slide is inflatable and lies flat when deflated. He reported that there have been no injuries or complaints about the slide and that it does not detract from the sunset views as it is deflated by that time of the day.

Ms. K'Shana Haynie, of Roetzel and Andress, counsel for the applicant, said that they do recommend a change in Condition #7 to ensure that the slide can continue to operate up until the time a new building is built. Mr. Ryffel commented that he agreed with the applicant's requested change.

Staff report: Dr. Shockey summarized that this is a request for a special exception in the downtown zoning district. Mr. Taylor has proper authorization from interested property owners and he said that this use would comply with setbacks and property lines. Dr. Shockey also agreed with the applicant's concerns involving Condition #7 and said the language could certainly be changed to address those concerns so that there need not be a period of dead time. He asked that the staff report be entered into the record as staff's testimony.

Mr. Mandel asked if there is any correspondence from residents to support that the applicant does in fact have the property owner's permission to do this. Dr. Shockey commented that the letters of authorization and other documents were included with the applicant's application, which was in the LPA's packet materials. Mr. Mandel voiced his concern that there is no specific end to the agreement for this exception and asked if the Town is named on any insurance policy of the applicant. Ms. Dalton stated that this would not be the norm to do this since the activity is on private property but the Town manager could be summoned to address the question.

Ms. Dalton swore in Mr. Green, Town Manager and he was asked if he feels that the Town should be named as an additional insured on the applicant's insurance policy. Mr. Green's opinion is that the liability would be with the owner of the property and the slide, leaving the Town with no fault in any lawsuits. Ms. Dalton agreed that

adding the Town to any policy would actually increase its vulnerability and set a precedent for other businesses to do the same, putting the Town in the line of liability. Mr. Ryffel pointed out that part of the property being discussed was once a parking lot for another business and asked Dr. Shockey if it had changed hands since the names on the application are different. Dr. Shockey pointed out that the names of the corporations owning parts of the subject property remained the same for several years, but the names of the directors and registered agents for the corporations had changed since the time referred to by Mr. Ryffel.

Public comment opened; no comment, public comment closed.

Applicant rebuttal: Ms. Haynie again addressed the LPA and commented regarding the insurance policy requirement. She agreed that this is a private property and that the Town should not be involved in any liability for approval of the slide. In addition, she agreed with Ms. Dalton about language to change Condition #7 regarding the change in ownership; this is just a zoning issue. She said if a future owner no longer desires that use, they do not have to use it that way and they do not have to return to Council to change to a use that is consistent with the zoning. Ms. Haynie also requested any move forward do so without the preapproval of minutes.

LPA questions: Mr. Mandel asked if the applicant actually has current owner permission and Ms. Haynie stated that she does have documentation to support that. No other questions from the LPA. Testimony closed. No discussion from members.

**Motion: Mr. Ryffel moved to approve the request in accord with the staff recommendation, except with item #7 revised as discussed. The LPA recommends that the Council approves applicant's request for special exception to allow the commercial recreation facility (water slide) on the property with the findings:**

- 1- Changed conditions do exist and make the requested approval appropriate;*
- 2- The request is consistent with the goals and policy of the Town...*
- 3- The requested special exception meets all standards set forth for the proposed use;*
- 4- The requested special exception will protect and preserve environmentally critical areas*
- 5- The requested special exception will be compatible with existing and planned uses... and will not caused damage or detriment to the neighborhood...*
- 6- The requested special exception will be in compliance with zoning...in Chapter 34.*

**Seconded by Ms. Kay.**

Mr. VanDuzer commented that these conditions do not change the hours of operation from what the applicant has requested; and there is a stipulation that, in the case of high winds, the slide must be deflated and secured. Ms. Shamp stated that these do become part of the resolution. With no further discussion of the motion, Ms. Shamp called for a vote on the motion.

**Vote: Motion passed 6-0.**

Hearing closed.

C. Ordinance 09-08 Amending LDC Sec. 34-113 (LPA Membership) Resolution #2009-26

Dr. Shockey confirmed that the public notice was published in the News-Press as in the previous hearings. Ms. Dalton read the ordinance into the record: *Ord. #09-08, an ordinance amending Chapter 34 of the FMB LDC, providing authority; amendments to section 34-113 and 34-114, Division 3, LPA, Article 2, Zoning Procedures, which are titled respectively "Composition Appointment and Compensation of Members" and "Members, Terms and Vacancies," providing for change in the terms of LPA members, severability, effect of ordinance and effective date.*

Ms. Dalton gave a brief overview of the ordinance. The new policy direction of the Town Council is basically that a member can belong to multiple committees, if desired, and this would implement that policy decision, if passed. The other advisory committee ordinances have already been changed to reflect this but, as Dr. Shockey pointed out, to change the LPA provisions it takes longer because it must go through LDC change process, which requires a hearing before the LPA.

Public comment was opened. There was no comment. Public comment was closed.

Ms. Kay asked if this would mean that LPA members would now be allowed to serve on other committees. Ms. Dalton agreed that it would and reiterated that the only conflict would be any personal or financial conflict having a personal gain for the member in any way.

**Motion: Mr. Van Duzer moved to adopt Resolution 2009-26 and send to Town Council.**

**Seconded by Mr. Mandel;**

**Vote: Motion passes 5-1, with Ms. Kay opposed.**

Hearing closed.

D. Ordinance 09-09 Amending LDC Sec. 6-11 34-1744 and 34-1745 Refuse Containers Resolution #2009-28

Dr. Shockey confirmed that the public notice was published in the News-Press as in the previous hearings. Ms. Dalton read the ordinance into the record: *Ordinance #09-09, an ordinance amending regulations in Chapter 6 and 34 of the FMB LDC, providing authority, adopting amendments to Article 1 Property Maintenance Code of Chapter 6 entitled "Maintenance Codes, Building Codes and Coastal Regulations;" adopting amendments to Division 17 entitled "Fences, Walls and Entrance Gates" of Article 4, entitled "Supplemental Regulations of Chapter 34-Zoning Districts, Design Standards and Non-Conformities; providing for severability and providing for an effective date.*

Brief overview of the ordinance was given by Dr. Shockey. An ad hoc committee had looked into the general handling/placement of refuse containers and found problems remain with the specific types of container (needing lids) and the fencing to enclose the trash areas so that they are not visible from the street or neighboring properties. The LDC changes would address the requirement for lids and changing the height

requirements for fencing only as it applies to containing/hiding receptacle locations in the town.

Lee Melsek addressed the meeting on behalf of the ad hoc committee. He spoke in support of changing these regulations. He wants to see the trash problems addressed and commented that these changes should help. Mr. Van Duzer noted that agreed whole-heartedly in this case even though he did not always agree with Mr. Melsek's other views. There was discussion about the compliance and enforcement issues as well as how this applies to commercial and private residences.

Mr. Ryffel said that although he is in support of what is trying to be done, he had some questions. He asked about dumpsters needing to be enclosed. Dr. Shockey referred to the current ordinance and how it requires dumpsters to be "screened from view" of adjoining properties and streets. Mr. Ryffel read the proposed amendment and there was confusion about the effect of the change regarding limits to fence heights. Ms. Dalton commented that Mr. Ryffel's confusion is justified and suggested that the language been reworked to be clearer. Mr. Ryffel agrees that the dumpsters need to be enclosed but thought that the proposed amendments, as currently worded, might leave it unclear that the fence or other screening needs to be tall enough to hide the dumpsters. More discussion ensued and there was consensus that the proposed language should be redrafted and presented again, to allow the taller fences while still requiring that the dumpster be screened fully.

**Motion: Mr. Van Duzer moved to continue this hearing to the February 9, 2010 meeting. Seconded by Mr. Mandel.** There was a brief discussion about the nature of the changes to be made to the language for the LPA's future consideration, and Ms. Shamp called for a vote on the motion.

**Vote: Motion passes 6-0.**

Short recess at 11:00 AM.

Reconvene at 11:11 AM

## **VII. ADMINISTRATIVE AGENDA**

- A. LPA Resolutions of Appreciation Resolution 2009-25  
Appreciation of Dennis Weimer, past chair.

**Motion: Mr. Ryffel moved to approve the resolution.**

**Seconded by Ms. Kay;**

**Vote: Motion passes 6-0.**

Appreciation of Mr. Jack Green, acting Town Manager.

**Motion: Mr. Ryffel moved to approve the resolution.**

**Seconded by Ms. Kay;**

Ms. Kay agrees wholeheartedly with the sentiments of the resolution but is sorry to

see Mr. Green leave. Mr. Van Duzer shares this feeling and said that Mr. Green is leaving for the most noble of reasons, which is his family. (Mr. Green was summoned to join the meeting.) Both Ms. Kay and Mr. Van Duzer extended their deepest appreciation for his service to the town. Mr. Ryffel joined in the praise for Mr. Green's service and commended him on his accessibility, which is unlike any other manager he can recall. Ms. Shamp agreed and commented on his attitude, accessibility and honesty, to name a few. Mr. Green thanked the members and agreed that his time with the town was memorable and he will also miss the people.

**Vote: Motion passes 6-0.**

**B. Designation of an LPA Representative to Town Council for CIP Purposes**

Mr. Mandel had been appointed with Ms. Shamp as the alternate. Mr. Mandel commented that there was a councilperson who had serious concerns about this since Mr. Mandel is running for office, among with his other reasons. Discussion ensued regarding the reasons for such a representative and the Town Council's concerns. There was a consensus that the LPA would like Town Council to make their request with some clarification as to what the purpose and scope of responsibilities of the representative should be. Ms. Dalton stated that the LPA could use a few methods to make their request to the Council and it was decided that one of the members will send a memo requesting further clarification of the Town Council's desire to have an LPA member present at M&P meetings, that Council can see the LPA minutes and that further discussion of the topic can be done at a joint LPA-Town Council meeting. Ms. Shamp will write the memo.

**VIII. ADJOURN- LPA, RECONVENE AS HPB**

**Motion: Mr. Van Duzer moved to adjourn as the LPA and reconvene as the HPB.**

**Seconded by Mr. Ryffel;**

**Vote: Motion passes 6-0.**

Ms. Kay called the HPB meeting to order at 11:40AM.

Motion: Mr. Mandel moved to accept the October 20, 2009 minutes.

Seconded by Ms. Shamp;

Vote: Motion passes 6-0

**IX. HPB MEMBER ITEMS OR REPORTS**

**A. Discussion of the 2010 budget proposal**

Ms. Shamp reported that this item is not ready at this point, as it was put together only for discussion. Ms. Dalton offered that she will bring this back with the resolution at the next meeting. The relationship between the Historic Advisory Committee and the LPA/HPB was explained to Mr. Moorefield as he was not familiar with this committee. Background discussion ensued.

**Motion: Ms. Shamp moved to adjourn the HPB and reconvene as the LPA.**

**Seconded by Mr. Van Duzer;**

**Vote: Motion passes 6-0.**

**X. ADJOURN AS HPB- RECONVENE AS LPA**

Ms. Shamp reconvened the LPA at 11:50 AM, all members still present.

**XI. LPA MEMBER ITEMS AND REPORTS**

**A. Former member Dennis Weimer's email and written report of statements at the December 7, Town Council meeting**

Mr. Weimer sent a message to Dr. Shockey that since he is no longer a member, the LPA needs to assign a new representative to attend the Pink Shell hearings, which have continued past the point in time up to which Mr. Weimer was able to continue. This issue will be addressed under the LPA action list.

Mr. Ryffel suggested that future meetings should not be scheduled to go until 4:00PM as stated on the agendas, since the meetings start earlier now. Ms. Kay believes that the time should remain since meetings were cut from 2 to 1 per month. Discussion took place and there was a consensus to have the agenda reflect no specific time since the reduction to one meeting a month did away with another time conflict related to the 4:00 PM ending time.

Mr. Ryffel asked to be excused from the rest of the meeting.

Ms. Kay asked about the status of the funds that had been reserved for the beach renourishment project, due to the recent decisions made by the County. Mr. Ryffel commented that it is too soon to tell what will happen with this.

Mr. Mandel reminded that there needs to be a new representative for the animal control issue since he cannot participate.

Ms. Shamp thanked Ms. Kay for the Christmas ornament on the tree.

**XII. LPA ATTORNEY ITEMS**

Nothing to report except thanking the chair for an efficient meeting. She welcomed Mr. Moorefield and wished all a happy holiday.

**XIII. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Nothing to report.

**XIV. LPA ACTION ITEMS**

**Resolutions to Town Council:**

- Animal Control-long term – Ms. Shamp: January 4, 2010
- Gulfview/ Vacation, second hearing on Vacation ordinance-December 21, 2009 at 4:00 PM Ms. Kay/Van Duzer alternate. Gulfview to be scheduled thereafter.
- Pink Shell- expected to be continued to Jan. 19 at 4:00 PM-Ms. Shamp
- Alcoholic beverages-COP expansion on the beach-TBD Ms. Kay
- Weimer resolution-Dec. 21, 2009 4:00PM-Ms. Shamp
- Green resolution Dec. 21 at 4:00 PM- Ms. Shamp
- Water slide-TBD Ryffel
- Wicked Wings-TBD Ryffel

**Continued LPA hearings:**

- Shipwreck - Jan. 12, 2010
- Refuse Containers – February 9, 2010

**Future Work Activities:**

- Present ROW resolution to Council-2/9/2010
- Storm Water-pending; Dr. Shockey/Kay/Van Duzer-TBD
- Seasonal Parking-TBD- final review
- HPB budget-Jan. 12, 2010
- HPB Vistas – Budget Proposal - Ms. Shamp; 1/12/10

**XV. PUBLIC COMMENT**

None.

**XVI. ADJOURNMENT**

**Motion: Mr. Mandel moved to adjourn.**

**Seconded by Mr. Van Duzer;**

**Vote: Motion passes 6-0.**

Adjourned at 12:13 PM.

**Next meeting January 12, 2010 at 9:00 AM**

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Joanne Shamp, LPA Chair

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

**TYPE OF CASE:** Special Exception

**CASE NUMBER:** FMBSEZ2009-0001 (Wicked Wings)

**LPA HEARING DATE:** December 15, 2009

**I. APPLICATION SUMMARY:**

Applicant: Atwatter LLC (Walter Simmons, President)

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. Applicant indicates the intent to apply for a 2COP State license for the sale of beer and wine for on-premises consumption.

Subject property:

LOT 11, BLOCK "D", CRESCENT BEACH SUBDIVISION,  
AS RECORDED IN PLAT BOOK 4, PAGE 45, PUBLIC  
RECORDS OF LEE COUNTY, FLORIDA.

Physical Address: 61 Avenue C., Fort Myers Beach, FL 33931

STRAP #: 19-46-24-W4-0070D-0110

Future Land Use designation: Pedestrian Commercial and Recreation

Zoning: DOWNTOWN and EC (Environmentally Critical)

Current use(s): Restaurant with outdoor seating on raised porch; a licensed personal watercraft and parasailing vendor operates on the littoral beach property seaward of the upland building, within the EC zoning district.

Adjacent zoning and land uses:

Adjacent properties are designated as Pedestrian Commercial Future Land Use Map (FLUM) category, except beach, which is Recreation FLUM.

North: 15-foot alley, then a single-family dwelling, then a vacant lot used as a seasonal parking lot, all zoned DOWNTOWN.

South: Undeveloped beach, zoned EC (Environmentally Critical).

East: Avenue C, then a mix of single-family, two-family and small multifamily residential buildings and a Retail store, small, with automobile fuel pumps, all zoned DOWNTOWN.

West: One single-family dwelling, then Lani Kai Island Resort, both zoned DOWNTOWN.

## **II. BACKGROUND AND ANALYSIS**

### **Introduction and Background:**

Walter Simmons ("Applicant"), President of Atwatter LLC (owner of the subject property), has requested a special exception 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. The applicant has indicated the intent to apply for a 2COP beverage license, which would allow the sale of beer and wine for consumption on the premises. The existing building on the subject property has been remodeled to serve as a kitchen and restroom area with a small lunch counter, and a raised outdoor porch has been built adjacent to the building for some additional seating. Pursuant to an approved development order and building permits, the use has lawfully been changed to a restaurant. The applicant has also provided other upgrades to the property and to nearby facilities, including construction of an accessible parking space and installation of a new fire hydrant near the intersection of Avenue C and Estero Boulevard. To allow consumption on premises of alcoholic beverages, however, a special exception is required under Land Development Code (LDC) Section 34-1264(a)(2)a.2. because the proposed outdoor seating area is less than 500 feet from a dwelling unit under separate ownership.

### **Analysis:**

The subject property is zoned DOWNTOWN and is in the Pedestrian Commercial Future Land Use Map (FLUM) category, except that a portion of the existing deck seaward of the building extends into the EC (Environmentally Critical) zoning district. Underlying and coterminous with the EC zoning district is the Recreation FLUM category. The applicant uses the property for a restaurant with a small

outdoor seating area on a raised porch, consisting of the existing deck in the EC zoning district and a newly constructed deck in the DOWNTOWN zoning district. A development order, LDO2007-00401, and building permit, COM09-0019, were issued for construction and site improvements. Construction is complete, the building permit has received a certificate of compliance, and the restaurant use has received a use permit, but use of the outdoor seating area for consumption of alcoholic beverages on the premises requires special exception approval.

The subject property is generally located between Avenue C and the Lani Kai resort, directly along the beach in the vicinity of several small residential buildings. The restaurant, with its outdoor seating area proposed to be used for consumption of alcoholic beverages, is adjacent to the beach. Access to the property from Estero Boulevard is available by platted rights-of-way, known as "Avenue C" and "I Street", that were dedicated to the public by the plat of Crescent Beach Subdivision, as recorded in Plat Book 4, Page 45, Public Records of Lee County, Florida.

The Comprehensive Plan encourages pedestrian-oriented development in the downtown area, generally conceived as the area within the Pedestrian Commercial FLUM category. However, many of the pedestrians along the beachfront are families with children and the service of alcoholic beverages in an unenclosed area a few feet from the beach, in and near the EC zoning district, may not be conducive to a family outdoor recreational atmosphere. Considering the proper balance between encouraging pedestrian orientation of the downtown area and limiting the intrusiveness of commercial activities into existing neighborhoods is squarely within the purview of the LPA and Town Council in the special exception process.

The restaurant's outdoor seating area is located on a porch, in accordance with LDC Section 34-678(e)(4):

**A restaurant wishing to provide outdoor seating between the restaurant and a street must obtain a permit for this use (see subsection (e)(5)) in addition to meeting all other requirements of this code. The seating must be located on a porch or patio as defined in this subsection. The sale of alcoholic beverages is regulated by state liquor laws and by § 34-1246 of this code.**

The term "porch" is defined in LDC Section 34-678(e)(1)a. as

**a wooden or concrete structure that is elevated off of the ground and has a railing at least 42 inches tall. A porch must be covered with an awning, roof, or umbrellas. Wood must be painted or stained. Businesses with existing porches are encouraged to utilize them for outdoor display. New or expanded porches must comply with all chapters of this code.**

The request for outdoor seating for patrons consuming alcoholic beverages on the premises implicates two general issues: (1) the use of the existing deck in the EC zoning district; and (2) the appropriateness of the outdoor seating area for alcoholic beverage consumption in this location generally.

#### Existing deck in the EC zoning district

The existing structure on the subject property includes a wooden deck (defined as a "porch" under LDC Section 34-678(e)(1)a., as discussed above) that is seaward of the building. This existing deck extends seaward of the Coastal Construction Setback Line ("1978 Line"), into the EC (Environmentally Critical) zoning district and the underlying Recreation FLUM category. The existing building was originally built in 1937 according to the records of the Lee County Property Appraiser. The deck appears on the archived Property Appraiser's field card dating to the late 1970s and on the FDOT aerial photograph dating to 1975, and therefore was built at least prior to the establishment of the 1978 Line.

The applicant has not requested a special exception to expand or replace the deck structure in the EC zoning district. The deck structure remains nonconforming with regard to its location.

As LDC Section 34-678(e)(1)a. states, "businesses with existing porches are encouraged to utilize them for outdoor display." This business has an existing porch, which existed prior to the establishment of the 1978 Line, and that extends into the Town's EC zoning district and is therefore nonconforming because LDC Section 6-366 requires a special exception to allow minor structures (including decks) in the EC zoning district. 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 porch can be expanded to include alcoholic beverage service in the EC zoning district. 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.

If removed, the existing porch 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 to allow use of the existing porch as a part of the restaurant's outdoor consumption of alcoholic beverages.

Alternatively, LPA could choose to recommend and Town Council could find that the commencement of alcoholic beverage consumption outdoors on the existing

deck in the EC district is contrary to the standards of LDC Section 34-88, because it would not protect, conserve, or preserve environmentally critical areas or because it would be incompatible with existing or planned uses in the EC zoning district and the Recreation FLUM. One basis for such a finding might be that the porch, being in the EC district, is so close to the public beach that its use for outdoor consumption of alcoholic beverages would be inappropriate given the recreational nature of the beach. In this case the Council could still choose to approve the requested special exception with the modification that the use is only permitted within the enclosed building and on the new porch, landward of the 1978 Line.

#### 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, to advance the goal of encouraging pedestrian activity. Although the porches on the subject property are between the building and Avenue C, they are also located near the beach, and part of one porch is in the EC zoning district.

Other commercial uses in the vicinity include the Lani Kai hotel and its accessory restaurant and retail activities, a retail store with gasoline fuel pumps, and other restaurant and retail uses, some of which have outdoor seating areas with (or without) consumption of alcoholic beverages. Interspersed among these uses are a variety of older residential buildings, some containing more than one dwelling unit.

On the beachfront adjacent to the subject property and adjacent to the nearby Lani Kai property, personal watercraft vending and parasailing activity licensees operate. These uses attract pedestrians to the area and contribute to the relatively commercial atmosphere of this part of the beach. Although residential buildings are located in the immediate vicinity, the area of the subject property has been zoned to allow commercial uses for many years, and contains a mix of commercial, lodging, and residential uses.

The applicant indicates its intent to operate between the hours of 10:00 AM and 11:00 PM daily. This is within the external limit prohibiting service between 2:00 AM and 7:00 AM daily that applies throughout the Town. The outdoor deck area has a seating capacity of 30 people and the indoor lunch counter has a seating capacity of 15 people as configured on the applicant's site plan. The applicant has stated its intent to acquire a 2COP state license, which would allow the service of beer and wine. A restaurant's outdoor seating area approved for 2COP at 1661 Estero Boulevard in 2002 was limited to operation between 11 AM and 9:30 PM daily (Resolution 02-43). A restaurant's outdoor seating area approved for 2COP at 1600 Estero Boulevard in 2002 was limited to operation between 11 AM and midnight, Monday through Thursday, 11 AM and 1 AM,

Friday and Saturday, and Noon and 10 PM on Sunday (Resolution 02-44). Other locations in the vicinity, such as the Lani Kai, have licenses that predate the requirement to obtain local approval and therefore are limited by the general prohibition on service between 2:00 AM and 7:00 AM daily.

In the past, the LPA has recommended and Town Council has approved limitations on the number of seats and the type and/or series of license subject to the approval 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. Changes to the types of seats used in the seating area or amendments to the building code could allow a different seating capacity within the same floor area in the future. 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, or to serve beer, wine, and liquor. Under current state law, because of its small floor area the establishment would be unable to qualify for the special restaurant ("SRX") exception to the quota limitations on licenses that allow sales of beer, wine, and liquor, but could purchase an existing quota license (which would be much more costly than acquiring a 2COP license for beer and wine). 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."

Outdoor seating for consumption of alcoholic beverages at this location could encourage the pedestrian-friendliness of the beach in this area. On the other hand, it could increase the intensity of activity and become a source of irritation to the neighborhood. It is the LPA's role to recommend, and the Town Council's role to decide, whether the potential benefits outweigh the potential for detriments, or vice versa, in accordance with the associated considerations and findings.

### **III. 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 licensed area of the subject establishment must be confined entirely to the building areas shown on the floor plan attached hereto and incorporated herein by reference as **Exhibit B**, including the interior of the building, and the two areas of the raised porch labeled “new deck” and “exist. deck.” The licensed area, and the area approved for consumption on premises, does not include any area beneath the raised porch or building, or any portion of the grounds, parking area, or beach and the use of these areas for consumption on premises and food service is prohibited.
2. Music and other audible entertainment must only take place during hours beginning at 10:00 AM and ending at 11:00 PM of each day and must comply at all times with applicable ordinances.
3. The hours of operation must not begin earlier than 10:00 AM and must end no later than 11:00 PM daily.
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 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. Approval of this special exception does not create a vested right to reconstruct the structure labeled “exist. deck” on **Exhibit B** that is located within the EC (Environmentally Critical) zoning district. The existing structure that is within the EC zoning district is 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.
7. At each egress point from the porch, instructional signs visible to restaurant patrons leaving the licensed area must be placed and maintained containing the legible statement “No Alcoholic Beverages Beyond This Point”.

#### Recommended Findings and Conclusions

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

Comprehensive Plan (Comp Plan) **Policy 3-D-1** envisions “revitalizing downtown as a lively, inviting, comfortable, and safe public environment.” This

neighborhood between the Lani Kai resort (1400 Estero Boulevard) and the Estero Island Beach Club condominium (1836 Estero Boulevard) contains a mix of older cottages, mostly used for rentals, and commercial activities such as a retail store with fuel pumps, a seasonal parking lot, a restaurant, a coffee shop, and a few small retail stores. Applicant acquired a development order and building permits to remodel the existing building for reuse as a small restaurant with an outdoor seating area on a raised porch. Staff recommends the finding that the applicant's successful change of use of the property from a dwelling unit to a restaurant is a changed condition and approval of the request, as conditioned, is 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, near Estero Boulevard and the Lani Kai resort. 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 areas northward from the Diamondhead and Lani Kai to Lynn Hall Park are heavily traveled by pedestrian beachgoers. The proposed restaurant will be oriented toward this foot traffic while providing a controlled area of alcoholic beverage consumption in conjunction with dining on a raised porch that is sequestered from the beach itself by railings and by its elevation above the adjacent grade. The elevation of the porch, the railings, and the recommended signage should help to remove the use of the restaurant from the activity of the public on the public 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, site development, and remodeling to the building, have already been addressed through the development order process and the requested use meets the applicable parking requirements under LDC Chapter 34, Article IV, Division 19. Whether or not the use of an existing nonconforming structure in the EC zoning district for on premises consumption is appropriate, is a question best answered on a case-by-case basis by Town Council through the special exception process. Adequate provision has been made for solid waste removal from the site using movable containers. 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.*

The existing structure on the subject property was developed many decades ago. Through the development order and building permit processes existing nonconformities have been removed or mitigated except for the remaining deck that extends into the EC zoning district. Artificial lighting has been required to be brought into compliance with sea turtle protection requirements. Construction of additional structures in environmentally critical areas has not been permitted and appropriate vegetation has been added to the site through the development order process. As conditioned, the existing deck in the EC zoning district cannot be replaced without proper prior approval from the Town Council through the special exception process. In conjunction with the completed site improvements and as conditioned, 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 dwelling units, the Lani Kai resort, a seasonal parking lot, a convenience food and beverage store with fuel pumps, a restaurant, and some small retail stores. Within the Pedestrian Commercial Future Land Use Map category, adjacent dwelling units and vacant 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 beach adjacent to the subject property supports personal watercraft and parasailing activities licensed under LDC Chapter 27, and is heavily traveled by the public. The recommended conditions clearly restrict the use to the existing deck and prohibit its expansion to the grounds of the site or the adjacent beach. 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 restaurant use complies with parking, lighting, and other similar requirements set forth in LDC Chapter 34. 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 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.

#### **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). This use of outdoor areas for dining is envisioned as an improvement to the pedestrian-orientation of the area, which will invite visitors to leave automobiles behind and walk from place to place.

Few such restaurants are located directly along the beachfront, however, and none of those located directly adjacent to the beach received zoning approval for on-premises consumption of alcoholic beverages recently. Nearby outdoor seating areas are located at the Lani Kai and at the Hooters Restaurant. Whether new outdoor seating areas for consumption of alcoholic beverages are appropriate so near the beach, and whether this particular outdoor seating area is appropriate in this particular location are questions of fact to be determined by the Town Council. 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); 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 they find such conditions are reasonably related to the requested special exception. Staff has recommended such conditions for the Town Council's convenience.

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

#### **Exhibits:**

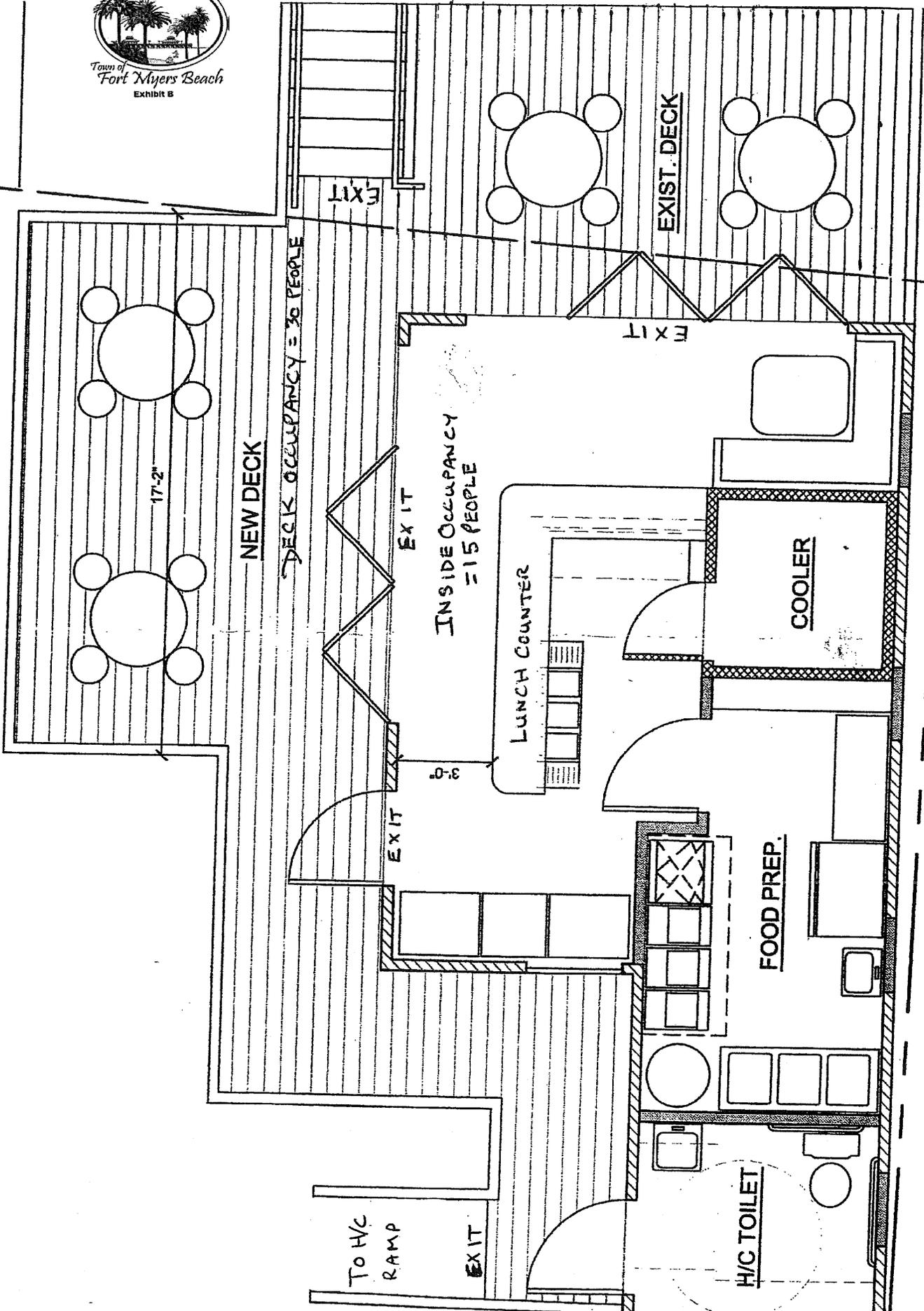
Exhibit A – Legal Description of Subject Property

Exhibit B – Floor plan

**Exhibit A**  
**SEZ2009-0001**

Lot 11, Block D, CRESCENT BEACH SUBDIVISION, as recorded in Plat Book 4,  
Page 45, Public Records of Lee County, Florida.

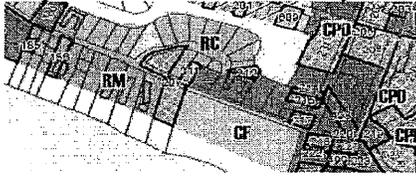
ATTACHMENT 3



Case # SE 22009-0001  
 Planner E. Shockey

Date Received 3/3/09  
 Date of Sufficiency/Completeness \_\_\_\_\_

**Town of Fort Myers Beach**  
 Department of Community Development



Zoning Division

**TOWN OF FORT MYERS BEACH**

MAR - 3 2009

RECEIVED BY **Town of Fort Myers Beach**

FMB 000 2009 0 0 0 1

**Application for Public Hearing**

This is the first part of a two-part application. This part requests general information required by the Town of Fort Myers Beach for any request for a public hearing. The second part will address additional information for the specific type of action requested.

Project Name:	<u>WICKED WINGS</u>
Authorized Applicant:	<u>WALTER SIMMONS / ATWATER, LLC</u>
LeePA STRAP Number(s):	<u>19-46-2464-0070D-0110</u>

Current Property Status:	
Current Zoning:	<u>DOWN TOWN</u>
Future Land Use Map (FLUM) Category:	<u>PEDESTRIAN COMMERCIAL</u>
Platted Overlay? <u>yes</u> <u>no</u>	FLUM Density Range: <u>6 UNITS/ACRE</u>

Action Requested	Additional Form Required
<input checked="" type="checkbox"/> Special Exception	Form PH-A
<input type="checkbox"/> Variance	Form PH-B
<input type="checkbox"/> Conventional Rezoning	Form PH-C
<input type="checkbox"/> Planned Development	Form PH-D
<input type="checkbox"/> Master Concept Plan Extension	Form PH-E
<input type="checkbox"/> Appeal of Administrative Action	Form PH-F
<input type="checkbox"/> Development of Regional Impact	Schedule Appointment
<input type="checkbox"/> Other (cite LDC section number: _____)	Attach Explanation

**Town of Fort Myers Beach**  
**Department of Community Development**  
 2523 Estero Boulevard  
 Fort Myers Beach, FL 33931  
 (239) 765-0202

Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

### PART I - General Information

#### A. Applicant:

Name(s):	WALTER SIMMONS / ATWATER, LLC.		
Address:	9659 Street: PINEAPPLE PRESERVE CT.		
	City: FORT MYERS	State: FL	Zip Code: 33908
Phone:	(614) 571-8243		
Fax:	(239) 437 8243		
E-mail address:	WALTER SIMMONS@HOTMAIL.COM		

#### B. Relationship of applicant to property (check appropriate response)

<input checked="" type="checkbox"/> Owner (indicate form of ownership below)	
<input type="checkbox"/> Individual (or husband/wife)	<input type="checkbox"/> Partnership
<input type="checkbox"/> Land Trust	<input type="checkbox"/> Association
<input checked="" type="checkbox"/> Corporation	<input type="checkbox"/> Condominium
<input type="checkbox"/> Subdivision	<input type="checkbox"/> Timeshare Condo
<input type="checkbox"/> Authorized representative (attach authorization(s) as Exhibit AA-1)	
<input type="checkbox"/> Contract Purchaser/vendee (attach authorization(s) as Exhibit AA-2)	
<input type="checkbox"/> Town of Fort Myers Beach (Date of Authorization: _____)	

#### C. Agent authorized to receive all correspondence:

Name:	WALTER SIMMONS		
Mailing address:	9659 Street: PINEAPPLE PRESERVE CT.		
	City: FT MYERS	State: FL	Zip Code: 33908
Contact Person:	WALTER SIMMONS		
Phone:	(614) 571-8243	Fax:	(239) 437-8243
E-mail address:	WALTER SIMMONS@HOTMAIL.COM		

#### D. Other agents:

Name(s):	ERIC O'GILVIE		
Mailing address:	9649 Street: PINEAPPLE PRESERVE CT.		
	City: FT MYERS	State: FL	Zip Code: 33908
Phone:	(239) 470-7079	Fax:	(239) 415-9347
E-mail address:	LABO1998@YAHOO.COM		

Use additional sheets if necessary, and attach to this page.

Case # \_\_\_\_\_  
 Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
 Date of Sufficiency/Completeness \_\_\_\_\_

**PART II – Nature of Request**

**Requested Action (check applicable actions):**

<input checked="" type="checkbox"/> Special Exception for: <b>Outdoor COP with food</b>
<input type="checkbox"/> Variance for:
<input type="checkbox"/> Conventional Rezoning from _____ to:
<input type="checkbox"/> Planned Development
<input type="checkbox"/> Rezoning (or amendment) from _____ to:
<input type="checkbox"/> Extension/reinstatement of Master Concept Plan
<input type="checkbox"/> Public Hearing of DRI
<input type="checkbox"/> No rezoning required
<input type="checkbox"/> Rezoning from _____ to:
<input type="checkbox"/> Appeal of Administrative Action
<input type="checkbox"/> Other (explain):

**PART III – Waivers**

**Waivers from application submittal requirements:** Indicate any specific submittal items that have been waived by the Director for the request. Attach copies of the Director’s approval(s) as Exhibit 3-1.

Code Section Number	Describe Item

**PART IV – Property Ownership**

<input type="checkbox"/> <b>Single owner</b> (individual or husband and wife)
Name:
Address: Street:
City: State: Zip Code:
Phone: Fax:
E-mail Address:

Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

<input checked="" type="checkbox"/> Multiple owners (including corporation, partnership, trust, association, condominium, timeshare condominium, or subdivision)
Attach Disclosure Form as Exhibit 4-1
Attach list of property owners as Exhibit 4-2
Attach map showing property owners' interests as Exhibit 4-3 if multiple parcels are involved
For condominiums, timeshare condominiums, and subdivisions, see instructions.

### PART V – Property Information

#### A. Legal Description of Subject Property

Is the property entirely made up of one or more undivided platted lots officially recorded in the Plat Books of the Public Records of Lee County?
<input checked="" type="checkbox"/> Yes     [ ] No
If yes:
Subdivision name:     CRESCENT BEACH
Plat Book Number: 4    Page: 45    Unit: /    Block: D    Lot: 11
If no:
Attach a legible copy of the metes and bounds legal description, with accurate bearings and distances for every line, as Exhibit 5-1. The initial point in the description must be related to at least one established identifiable real property corner. Bearings must be referenced to a well-established and monumented line.

#### B. Boundary Survey

Attach a Boundary Survey of the property meeting the minimum standards of Chapter 61G17-6 of the Florida Administrative Code, as Exhibit 5-2. A Boundary Survey must bear the raised seal and original signature of a Professional Surveyor and Mapper licensed to practice Surveying and Mapping by the State of Florida.
--

#### C. STRAP Number(s):

19-46-2464-00700.0110
-----------------------

#### D Property Dimensions:

Area: 50' X 186.52'     square feet     acres
Width along roadway: 50     feet     Depth: 186.52     feet

#### E. Property Street Address:

61 AVENUE C, FORT MYERS BEACH FL 33931
--

Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

**F. General Location of Property (from Sky Bridge or Big Carlos Pass Bridge):**

FROM SKY BRIDGE HEAD SOUTH-EAST ON ESTERO BLVD UNTIL BEACH ACCESS #34 (AVE. C)
Attach Area Location Map as Exhibit 5-3

**G. Property Restrictions (check applicable):**

<input checked="" type="checkbox"/> There are no deed restrictions or covenants on this property that affect this request.
<input type="checkbox"/> Restrictions and/or covenants are attached as Exhibit 5-4
<input type="checkbox"/> A narrative statement explaining how the deed restrictions and/or covenants may affect the request is attached as Exhibit 5-5.

**H. Surrounding property owners:**

Attach list of surrounding property owners (within 500 feet) as Exhibit 5-6
Attach two sets of mailing labels as Exhibit 5-7
Attach a map showing the surrounding property owners as Exhibit 5-8

**I. Future Land Use Category: (see Comprehensive Plan Future Land Use Map)**

<input type="checkbox"/> Low Density	<input type="checkbox"/> Marina
<input type="checkbox"/> Mixed Residential	<input type="checkbox"/> Recreation
<input type="checkbox"/> Boulevard	<input type="checkbox"/> Wetlands
<input checked="" type="checkbox"/> Pedestrian Commercial	<input type="checkbox"/> Tidal Water
<b>Is the property located within the "Platted Overlay" area on the Future Land Use Map?</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

**J. Zoning: (see official zoning map, as updated by subsequent actions)**

<input type="checkbox"/> RS (Residential Single-family)	<input type="checkbox"/> CM (Commercial Marina)
<input type="checkbox"/> RC (Residential Conservation)	<input type="checkbox"/> CO (Commercial Office)
<input type="checkbox"/> RM (Residential Multifamily)	<input type="checkbox"/> CB (Commercial Boulevard)
<input type="checkbox"/> VILLAGE	<input type="checkbox"/> SANTINI
<input type="checkbox"/> SANTOS	<input checked="" type="checkbox"/> DOWNTOWN
<input type="checkbox"/> IN (Institutional)	<input type="checkbox"/> RPD (Residential Planned Dev.)
<input type="checkbox"/> CF (Community Facilities)	<input type="checkbox"/> CPD (Commercial Planned Dev.)
<input type="checkbox"/> CR (Commercial Resort)	<input type="checkbox"/> EC (Environmentally Critical)
<input type="checkbox"/> BB (Bay Beach)	

**PART VI - Affidavit**

**Application Signed by a Corporation, Limited Liability Company (LLC),  
Limited Company (LC), Partnership, Limited Partnership, or Trustee**  
See attached explanatory notes for instructions

I, Walter Simon, as President  
of ATWATER, LLC, swear or affirm under oath, that I am  
the owner or the authorized representative of the owner(s) of the property and  
that:

1. I have full authority to secure the approval(s) requested and to impose covenants and restrictions on the referenced property as a result of any action approved by the Town in accordance with this application and the Land Development Code;
2. All answers to the questions in this application and any sketches, data, or other supplemental matter attached hereto and made a part of this application are honest and true;
3. I hereby authorize Town staff or their designee(s) to enter upon the property during normal working hours (including Saturdays and Sundays) for purposes reasonably related to the subject matter of this application; and
4. The property will not be transferred, conveyed, sold, or subdivided unencumbered by the conditions and restrictions imposed by the approved action

Atwater, LLC  
Name of Entity (corporation, LLC, partnership, etc)  
President  
Title of Signatory

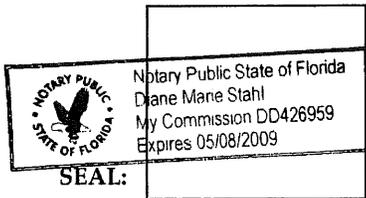
[Signature]  
Signature  
Walter Simon  
Typed or Printed Name

State of FL  
County of Lee

The foregoing instrument was sworn to (or affirmed) and subscribed  
before me this 25th Feb 2009 by Walter Simon  
Date Name of person under oath or affirmation  
who is personally known to me or who has produced FL license  
Type of identification

as identification  
[Signature]  
Signature of person administering oath

DIANE MARIE STAHL  
Typed or Printed Name



Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

**EXHIBIT 4-1  
DISCLOSURE OF INTEREST FORM**

STRAP# 19-46-24W4-0070D.0110

Attach additional sheets in the same format for each separate STRAP number in the application if multiple parcels with differing ownership are included.

1. If the property is owned in fee simple by an INDIVIDUAL, tenancy by the entirety, tenancy in common, or joint tenancy, list all parties with an ownership interest as well as the percentage of such interest.

Name and Address	Percentage

2. If the property is owned by a CORPORATION, list the officers and stockholders and the percentage of stock owned by each.

Name, Address, and office	Percentage
<u>WALTER SIMMONS 9659 PINEAPPLE PRESERVE CT. FT MYERS FL</u>	<u>50%</u>
<u>ERIC O'GILVIE 9649 PINEAPPLE PRESERVE CT. FT MYERS FL</u>	<u>50%</u>

Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

6. If any contingency clause or contract terms involve additional parties, list all individuals, or officers if a corporation, partnership, or trust.

Name and Address

Walter Simmons	9659 Pineapple Preserve CT
	Ft Myers FL 33908
ERIC O'glove	9649 Pineapple Preserve CT
	Ft Myers FL 33908

For any changes of ownership or changes in contracts for purchase subsequent to the date of the application but prior to the date of final public hearing, a supplemental disclosure of interest must be filed.

The above is a full disclosure of all parties of interest in this application, to the best of my knowledge and belief.

Signature \_\_\_\_\_

Applicant

Walter Simmons

Printed or typed name of applicant

STATE OF FL  
COUNTY OF Lee

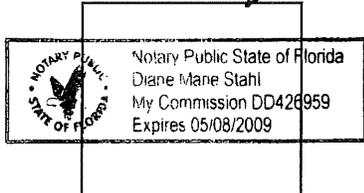
The foregoing instrument was acknowledged before me this 25<sup>th</sup> day of February 2009, by Walter Simmons, who is personally known to me or who has produced FL drivers license as identification and who did (or did not) take an oath.

Signature of Notary

Diane Marie Stahl

Typed or Printed Name of Notary

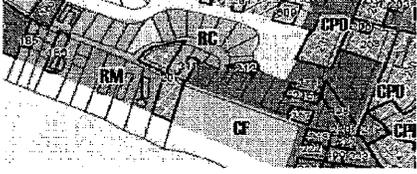
SEAL:



Case # 9E7209-001  
Planner F. Shockey

Date Received 3/3/09  
Date of Sufficiency/Completeness \_\_\_\_\_

**Town of Fort Myers Beach**  
Department of Community Development



Zoning Division

**Supplement PH-A**

**Additional Required Information for a  
Special Exception Application**

This is the second part of a two-part application. This part requests specific information for a special exception. Include this form with the Request for Public Hearing form.

Project Name:	<u>WICKED WINGS</u>
Authorized Applicant:	<u>WALTER SIMMONS / ATWATER, LLC</u>
LeePA STRAP Number(s):	<u>19-46-24W4-0070D.0110</u>

Current Property Status:	
Current Zoning:	<u>DOWN TOWN</u>
Future Land Use Map (FLUM) Category:	<u>PEDESTRIAN COMMERCIAL</u>
Platted Overlay? <input type="checkbox"/> yes <input checked="" type="checkbox"/> no	FLUM Density Range: <u>6 UNITS / ACRE</u>

**Requested Action:**

<input type="checkbox"/> Use of premises in the EC (Environmentally Critical) zoning district for:	
<input checked="" type="checkbox"/> Use of premises in the <u>DOWN TOWN</u> zoning district for:	
	<u>RESTAURANT WITH ALCOHOLIC BEVERAGES AND OUTDOOR SEATING.</u>

Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

PART I  
Narrative Statements

A. Request for: (indicate the proposed use that requires a special exception)

WE WISH TO OPERATE A RESTAURANT WITH AN OUTDOOR SEATING AREA. THE OUTDOOR SEATING AREA WILL CONSIST OF A 413.5 SQ. FT. DECK WHERE MEALS WITH BEER/WINE BEVERAGES WILL BE SERVED PER A 2 COP STATE LICENSE. THE PLANNED HOURS OF OPERATION ARE 10 AM TO 11 PM. THE SEATING CAPACITY ON THE OUTDOOR DECK SHALL BE 30 PERSONS.

B. Reasons for request: (state how the property qualifies for a special exception and what impact granting the request could have on surrounding properties. Direct these statements toward the guidelines in LDC Section 34-88)

The property qualifies for a Special Exception because:
SEE ATTACHMENT 1



## ATTACHMENT 1

The changing conditions on the beach which make approval of the request appropriate would include the desire to grow and develop the beach in this time of economic depression where we have witnessed the closure of other nearby businesses.

The project will provide short & long term jobs for the local economy affecting the entire financial chain; construction, local contractors and subs, suppliers of construction materials, food/drink/gas distributors, waiters/waitresses/cooks.

The restaurant's commercial activities will contribute to the pedestrian-oriented public realm as described in the Comprehensive Plan. By way of its approved development order, this project meets the design concepts of this plan and the Land Development Code.

This project meets or exceeds all performance and local standards as evidenced by our approved (LDO 2007-00401) development order. Building plans are currently being pursued that support the intended use of the property.

In the LDO, the protection, conservation, or presentation environmentally of critical areas and natural resources are addressed. Additionally, our restaurant operation practices will be environmentally sound.

The restaurant project will be compatible with existing or planned uses by offering food and drink on the beach access while customers enjoy the gulf scenery. The completed project will greatly improve the appearance of the beach at Public Access #34. This will include a designated handicapped accessible parking spot and bathroom. It will increase value of local seasonal rental properties by offering a nearby family restaurant; provide additional dining, and employment for residents. We will prevent any inconvenience to the neighborhood by adopting reasonable hours of operation, from 10 a.m. to 11 p.m.

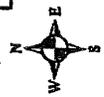
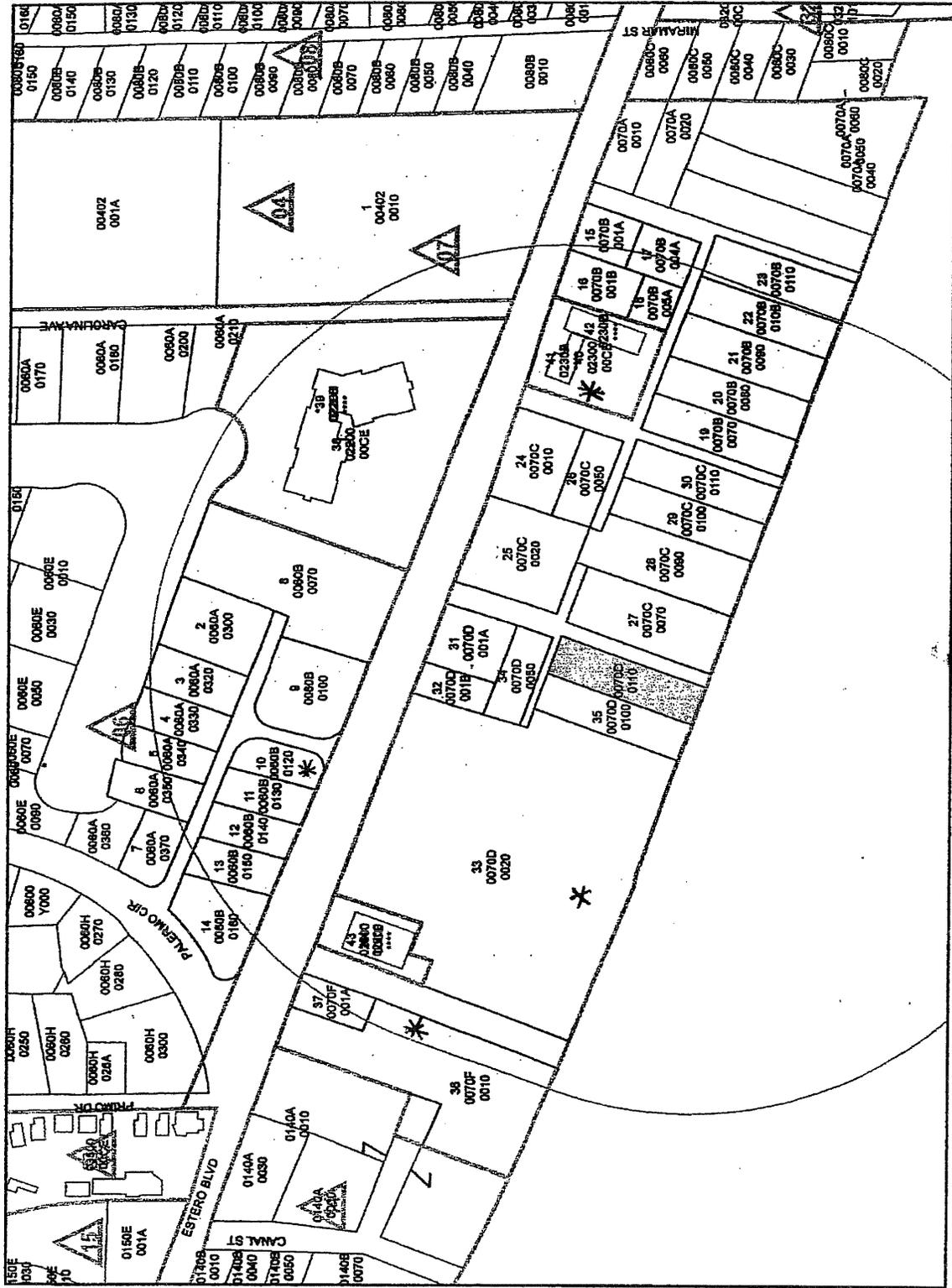
The requested use will be in compliance with the applicable general zoning provisions and supplemental regulations set forth in chapter 34 of the Land Development Code. Per the Code, a restaurant is allowed in this area, and the parking requirements are satisfied. The special exception is required because the proposed outdoor seating does not meet the administrative approval in section 34 – 1264.

Granting of this request will not cause any adverse effects on the surrounding properties. This restaurant will create a draw bringing more people to the area, supporting the service station, parking lots, other nearby establishments and potential rentals. The on-site turtle friendly video surveillance will provide an added level of security for the public access and surrounding properties. This project will also bring an added level of safety to local property owners, by the installation of new fire hydrant on Estero Blvd. at our expense.

# VARIANCE REPORT

2/12/2009

Subject Parcels : 1 Affected Parcels : 115 Buffer Distance : 500 ft

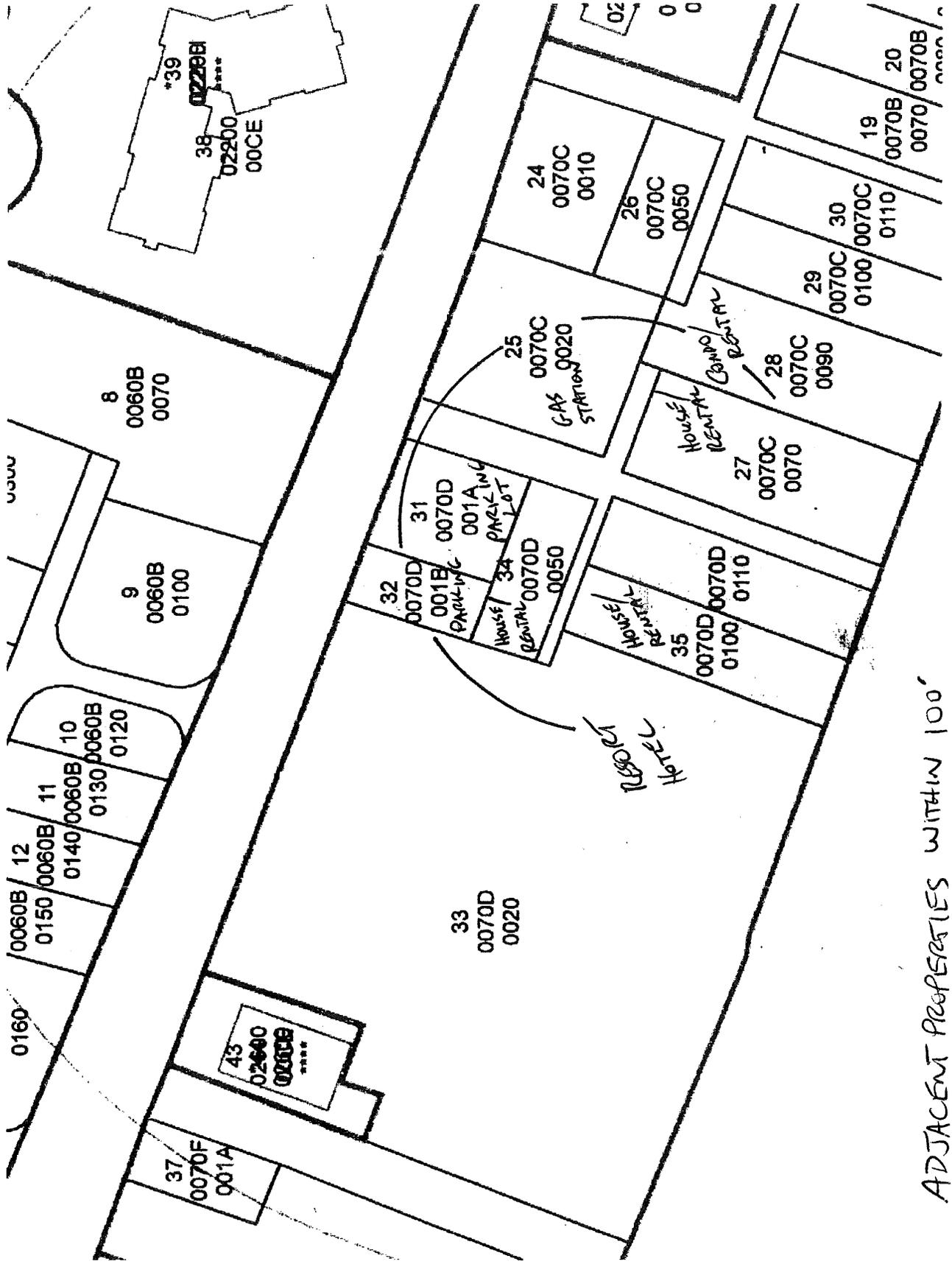


19-46-24-W4-0070D.0110

210 105 0 210 Feet

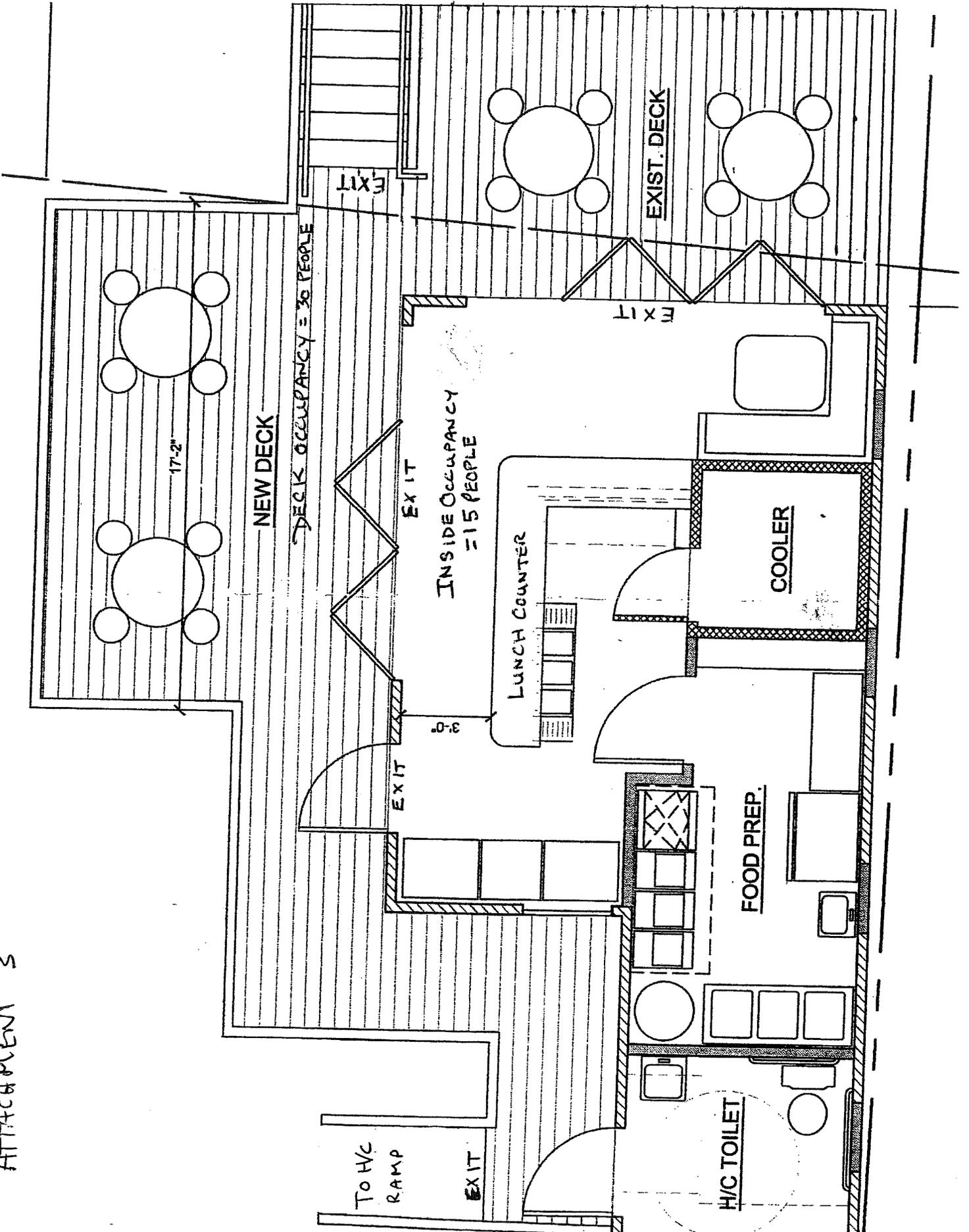
\* - INDICATE LOCATIONS OF OTHER PROPERTIES WITHIN 500 FEET OF THE REQUEST WHERE CONSUMPTION ON-PREMISES USES ARE ALREADY IN OPERATION

ATTACHMENT 4



ADJACENT PROPERTIES WITHIN 100'  
OF THE PERIMETER AND EXISTING USES

ATTACHMENT 3



REVISIONS	DATE	BY
1ST REVISION	06/07/09	JML
2ND REVISION	01/27/09	JML
3RD REVISION	01/27/09	JML

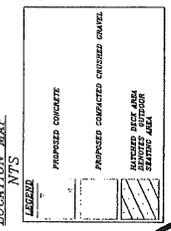
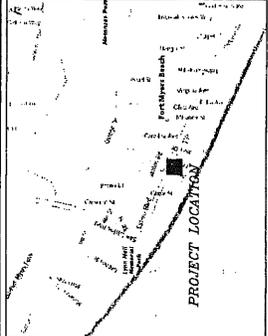
# SPEATH ENGINEERING

8000 SUMMERLIN LAKES DR SUITE 200 FORT MYERS FLORIDA  
PHONE: 787-715-1899 FAX: 787-215-0105

**OVERALL SITE PLAN**  
FOR  
**WICKED WINGS II**  
61/66 AVENUE C  
FORT MYERS BEACH, FL 33931

DRAWN: JML  
CHECK: MSS  
DATE: 01/27/09  
SCALE: VARIOUS  
PLOT: FOR-01

SHEET: **C1**  
1 OF 2



**PARKING REQUIREMENTS**

RESTROOMS - 8 SPACES FOR 50 RESTROOMS  
 EXISTING BUILDING - 4250 SF  
 TOTAL REQUIRED PARKING SPACES - 415  
 81.6 SF X 4 SPACES = 326.4 SF  
 TOTAL SPACES PROVIDED - 326.4 SF  
 SHORTAGE OF 88.6 SPACES

EXISTING ASPHALT DRIVEWAY - 1000 SF  
 PROPOSED ASPHALT DRIVEWAY - 1000 SF  
 TOTAL ASPHALT DRIVEWAY - 2000 SF  
 SHORTAGE OF 115 SPACES

EXISTING ASPHALT DRIVEWAY - 1000 SF  
 PROPOSED ASPHALT DRIVEWAY - 1000 SF  
 TOTAL ASPHALT DRIVEWAY - 2000 SF  
 SHORTAGE OF 115 SPACES

**GENERAL NOTES:**

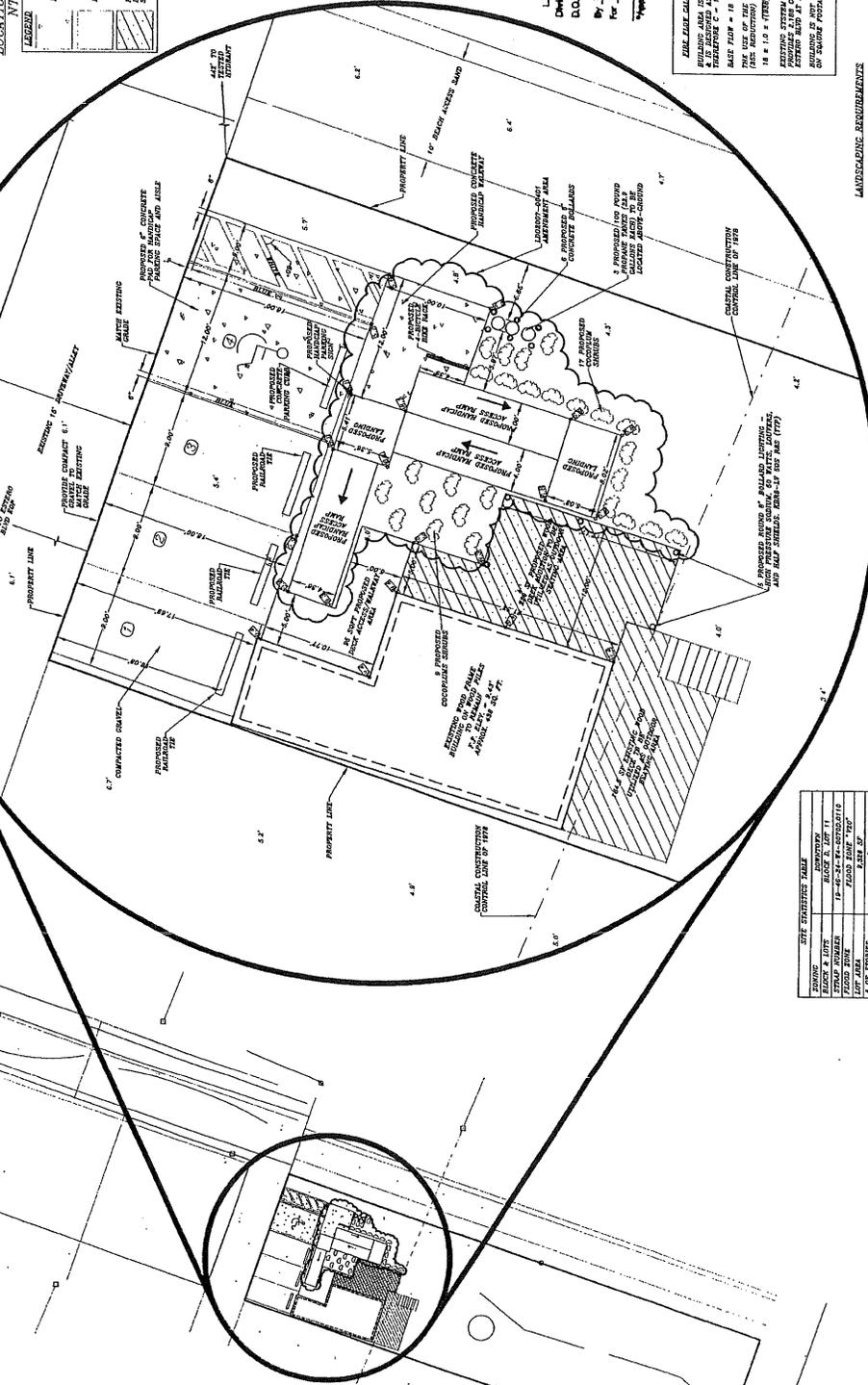
1. ALL UTILITIES SHOWN ON THIS PLAN AND REFERRED TO THE PROPOSED AREA SHALL BE VERIFIED BY THE CONTRACTOR PRIOR TO CONSTRUCTION.

2. ALL UTILITIES SHALL BE DEEPENED TO THE PROPOSED GRADE AND REFERRED TO THE PROPOSED AREA SHALL BE VERIFIED BY THE CONTRACTOR PRIOR TO CONSTRUCTION.

3. ALL UTILITIES SHALL BE DEEPENED TO THE PROPOSED GRADE AND REFERRED TO THE PROPOSED AREA SHALL BE VERIFIED BY THE CONTRACTOR PRIOR TO CONSTRUCTION.

4. ALL UTILITIES SHALL BE DEEPENED TO THE PROPOSED GRADE AND REFERRED TO THE PROPOSED AREA SHALL BE VERIFIED BY THE CONTRACTOR PRIOR TO CONSTRUCTION.

5. ALL UTILITIES SHALL BE DEEPENED TO THE PROPOSED GRADE AND REFERRED TO THE PROPOSED AREA SHALL BE VERIFIED BY THE CONTRACTOR PRIOR TO CONSTRUCTION.



**LDC**  
FEB 13 2009  
**APPROVED**

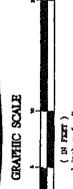
LDC0207-04041  
Division of Development Services  
D.C. MICHENER, P.E.  
By: [Signature]  
For: [Signature]

**TABLE FOR CALCULATION OF THE BUILDING**

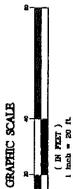
1. BUILDING AREA - 10,000 SF  
 2. BUILDING AREA - 10,000 SF  
 3. BUILDING AREA - 10,000 SF  
 4. BUILDING AREA - 10,000 SF

**LANDSCAPING REQUIREMENTS**

NO. OF TREES	NO. OF SHRUBS	NO. OF PERENNIALS
1	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10



ITEM	QUANTITY	REMARKS
CONCRETE	10,000 SF	FOR BUILDING
ASPHALT	2,000 SF	FOR DRIVEWAY
GRAVEL	10,000 SF	FOR PARKING
TOTAL	22,000 SF	



S & H Land Survey Company, Inc.  
 4100 Center Pointe Dr., Suite 107  
 Fort Myers, Florida 33916  
 LB#: 1057  
 Phone: (239) 481-2366  
 Fax: (239) 481-2437

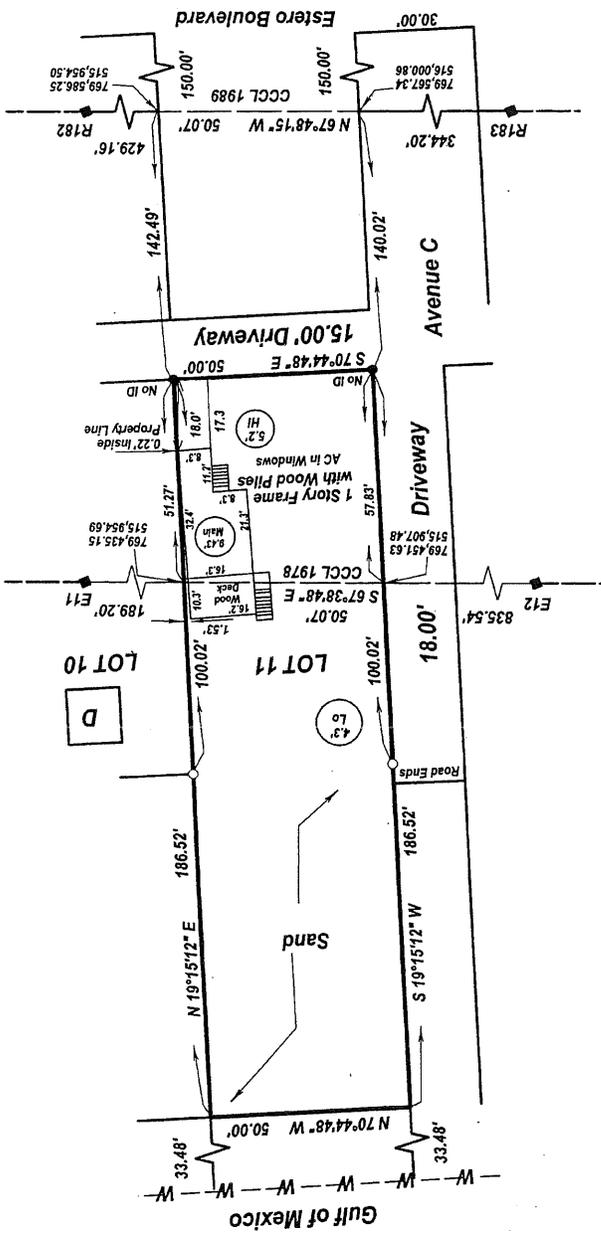
Date of Signature: 05/14/07

Registered Land Surveyor  
 #2239 - State of Florida  
 R. L. Schumann, R.L.S.  
 (Signature)

Date: 01/16/07  
 Scale: 1" = 30'

- LEGEND
- A/C = Air Conditioner
  - B.M. = Benchmark
  - C = Calculated
  - C.B. = Catch Basin
  - C.B.S. = Conc. Block
  - E.O.P. = Edge of Pavement
  - F.H. = Fire Hydrant
  - F.V. = Fire Valve
  - Gar. = Garage Floor
  - N.G.V.D. = National Geodetic Vertical Datum (1929)
  - M = Measured
  - = Centerline of R/W
  - - - = Overhead Powerline
  - W — = Edge of water
  - = Conc. Monument Found
  - = 1/2" Iron Pin/Cap Set
  - = 1/2" Iron Rod Found
  - ▲ = PK & Disk Set
  - ▼ = PK & Disk Found
  - = Conc. Monument Found

- NOTES:
1. Description as furnished by Client. No search of the Public Records was conducted by this firm.
  2. Elevations as shown are based on N.G.V.D. 1929 Datum unless otherwise stated.
  3. Bearings are based on State Plane Coordinates.
  4. Encroachments are based on Plat.
  5. There may be other encroachments not shown hereon recorded in the Public Record of governing County.
  6. No determination of hazardous waste materials have been made by this firm.
  7. Signor limits liability only up to the cost of the survey.
  8. This Survey is protected by Copyright and All Rights Are Reserved.
  9. Not Valid without signature and Raised Seal.
  10. This Sketch Does Not Reflect or Determine Ownership. This Sketch is Not an ALTA/CSM Land Title Survey. Photocopying, Forfeiture, Copyrighted Material.
  11. No copies shall be made without written Authorization. Possession of any such document is an agreement that the property as outlined within Chapter 815.04 & 815.05, Florida Statutes. Authorization by signed and sealed letter is required prior to possession of any Copyrighted documents. Failure to do so could result, if convicted, in a felony record.
  12. Survey valid for 90 days from last field update.



**LEGAL DESCRIPTION:**  
 Lot 11, Block D, Crescent Beach, a subdivision according to the plat thereof on file and recorded in Plat Book 4, Page 45, of the Public Records of Lee County, Florida.

**PROPERTY ADDRESS:**  
 61 Avenue C  
 Fort Myers Beach, FL 33931

**CERTIFIED TO:**  
 Eric O'Glive

Subject Property Located in FEMA Flood Zone V20 (17.0)  
 Panel: 125124-0429-D  
 Dated: 09/20/1996



Boundary, Location &  
 NGVD Elevation Survey &  
 Located Coastal  
 Construction Line  
 01/16/07  
 04/26/07

RESOLUTION OF THE LOCAL PLANNING AGENCY OF  
THE TOWN OF FORT MYERS BEACH FLORIDA  
RESOLUTION NUMBER 2009-29

WHEREAS applicant Atwatter LLC, by and through Walter Simmons, President, has requested a special exception in the DOWNTOWN and EC (Environmentally Critical) zoning districts to allow consumption on premises of beer and wine (2COP) in a restaurant providing an outdoor seating area that is within 500 feet of a dwelling unit under separate ownership; and

WHEREAS, Applicant has indicated its intent to apply for a 2COP State license for the sale of beer and wine for on-premises consumption; and

WHEREAS the subject property is located at 61 Avenue C, Fort Myers Beach, Florida 33931; and

WHEREAS the applicant has indicated that the STRAP number assigned to the subject property by the Lee County Property Appraiser is 19-46-24-W4-0070D-0110 and the legal description of the subject property is LOT 11, BLOCK "D", CRESCENT BEACH SUBDIVISION, as recorded in Plat Book 4, Page 45, Public Records of Lee County, Florida; and

WHEREAS a public hearing on this matter was legally advertised and held before the Local Planning Agency (LPA) on December 15, 2009, as shown by the legal affidavit which is attached hereto as Exhibit "A" and hereby incorporated by reference; and

WHEREAS at the hearing the LPA gave full and complete consideration to the request of Applicant, recommendations of staff, the documents in the file, and the testimony of all interested persons, as required by Fort Myers Beach Land Development Code (LDC) Section 34-88.

IT IS HEREBY RESOLVED BY THE LPA OF THE TOWN OF FORT MYERS BEACH, FLORIDA, as follows:

Based upon the presentations by the applicant, staff, and other interested persons at the hearing, and review of the application and the standards for granting special exceptions, the LPA recommends the following findings of fact, conditions for approval, and conclusions for consideration by the Town Council:

The LPA recommends that the Town Council **APPROVE** the applicant's request for a special exception to permit consumption on premises of beer and wine (2COP) in the DOWNTOWN and EC (Environmentally Critical) zoning districts, with such approval subject to the following conditions

**RECOMMENDED CONDITIONS OF APPROVAL:**

1. The licensed area of the subject establishment must be confined entirely to the building areas shown on the floor plan attached hereto and incorporated herein by reference as **Exhibit B**, including the interior of the building, and the two areas of the raised porch labeled "new deck" and "exist. deck." The licensed area, and the area approved for consumption on premises, does not include any area beneath the raised

porch or building, or any portion of the grounds, parking area, or beach and the use of these areas for consumption on premises and food service is prohibited.

2. Music and other audible entertainment must only take place during hours beginning at 10:00 AM and ending at 11:00 PM of each day and must comply at all times with applicable ordinances.

3. Hours of operation for service of alcohol must begin no earlier than 10 am and end no later than 11 pm daily. The hours of service of food and non-alcoholic beverages are not regulated by the Town.

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 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. Approval of this special exception does not create a vested right to reconstruct the structure labeled "exist. deck" on **Exhibit B** that is located within the EC (Environmentally Critical) zoning district. The existing structure that is within the EC zoning district is 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.

7. At each egress point from the porch, instructional signs visible to restaurant patrons leaving the licensed area must be placed and maintained containing the legible statement "No Alcoholic Beverages Beyond This Point".

#### **RECOMMENDED FINDINGS AND CONCLUSIONS:**

In accordance with the requirements of LDC Sections 34-84 and 34-88 regarding consideration of eligibility for a special exception, the LPA recommends that the Town Council make the following findings and reach the following conclusions:

1. Changed or changing conditions **exist** that make the requested approval, as conditioned, appropriate:

Comprehensive Plan (Comp Plan) **Policy 3-D-1** envisions "revitalizing downtown as a lively, inviting, comfortable, and safe public environment." This neighborhood between the Lani Kai resort (1400 Estero Boulevard) and the Estero Island Beach Club condominium (1836 Estero Boulevard) contains a mix of older cottages, mostly used for rentals, and commercial activities such as a retail store with fuel pumps, a seasonal parking lot, a restaurant, a coffee shop, and a few small retail stores. Applicant acquired a development order and building permits to remodel the existing building for reuse as a small restaurant with an outdoor seating area on a raised porch.

2. The requested special exception, as conditioned, **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, near Estero Boulevard and the Lani Kai resort. 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 areas northward from the Diamondhead and Lani Kai to Lynn Hall Park are heavily traveled by pedestrian beachgoers. The proposed restaurant will be oriented toward this foot traffic while providing a controlled area of alcoholic beverage consumption in conjunction with dining on a raised porch that is sequestered from the beach itself by railings and by its elevation above the adjacent grade. The elevation of the porch, the railings, and the recommended signage should help to remove the use of the restaurant from the activity of the public on the public beach.

3. The requested special exception, as conditioned, **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, site development, and remodeling to the building, have already been addressed through the development order process and the requested use meets the applicable parking requirements under LDC Chapter 34, Article IV, Division 19. Whether or not the use of an existing nonconforming structure in the EC zoning district for on premises consumption is appropriate, is a question best answered on a case-by-case basis by Town Council through the special exception process. Adequate provision has been made for solid waste removal from the site using movable containers.

4. The requested special exception, as conditioned, **will** protect, conserve, or preserve environmentally critical areas and natural resources:

The existing structure on the subject property was developed many decades ago. Through the development order and building permit processes existing nonconformities have been removed or mitigated except for the remaining deck that extends into the EC zoning district. Artificial lighting has been required to be brought into compliance with sea turtle protection requirements. Construction of additional structures in environmentally critical areas has not been permitted and appropriate vegetation has been added to the site through the development order process. As conditioned, the existing deck in the EC zoning district cannot be replaced without proper prior approval from the Town Council through the special exception process.

5. The requested special exception, as conditioned, **will** be compatible with existing or planned uses and **will not** cause damage, hazard, nuisance or other detriment to persons or property:

The existing surrounding uses include dwelling units, the Lani Kai resort, a seasonal parking lot, a convenience food and beverage store with fuel pumps, a restaurant, and some small retail stores. Within the Pedestrian Commercial Future Land Use Map category, adjacent dwelling units and vacant 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 beach adjacent to the subject property supports personal watercraft and parasailing activities licensed under LDC Chapter 27, and is heavily traveled by the public. The recommended conditions clearly restrict the use to the existing deck and prohibit its expansion to the grounds of the site or the adjacent beach.

6. The requested special exception, as conditioned, will be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34:

The restaurant use complies with parking, lighting, and other similar requirements set forth in LDC Chapter 34. 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.

7. The LPA directs that this matter go forward to hearing before Town Council without the necessity of approved LPA minutes.

The foregoing Resolution was adopted by the LPA upon a motion by LPA Member Ryffel and second by LPA Member Van Duzer, and upon being put to a vote, the result was as follows:

Joanne Shamp, Chair <u>aye</u>	Bill Van Duzer, Vice Chair <u>aye</u>
Carleton Ryffel, Member <u>aye</u>	Rochelle Kay, Member <u>aye</u>
Chuck Moorefield, Member <u>aye</u>	Alan Mandel, Member <u>aye</u>

DULY PASSED AND ADOPTED THIS 15<sup>TH</sup> day of December, 2009

LPA of the Town of Fort Myers Beach

By: Joanne Shamp  
Joanne Shamp, LPA Chair

Approved as to legal sufficiency:

By: Anne Dalton  
Anne Dalton, Esquire  
LPA Attorney

ATTEST:

By: Michelle Mayher  
Michelle Mayher, Town Clerk

EXHIBIT (A)

**NEWS-PRESS**  
*Published every morning - Daily and Sunday*  
Fort Myers, Florida  
**Affidavit of Publication**

STATE OF FLORIDA  
COUNTY OF LEE

Before the undersigned authority, personally appeared Kathy Allebach who on oath says that he/she is the Legal Assistant of the News-Press, a daily newspaper, published at Fort Myers, in Lee County, Florida; that the attached copy of advertisement, being a Notice of Public Hearing In the matter of Hearing on December 15, 2009

In the court was published in said newspaper in the issues of

**December 3, 2009**

Affiant further says that the said News-Press is a paper of general circulation daily in Lee, Charlotte, Collier, Glades and Hendry Counties and published at Fort Myers, in said Lee County, Florida and that said newspaper has heretofore been continuously published in said Lee County, Florida, each day, and has been entered as a second class mail matter at the post office in Fort Myers in said Lee County, Florida, for a period of one year next preceding the first publication of the attached copy of the advertisement; and affiant further says that he/she has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

*Kathy Allebach*

Sworn to and subscribed before me this

3rd day of December 2009 by

**Kathy Allebach**  
personally known to me or who has produced

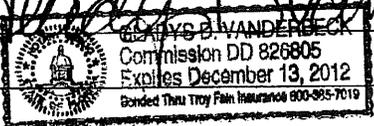
as identification, and who did or did not take an oath.

Notary Public

Print Name

My commission Expires:

*Gregory B. Winderbeck*

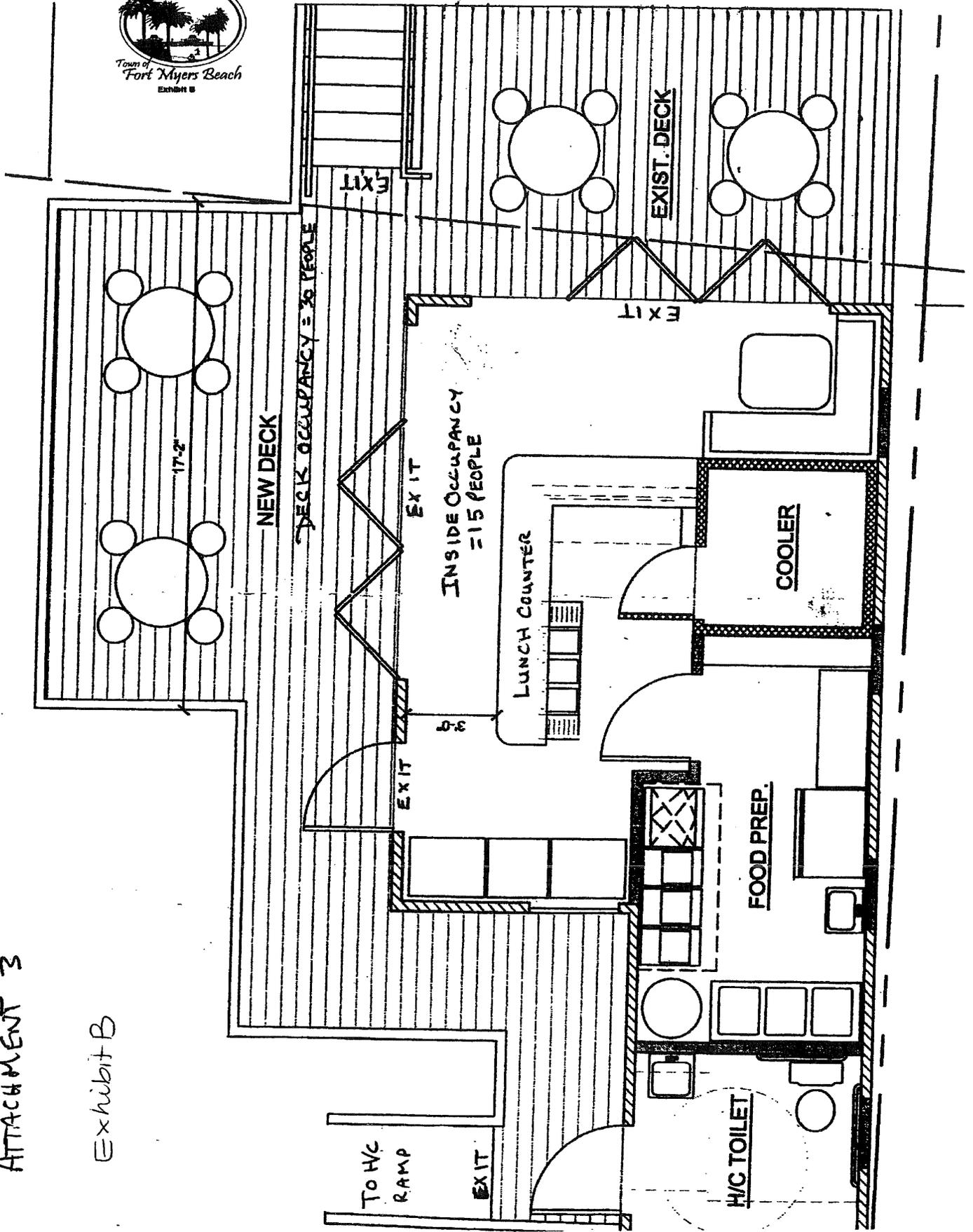


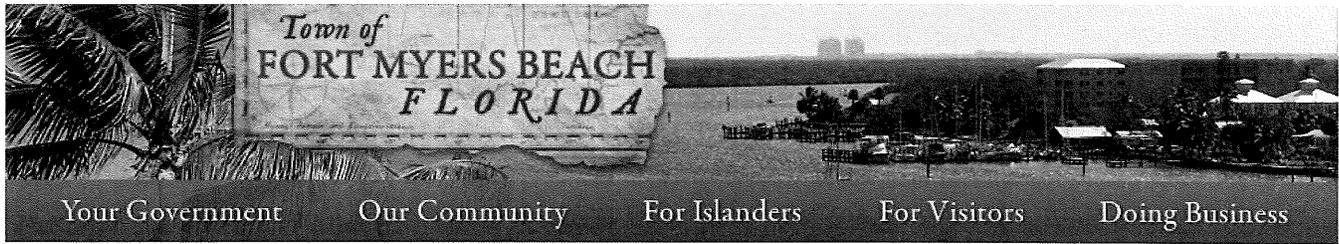
Notice of Public Hearing  
Notice is hereby given that the Local Planning Agency of the Town of Fort Myers Beach will hold public hearings at 9:00 AM on December 15, 2009 regarding the cases listed below. These hearings will take place in the council chambers at Fort Myers Beach Town Hall, 2523 Estero Boulevard, Fort Myers Beach, Florida, 33931. You may appear in person, through counsel, or through an authorized agent and provide testimony, legal argument, or other evidence to become a participant in the hearings.  
At these hearings the Local Planning Agency of Fort Myers Beach will review the cases and make recommendations to the Town Council. If any person should choose to appeal a decision made at these public hearings, such person would need a record of the proceedings, and for that purpose may need to ensure that a verbatim record of the proceedings is made, which record indicates the testimony and evidence upon which the appeal is to be based.  
Copies of the staff reports are available at Fort Myers Beach Town Hall. Call 239-765-0202 for more information. Town Hall is open between the hours of 8:30 AM and 4:30 PM.  
Reasonable accommodations will be made in accordance with the Americans with Disabilities Act. If you are in need of reasonable accommodation, contact Frank Shockey at 239-765-0202.  
Case Number: SEZ2009-0001  
Case Name: Wicked Wings  
Applicant: W a t e r Simmons/Atwater, 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. Applicant indicates the intent to apply for a 2COP State license for the sale of beer and wine for on-premises consumption.  
Location: 61 Avenue C, Fort Myers Beach, FL 33931  
Staff Report: Inquire at Fort Myers Beach Town Hall, 239-765-0202, 2523 Estero Boulevard, Fort Myers Beach, FL 33931.  
Case Number: SEZ2009-0002  
Case Name: Taylor Recreation  
Applicant: Joseph G. Taylor  
Request: Special Exception in the DOWNTOWN zoning district to allow a commercial recreation facility containing an amusement device (inflatable waterslide), on the subject property.  
Location: 1100 and 1130 Estero Boulevard, Fort Myers Beach, FL



ATTACHMENT 3

Exhibit B





Search the site...

You are here: [Home](#) > [Your Government](#) > [Advisory Committees](#) > [Local Planning Agency](#) > September 17



## September 17

### Agenda Town Council/Local Planning Agency Workshop 9:00 AM – September 17, 2009

- Contact Us
- Request for Action
- Bay Oaks
- How Do I...?
- Notify Me
- Weather & Tidal Info
- Emergency Prep

1. Historic Preservation (15 minutes)  
The Historic Advisory Committee representatives from the Estero Island Historic Society are to be invited for this portion of the agenda. [\[Topics\]](#) [\["vistas" concept\]](#)
2. Beach Furniture (15 minutes)  
An item that was referred to the LPA via blue sheet. While issue is probably resolved prior to this meeting, its purpose on the agenda is to discuss how to communicate direction from Council to LPA.
3. Rights-of-Way (15 minutes)  
Subject is intertwined with stormwater management. LPA current focus is residential driveway connection to streets.
4. Review of current LPA activities for Council Direction (15 minutes)  
Discussion surrounds alcohol and alcohol-related topics for possible LDC changes, including:
  - a) Beverage serving times dependent upon location (indoor/outdoor).
  - b) Open container modifications (inactive pending Council input)
  - c) Noise abatement – Note LPA is currently inactive on this subject based on understanding that Town Council has an ad hoc committee working the topic.
  - d) Sexually Oriented Businesses (inactive pending Council input)
  - e) Lighting (inactive)
  - f) Buffering/Vegetation (inactive)[\[October 2008 Memo to LPA\]](#) [\[November 2008 Consultant's Report to LPA\]](#) [\[Comment by LPA member Ryffel on Open container\]](#)
5. Action List/Agenda Management (30 minutes) – Discussion of ways to link joint Council/LPA items for improved prioritization and scheduling towards completion.  
[\[LPA Action Item List from 8/25/09\]](#)

#### LUNCH BREAK

FORT MYERS BEACH  
**LOCAL PLANNING AGENCY (LPA)**  
Town Hall – Council Chambers  
2523 Estero Boulevard  
Fort Myers Beach, Florida  
**September 17, 2009**

AGENDA	[all time frames are informational and approximate]
<b>1:00 PM</b>	
I. Call to Order	
II. Pledge of Allegiance	
III. Invocation	
IV. Minutes	10 minutes
A. <a href="#">Minutes of July 14, 2009 Meeting</a>	
B. <a href="#">Minutes of August 25, 2009 Meeting</a>	
V. Administrative Agenda	
A. <a href="#">Resolution 2009-19 ROW agreement</a>	
	30 minutes
<a href="#">[Attachment]</a> <a href="#">[Summary Memo]</a>	
B. <a href="#">Resolution 2009-20 LPA PnP Manual Amendment</a>	
	15 minutes
<a href="#">[Attachment]</a> <a href="#">[Summary Memo]</a>	
VI. Adjourn as LPA and reconvene as Historic Preservation Board	
VII. HPB Member Items or Reports	5 minutes
VIII. Adjourn as Historic Preservation Board and reconvene as LPA	
IX. LPA Member Items and Reports	15 minutes
X. LPA Attorney Items	5 minutes
XI. Community Development Director Items	5 minutes
XII. LPA <a href="#">Action Item List Review</a>	10 minutes
XIII. Public Comment	

**Adjourn no later than 4:00 P.M.**

**Next Meeting:** September 29, 2009, 10:30 AM

2523 Estero Blvd • Fort Myers Beach, FL • Ph. (239) 765-0202 • Fx. (239) 765-0909  
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**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency Meeting**

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

**Thursday, September 17, 2009**

**I. CALL TO ORDER**

Meeting was called to order at 1:05 PM by Chairperson Dennis Weimer. Six members present:

Dennis Weimer  
Rochelle Kay  
Alan Mandel  
Bill Van Duzer  
Joanne Shamp  
Carleton Ryffel

Staff present: LPA Attorney Anne Dalton; Community Development Director Dr. Frank Shockey. There were no members of the public present.

**II. PLEDGE OF ALLEGIANCE**

**III. INVOCATION-Mr. Weimer**

**IV. MINUTES**

**Motion: Ms. Kay moved to adopt the minutes of July 14, 2009, as presented.**

**Seconded by Mr. Ryffel, who noted an error in the spelling of his name;**

**Mr. Yerkes was mistakenly listed in place of Mr. Mandel; Ms. Dalton noticed the “e” missing from her name; Mr. Weimer noted a question regarding a second to a motion on page 14. After some discussion it was determined that Mr. Weimer was looking at a an unedited version of the minutes that had not been corrected for typographical and similar errors, and that the record on page 14 had been corrected in the minutes distributed to the LPA for consideration at this meeting. The minutes presented to the LPA for consideration today indicate Mr. Weimer’s request that the LPA to consent to “move” an item from one part of the agenda to another at the July 14 meeting; there was no “motion.” Ms. Kay and Mr. Ryffel signified their acceptance of the changes.**

**Vote: Motion passed 6-0**

**Motion: Mr. Van Duzer moved to approve the minutes of the August 25, 2009.**

**Seconded by Mr. Ryffel, with note that his name is misspelled; Mr. Van Duzer signified his acceptance of the correction.**

**Vote: Motion passed 6-0.**

**V. ADMINISTRATIVE AGENDA**

**A. Right of Way Resolution Number 2009-19**

Ms. Dalton referred to the agreement for the use of the Town ROW incorporating the LPA's suggestions. She also pointed out one addition related to a suggestion that had been made by Mr. Mandel, now spelled out in paragraph 7, regarding damage done to the ROW by others, indicated by shaded areas in that paragraph.

Mr. Weimer asked for LPA comment. Ms. Shamp commented that she liked it with Mr. Mandel's suggested alteration.

**Motion: Mr. Ryffel moved to approve the resolution.**

Members were satisfied with this agreement and the addition suggested by Mr. Mandel, but there was brief discussion about what price index should be used for the insurance requirement to be included in the resolution. Mr. Mandel suggested the Municipal Cost Index, which shows the effects of inflation on the cost of providing municipal services.

**Mr. Mandel seconded the motion.**

Mr. Ryffel asked if someone builds out over the ROW and drops something out of a window, hitting someone on the head, is that what this kind of insurance covers? Mr. Mandel answered that this scenario could involve much more than just the litterer in a lawsuit. Ms. Dalton added that these builders/owners would have liability insurance whether or not they were actually over the ROW. Mr. Ryffel asked if that (the amount indicated by the index) would be a sufficient amount of insurance. Ms. Dalton said it is up to the recommendation of the LPA. Ms. Shamp wondered how it would be determined that the indicated insurance amount would be sufficient and who could advise the LPA as to a guideline. Ms. Dalton summoned the Town finance director to the meeting for an educated opinion.

Jack Green, Interim Town Manager, addressed the meeting in the absence of the finance director, and Ms. Dalton advised him that they needed to know if the insurance requirement amount should be indexed and what the amount should the minimum be. Mr. Green said they would need to know what the potential risk would be and said that there are too many types of exposures to possibly consider. There was discussion regarding this and many possible situations which may arise. Ms. Dalton pointed out that there is a requirement within the resolution that those using the ROW carry the required insurance and that they provide the Town a copy of the coverage policy each year when renewing their agreements. The suggestion was to have the finance director ask the FL League of Cities for guidance as to the amount to be carried and necessity to index appropriately.

After this discussion Mr. Weimer asked, and Mr. Ryffel as motion-maker and Mr. Mandel as seconder, assented, to the changes discussed.

**Vote: 6-0 in favor.**

**B. Resolution 2009-20 LPA Policies and Procedures-Manual Amendment**

Ms. Dalton printed out a comment from Mr. Mandel and distributed it to the members for discussion regarding emails and phone calls as ex-parte communications. There was discussion about these exchanges and how they are forwarded and recorded. The proper manner to report these communications would be to forward the information about any ex-parte communications to the Town clerk, with copies to the LPA attorney and the Community Development Director. Mr. Van Duzer agreed this would be fine for emails but not efficient for telephone communications, as it would be cumbersome and redundant. Telephone calls should be disclosed during the ex-parte announcements at the beginning of the hearing processes. Other members assented to this viewpoint.

Mr. Ryffel pointed out a part on page 5, under "Public Notice" wherein it states "the Town clerk shall advertise..." He wanted to change the "7 days" to be "10 days."

Ms. Dalton cautioned that this would make the notice even further in advance due to lead time for publishing the advertisement. Dr. Shockey also pointed out advertising items in Chapter 22 that provide minimum and maximum notification periods and said that if the minimum is raised too high the window for publishing a notice could become very small or there could be a conflict. There was discussion as to the requirements, notices, etc. The consensus was to keep the "7 days" but add "except as modified by the LDC."

**Motion: Mr. Van Duzer moved to adopt Resolution 2009-20 with the modifications discussed.**

**Seconded by Mr. Mandel;**

**Vote: Motion carried 5-1, with Mr. Ryffel dissenting.**

**Motion: Mr. Ryffel moved to adjourn as the LPA and reconvene as the HPB.**

**Seconded by Ms. Kay;**

**Vote: Motion carried 6-0**

It was noted that Mr. Mandel was excused for the remainder of this meeting.

**VI. ADJOURN AS LPA; RECONVENE AS HPB**

Ms. Shamp called the meeting to order at 1:52 PM with all members, except Mr. Mandel, present.

Ms. Shamp opened discussion regarding the concept of a budget, as discussed in the earlier workshop meeting. Mr. Weimer opined that there should be money in the Town's budget earmarked for the HPB and he feels that \$10,000.00 is an appropriate amount at this time. He is concerned that the HPB will be trapped into specific amount for specific line items and not have the flexibility required to fund proper projects. Mr. Van Duzer stated that he understands that there must be a reasonable budget amount spelled out for

Council to appropriate the necessary funds. Ms. Kay asked is the HPB to function as a separate body or be under the thumb of the Council with no certainties involving funds. Mr. Weimer said it is obvious that Council feels this is not the HPB's money and has no intention of allowing the HPB to spend it the way they see fit. There was further discussion about earmarking funds. Ms. Shamp also questioned what authority the HPB actually has regarding the spending of its own money. Mr. Ryffel also questioned why the Council refuses to release certain funds to the HPB when there is specific money budgeted for certain HPB projects. Mr. Weimer explained that the Council just admonished the HPB for asking for funds earmarked for specific projects, suggesting that the HPB shouldn't expect that budgeted money actually all be used for planned projects. Both Ms. Dalton and Mr. Weimer pointed out LDC sections wherein full authority and discretion is given to the LPA to make those decisions. Mr. Van Duzer mentioned that there was other funding that was not specifically earmarked and the HPB was vague about the way to use it, suggesting that money be specifically budgeted for recorded items to ensure they are used for only those projects. More discussion ensued. Mr. Van Duzer will gather information for costs involved with getting signs with everything needed for the display. Dr. Shockey will then get that information together before the next HAC meeting to resemble a budget. Dr. Shockey recalled that the Council had discussed putting some money into the budget for HPB for the coming fiscal year but was not sure if that was still being proposed. Mr. Weimer voiced his concern that funding should be in place or several of these projects, specifically the website design. He said that this is currently being left up to the staff, specifically Dr. Shockey, who he feels will not have the time to set up and keep an additional website running. Mr. Ryffel agreed and said that a committee such as this cannot exist without a budget. Ms. Kay suggested using some volunteers for this purpose and Mr. Ryffel agreed but stated that, for budgetary purpose, they must assume that there are no volunteers. Ms. Kay brought up using the Newton Cottage as an administrative building for the Town. Ms. Dalton advised that the Town did reject the idea of moving this structure to town-owned land to be used for their purposes.

**Motion: Mr. Weimer moved to adjourn as the HPB and reconvene as the LPA.**

**Seconded by Mr. Ryffel;**

**Vote: Motion carried 5-0, with Mr. Mandel excused.**

## **VII. ADJOURN AS HPB; RECONVENE AS LPA**

Reconvened at 2:18 PM.

## **VIII. LPA MEMBER ITEMS AND REPORTS**

Mr. Van Duzer only commented that he enjoyed the earlier joint meeting.

Ms. Kay - nothing to report.

Ms. Shamp wished to respond to an email that Mr. Ryffel wrote to County Commissioner Ray Judah. She said she agrees with Mr. Ryffel about renourishment being an issue for the LPA because it is a capital expense. She said she is opposed to this extensive project because the county has not taken responsibility for certain areas. Mr. Ryffel added to her comments and they both believe that this is a long-term and expensive project that may best be replaced by a smaller project to remedy the situation at the north end of the island.

Mr. Weimer added that he feels that the LPA should be able to pull together the expertise to make educated, economically sound suggestions to send to the Council in certain cases.

Mr. Mandel-reported on the M&P meeting he attended, wherein Bay Oaks was discussed. He advised that the budget was also discussed and that funds are running low. There will be a presentation regarding the water utilities upcoming.

Mr. Weimer said he would add something back into the PnP manual that established that the Mayor, Town Manager and the LPA Chair will meet the 3<sup>rd</sup> Wednesday of the month at 1:00 PM in Oct., Jan., April and July and that the LPA and Council will establish a semi-annual workshop to be held in April and September, in keeping with the discussion at the joint meeting earlier.

**IX. LPA ATTORNEY ITEMS**

Ms. Anne Dalton thanked the LPA for their comments today.

**X. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Nothing to report.

**XI. LPA ACTION ITEMS**

- Gulfview-waiting for the Vacation Issue
- Vacation-TBD
- Historic Plaque Program-Ms. Shamp/Dr. Shockey; 10/5/09
- Pink Shell-10/16/09; Mr. Weimer
- Continued LPA hearings: Shipwreck-Jan. 12, 2010
- Storm Water-still waiting for report; TBD-10/13/09
- Seasonal Parking-9/29 final review before hearings; Dr. Shockey/Ms. Dalton
- Animal Control - Long Term-10/27/09; Dr. Shockey
- Code of Ethics-9/17/09 (with the add-ons)
- Alcoholic Beverages-TBD; 11/10/09
- Parcelization-topic for discussion; Dr. Shockey
- Present ROW resolution to Council-10/19/09; Mr. Van Duzer
- PnP revisions-next meeting

**XII. PUBLIC COMMENT**

No further comments.

Mr. Weimer asked for a motion to adjourn.

**Motion: Mr. Ryffel moved to adjourn.**

**Seconded by Mr. Van Duzer;**

**Vote: Motion carried 5-0, with Mr. Mandel excused.**

**XIII. ADJOURNMENT**

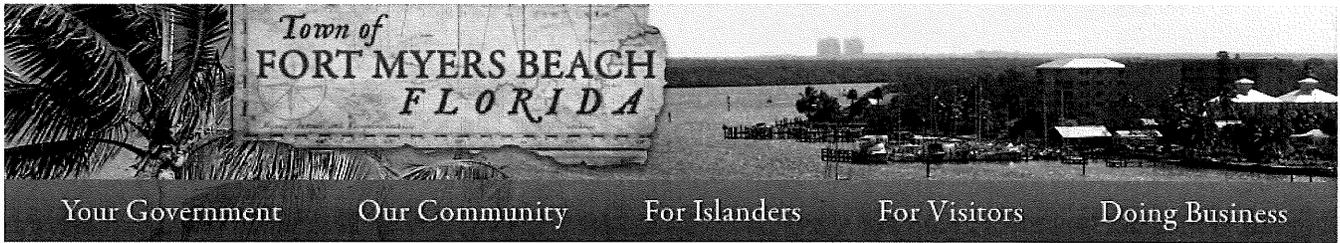
Adjourned at 3:02 PM.

**Next meeting September 29, 2009**

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_  
Dennis Weimer, LPA Chair

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**June 8, 2010**

FORT MYERS BEACH  
 LOCAL PLANNING AGENCY (LPA)  
 Town Hall – Council Chambers  
 2523 Estero Boulevard  
 Fort Myers Beach, Florida  
 June 8, 2010

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**AGENDA** [all time frames are informational and approximate]

- 9:00 AM
- I. Call to Order
  - II. Pledge of Allegiance
  - III. Invocation
  - IV. Minutes: 5 minutes
    - A. [Minutes of May 11, 2010](#)
  - V. Public Hearings
    - A. SEZ2010-0007 Nemo's on the Beach COP special exception: 30 minutes  
[Staff Report](#) [Application](#)
    - B. Ordinance 10-xx Amending Land Development Code Chapter 34, Article IV, Division 26 (Parking): 30 minutes  
[Ordinance Draft](#) [Draft Language \(Exhibit A\)](#) [Draft LPA Resolution](#)
  - VI. Administrative Agenda
    - A. Update on sign regulations development from June 7 Council meeting (verbal only): 15 minutes
  - VII. Adjourn as LPA and reconvene as Historic Preservation Board
  - VIII. Administrative Agenda
    - A. Discussion of [HAC vista project ideas](#): 15 minutes
  - IX. HPB Member Items or Reports: 10 minutes
  - X. Adjourn as Historic Preservation Board and reconvene as LPA
  - XI. LPA Member Items and Reports: 10 minutes
  - XII. LPA Attorney Items: 5 minutes
  - XIII. Community Development Director Items: 5 minutes
  - XIV. LPA [Action Item List](#) Review: 10 minutes
  - XV. Public Comment
  - XVI. Adjournment

Next Meeting: July 13, 2010, 9:00 AM

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**MINUTES**  
**FORT MYERS BEACH**  
**Local Planning Agency**

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

**Tuesday, June 8, 2010**

**I. CALL TO ORDER**

Meeting was called to order at 9:05AM by Carleton Ryffel. Other members present:

Joe Kosinski  
Rochelle Kay  
John Kakatsch  
Chuck Moorefield  
Joanne Shamp-excused  
Bill Van Duzer-excused

Staff present: Dr. Frank Shockey  
LPA Attorney, Anne Dalton

**II. PLEDGE OF ALLEGIANCE and INVOCATION**

Rochelle Kay

The Chair recognized the newest member, Joe Kosinski, who then gave a brief resume to the group.

**III. MINUTES**

A. Minutes of May 11, 2010

**Motion: Ms. Kay moved to accept the minutes, as recorded.**

**Seconded by Mr. Kosinski;**

**Vote: Motion passed 5-0**

**IV. PUBLIC HEARINGS**

A. SEZ2010-0007 Nemo's on the Beach COP Special Exception

Ms. Dalton prompted the members to declare any ex parte discussion. Mr. Ryffel noted that he had a brief conversation with the applicants and their representative, Mr. Madden, and said that he was the original planner for a special permit at this location in 1995; however, he has no present connection with this applicant in any way. No other members had any communications.

Ms. Dalton swore in witnesses.

Applicant Testimony

Mr. Madden addressed the meeting for the applicant, Estero Beach Holdings, LLC. He thanked the staff for their report and asked that it be made a part of the record, as the applicant agrees with the findings and conclusions in the report. The intention of the special exception is basically to add liquor to the menu, in addition to beer and wine.

Mr. Moorefield asked the applicant if his statement regarding adding 30 employees was an accurate statement. Mr. Ciniello, one of the owners, responded and said that if the amount of customers increases, the number of jobs would increase but he said it is more his hope than an actual estimate.

Ms. Kay asked if the patio is in an environmentally critical zone. Dr. Shockey addressed her question, explaining that the area now zoned EC, which extends out to the seawall, was included in zoning for the alcoholic beverage use that was allowed in the 1995 special permit. The applicant added that the use of the patio was a pre-existing condition.

Mr. Ryffel recalled the original special permit and asked if the inside still has the same seating in the front porch area. The applicant explained that there had been additions since then and that area has about 40 seats inside the building now. In addition, he said there are about 180 seats total, including the patio, porch and covered area under canvas awnings, in accordance with the current permits. Dr. Shockey said that the recommended conditions would not restrict them to a specific type of license but would require them to comply with the Town's requirements for service in conjunction with the restaurant, similar to but not the same as the state's requirements for an SRX series license.

Mr. Kakatsch asked if it is necessary to start serving at 7:00 AM. The applicant stated that they don't actually open for business until 11:00 AM and this was just added for consistency.

Staff Report

Dr. Shockey corrected a few typographical errors in the address (1054 Estero Boulevard instead of 1600 Estero Boulevard) and the strap number in the report, for the record, and gave an overview of the request. The applicant is seeking a special exception in the DOWNTOWN zoning district that would allow "consumption of alcoholic beverages on the premises in a restaurant that provides outdoor seating within 500 ft. of a dwelling that is under separate ownership." This would include the existing patio area, including the part located in the EC zoning district but landward of the existing retaining wall, and applicant specifically requests that it includes beer, wine and liquor.

Staff recommendation is approval with some conditions. The "Findings and Conclusions" discuss the request in some detail, with some history as to the original

alcoholic beverage use permitted in 1995. The seating was limited to a specific floor area in square feet and number of seats and alcohol was limited to a 2COP state license, which allows only beer and wine service. Additionally, there was a restriction on outdoor entertainment. There were physical changes to the property between 1995 and 2006, as well as an appeal in which the Town Council modified some of these conditions, though not the condition limiting the type of state license.

Dr. Shockey suggested that the only condition the LPA might want to discuss would be hours of operation. He said that the Town has an ordinance that prohibits alcoholic beverage sales, service and consumption between the hours of 2:00 and 7:00 AM of each day. If the hours were to be required to be more limited, evidence to show why the limitation was necessary ought to be introduced and discussed. Dr. Shockey asked that the report be entered into the record as staff's testimony.

A suggestion was made to change the hours of service to limit the allowable hours to the actual hours currently proposed by the applicant for operation of the business. Dr. Shockey commented that the close proximity of a few dwelling units might be a factor the LPA could point to if they wished to recommend such a condition. Ms. Kay had a question about page 8 wherein it states "the immediate vicinity is within the Pedestrian Commercial category, except for the beach..." Dr. Shockey explained the boundary between the Pedestrian Commercial land use category and the Recreation category was set decades ago and partly accounted for the locations of buildings, but not always decks, patios, and other smaller objects that may have been in existence at the time. The County's rules for what could take place near the beach also were not exactly the same as the Town's. In this case, a brick patio exists between the wooden retaining wall and the coastal construction setback line, and the County's original approval of the special permit for this location included that area as outdoor seating.

Another question was raised as to where the 2:00 AM to 7:00 AM guideline came from. Dr. Shockey explained that one of the first ordinances passed by the Town set the external boundaries of hours for alcoholic beverage sales, service, and consumption for all establishments in the Town. In approving individual locations, more limited hours can be set for each location, depending on their zoning of the area and as necessary to mitigate effects of the business on the health, safety and welfare of the immediate community. However, he pointed out, some businesses were "Grandfathered" into their current operating conditions and only have to abide by the ordinance that prevents them from serving between 2 AM and 7 AM. Others have applied for zoning approval under more recent rules and received the special exceptions or administrative approvals that limit them to service during more restricted hours.

Mr. Ryffel asked if there had been any letters of objection and Dr. Shockey could not recall any related to this case or during the Town Council appeal a few years ago. Mr. Ryffel opined generally that it would be good to include a section in the staff report noting any letters of objection from the citizens. Ms. Dalton added that this is a good

idea but that it should include all letters, in support or against.

Mr. Ciniello again spoke and elaborated on the hours of operation, assuring that his business will be responsible and probably not use the earlier hours but wants them included because all other businesses have them and he feels it is only fair to keep this consistent.

Mr. Ryffel asked for public comment, and no one came forward. Ms. Kay commented that she did not approve of expanding alcoholic beverage activities into the EC zoning district. There was LPA discussion including whether to change the hours of operation for all business so that all are serving during the same hours, or to restrict individual businesses piecemeal. Mr. Ryffel commented that he didn't feel the request involved expanding into the EC zoning district since the patio was already included in the licensed area, and the applicant was merely asking to change the type of alcohol they would be able to serve.

**Motion:** Mr. Kosinski moved to recommend approval of the requested special exception SEZ2010-0007, Nemo's on the Beach, selecting the recommended findings and conclusions as stated in the *"Findings of Facts" in the draft resolution:*

- #1. "changed or changing conditions exist that make the request approval, as recommended, appropriate;"*
- #2. "the request, as conditioned, is consistent with the goals, objectives, policies and intent of the FMB Comp Plan;"*
- #3. "the request, as conditioned, meets all performance and locational standards set forth for the proposed use;"*
- #4. "the request, as conditioned, will protect, conserve or preserve environmentally critical areas and natural resources;"*
- #5. "the request, 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. "the request, as conditioned, will be in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in the LDC Chapter 34."*

Seconded by Mr. Moorefield

**Vote:** Motion passes 3 to 2, with Mr. Kakatsch and Ms. Kay opposed. Mr. Kakatsch added that he only opposes the hours of operation and it is nothing against this particular applicant, but he would like the times changed for all beach businesses. Ms. Kay feels that this is expansion of alcohol into the EC zone and does not support this.

Hearing closed.

B. Ordinance 10-xx Amending LDC Chapter 34, Article IV, Div. 26 (Parking)

Dr. Shockey referred to the packets given to members which included the draft resolution for recommending the ordinance to Town Council, and an ordinance that references Exhibit A, which is code language that would be adopted. He gave a brief overview of places in the Exhibit A where there are the options regarding different

language for specific sections of the code.

Mr. Ryffel opened the hearing and asked Dr. Shockey to begin with the first recommendation and go through them, with discussion about each. Dr. Shockey began with pg. 2, Parking Plan, and listed the options: “*A parking plan is required for...*” Option #1-“*all uses,*” or Option #2-“*all uses except single family and 2 family dwelling units.*” There was a consensus for Option #2.

Pg. 3, Sec. 34-201-5, Sub.7, Pedestrian System: Option #1: “*Walkways must be provided which accommodate safe and convenient pedestrian movement...*” or Option #2: “*Walkways must be provided which accommodate safe and convenient pedestrian movement from vehicles to building entrances and other walking destinations...*” There was discussion about the differences. There was a consensus for Option #1.

Pg. 4, Sec. 34-201-6, Sub. 4, Delineation of Spaces-sub. 3: “*Parking spaces for the disabled must be...*” Option #1: “*permanently outlined in blue with the outline replenished when necessary...*” or Option #2 contains the same language as Option #1 except that “*permanently outlined in blue with the outline replenished when necessary...*” is removed. There was a consensus for Option #2.

Pg. 10, Requirements for a Seasonal Parking lot that operates for multiple years: “*a total of (insert number of years) consecutive or non-consecutive seasonal parking permits may issued for a parcel without requiring compliance with the requirements below.*” “*The subsequent consecutive permit for the parcel, the permit application must comply with the following...*” The suggested options are 3 years or 5 years, but upon discussion the LPA could recommend some other period. After discussion, there was a consensus for 3 years.

Mr. Ryffel opened the meeting for public comment. Dr. Jean Matthew asked what “Option 3” is and asked if the members could state what Option #3 is in the Disabled Parking section when making the motion to accept the resolution. Ms. Dalton suggested that Dr. Matthew receive a copy of the draft language and the motion maker call out the option being chosen.

**Motion: Ms. Kay moved that Resolution 2010-04 be adopted as stated in the “Proposed findings, facts and conclusions of law”:**

*the proposed amendment is in the best interest of the health, safety and welfare of the citizens...of Ft. Myers Beach; therefore, be it resolved that the LPA does recommend that Town Council approve and adopt the proposed Town Ordinance to amend the regulation of parking within municipal limits as set forth in Div. 26, Article 4 of Chapter 34 of the Town LDC and recommends the following findings of fact: Section 34-2014, Option #2--“all uses except single family and 2 family dwelling units.”*

*Section 34-2015, Sub.7, Pedestrian System- Option #1: “Walkways must be provided which accommodate safe and convenient passing and movement...”*

*Section 34-2016, Sub. 4, Delineation of Space-sub. –Option 2-“clearly distinguishable as parking space designated for persons of disabilities and must be*

*posted with a permanent above grade sign bearing international symbol of accessibility and the caption 'parking by disabled permit only'; signs erected after Oct. 1, 1996 must indicate the penalty for illegal use of these spaces..."*

*Section 34-2022, Sub. c,- "a total of 3 consecutive or non-consecutive seasonal parking permits may be issued for a parcel without requiring compliance with the requirements below." "The subsequent consecutive permit for the parcel, the permit application must comply with the following requirements..."*

**Seconded by Mr. Kosinski.**

**Vote: Motion passed unanimously, with the absence of Mr. Van Duzer and Ms. Shamp.**

Hearing closed.

## **V. ADMINISTRATIVE AGENDA**

### **A. Update on sign regulations development from June 7 Council Meeting (verbal)**

Dr. Shockey gave a brief overview of the results from this meeting and said there was an agreement to schedule time at the next meeting on June 21 for further discussion. He said that he had hoped there would be a public joint workshop so that the LPA and Council could all hear the public comments at the same time. Dr. Shockey gave the Council a few suggestions for moving ahead including a workshop for themselves, a joint workshop or sending it to LPA without holding a workshop, but at the June 7 meeting Council chose the first option, in a way, by deciding to discuss the matter again on June 21.

**Motion: Mr. Ryffel moved to adjourn as the LPA and reconvene as the HPB.**

**Seconded by Mr. Kakatsch;**

**Vote: Motion passed 5-0.**

## **VI. ADJOURN AS LPA-RECONVENE AS THE HPB**

Ms. Kay called the meeting to order at 10:20 AM. She referred to information in the packets regarding the vista signs. She said there was a meeting with the HAC and they discussed the funding for this, as well as discussion about the historic recognition plaques. Dr. Shockey said he spoke to the town manager about the LPA budget for the coming year and he agreed to include the \$2000.00 in a line item for these activities. Dr. Shockey agreed that there should be some work done on developing a concept of where these vistas should be located and what they should be like. He suggested that Theresa Schober be heavily involved since she has a grasp of what would work best as well as a good working relationship with some of the business community.

**Motion: Ms. Kay moved that the HPB present their idea to Council to move the project forward.**

**Seconded by Mr. Kakatsch;**

**Vote: Motion passed 5-0, with 2 members absent.**

Mr. Kakatsch suggested trying to use concrete benches, like the ones located at bus stops, etc., to advertise the historic sites and projects in town. This will be discussed again at a later date.

**Motion: Mr. Ryffel moved to adjourn as the HPB and reconvene as the LPA.**

**Seconded by Mr. Kosinski;**

**Vote: Motion passed 5-0, with 2 members absent.**

**VII. ADJOURN AS HPB AND RECONVENE AS LPA**

Reconvene at 10:30 AM with all above members still present.

**VIII. LPA MEMBER ITEMS AND REPORTS**

Mr. Kakatsch presented a few items of concern that he said he just wanted to bring up for discussion. His first concern is the municipal building and he thinks that this is the time to buy property. He asked if the beach has an “action” plan for the oil spill. Another concern is the Seafarer property at the beach and the tax loss involved if the County buys it. He also wonders about the progress on the north end of Estero Blvd. and beach renourishment. Mr. Ryffel advised that beach renourishment was discussed yesterday at the Council meeting and it is slowly moving forward but will not likely progress until after hurricane season. He said that these items are valid concerns but thought they would be better answered by the Council or the Town Manager. Some discussion ensued regarding the Seafarer property and Ms. Dalton updated the group with information she got during a recent meeting with County and other officials. The town was also asked to suggest uses they would be interested in for that property and she sees these items probably coming up for future discussions by the town. Dr. Shockey also advised that Keith Laakkonen is heavily involved in the town’s participation in the planning for the oil spill response and further detail from the countywide and regional plans would come from him. Lastly, Dr. Shockey said that the Estero Blvd. project is still ongoing but this is a slow process. Ms. Dalton stated that the council just approved night construction to move it along and referred to a “comprehensive” information packet online regarding this. It was suggested that a newsletter of sorts should be published to keep people advised. Ms. Kay reminded the group that there had been a weekly item in the newspaper by the Town Manager and asked if that was still a possibility. Ms. Dalton said it was last year but the current manager hasn’t adopted this practice. The LPA would like to see something like this again and/or ask the town manager to attend the LPA meetings, at least occasionally.

Mr. Ryffel advised that this is Attorney Anne Dalton’s last meeting. Ms. Dalton said that the town will now contract the firm of Fowler White, with attorney Jim Humphrey as the principal, to perform town and LPA services, with Ms. Dalton assisting as Special Counsel to the town to finish some specific projects. Mr. Ryffel read Resolution 2010-05, recognizing Ms. Dalton’s superior service:

*“Whereas Anne Dalton has served as served the LPA as LPA Attorney since April 4, 2005, and whereas Anne Dalton has served as served as Attorney to the Historic Preservation Board since April 4, 2005, and whereas during her tenure as LPA and HPB attorney, Anne Dalton has provided exemplary service to the Town of Fort Myers Beach, it is hereby resolved by the LPA of the Town of Fort Myers Beach, FL as follows: Anne Dalton is recognized for her outstanding work, outstanding guidance and dedicated*

*service to the Town of Fort Myers Beach. She created a positive and highly professional environment for the LPA and HPB while maintaining an attitude towards colleagues, citizens and staff during all discussions and deliberations. She discharged her duties with grace and highest ethical standards while respecting all laws, rules and regulations of the Town and the LPA. Her contribution to the progress, function and efficiency of the LPA has positively impacted the welfare of the Town of Fort Myers Beach and its citizens.”*

Mr. Ryffel said that it is well stated, yet understated. Ms. Dalton thanked the members and commended them on their dedication and service to the community.

**Motion: Ms. Kay moved to adopt Resolution 2010-05.**

**Seconded by Mr. Kakatsch;**

**Vote: Motion passed 5-0, with 2 members absent.**

**IX. LPA ATTORNEY ITEMS**

Ms. Dalton reported that the new town attorney, Mr. Humphrey may be assisted by Marilyn Miller.

**X. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Nothing to report.

**XI. LPA ACTION LIST REVIEW**

- Shipwreck-Oct. 12, 2010
- ROW-Residential Connection-TBD; Dr. Shockey
- LDC 613-14 10-25 Storm Water; TBD
- HPB Budget request for Town Council-Ms. Kay
- Resolution of HPB budget request-Ms. Dalton
- Post-disaster reconstruction/recovery-Ms. Dalton said she has provided the most recent draft of the ordinance to Council and will meet with the new attorney to make the change over and she will be sure he realizes that this is an urgent issue. She and Mr. Ryffel agree that this is of the utmost importance.

**XII. PUBLIC COMMENT**

No comment.

**XIII. ADJOURNMENT**

**Motion: Ms. Kay moved to adjourn.**

**Seconded by Mr. Kosinski;**

**Vote: Motion passes 5-0.**

Meeting adjourned at 11:17 AM.

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_

- End of document

RESOLUTION OF THE LOCAL PLANNING AGENCY OF  
THE TOWN OF FORT MYERS BEACH FLORIDA  
RESOLUTION NUMBER 2010-06  
FMBSEZ2010-0007 (Nemos on the Beach Resolution)

WHEREAS applicant Estero Beach Holdings, LLC ( "applicant") 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 located landward of an existing retaining wall but within the EC zoning district, to include beer, wine and liquor; and

WHEREAS the subject property is located at 1154 Estero Boulevard, Fort Myers Beach, FL 33931; and

WHEREAS the applicant has indicated that the STRAP for the subject property is 24-46-23-W3-000011.0000 and the legal description of the subject property is attached hereto as Exhibit "A" and hereby incorporated by reference; and

WHEREAS a public hearing on this matter was legally advertised and held before the Local Planning Agency (LPA) on June 8<sup>th</sup>, 2010; and

WHEREAS at the hearing the LPA gave full and complete consideration to the request of Applicant, recommendations of staff, the documents in the file, and the testimony of all interested persons, as required by Fort Myers Beach Land Development Code (LDC) Section 34-88.

IT IS HEREBY RESOLVED BY THE LPA OF THE TOWN OF FORT MYERS BEACH, FLORIDA, as follows:

Based upon the presentations by the applicant, staff, and other interested persons at the hearing, and review of the application and the standards for granting special exceptions, the LPA recommends the following findings of fact, conditions for approval, and conclusions for consideration by the Town Council:

The LPA recommends that the Town Council **APPROVE** the applicant's request for a special exception to permit consumption on premises of beer, wine and liquor in the DOWNTOWN zoning

**RECOMMENDED CONDITIONS OF APPROVAL:**

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 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 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.

### **RECOMMENDED FINDINGS AND CONCLUSIONS:**

In accordance with the requirements of LDC Sections 34-84 and 34-88 regarding consideration of eligibility for a special exception, the LPA recommends that the Town Council make the following findings and reach the following conclusions:

1. Changed or changing conditions **exist** that make the requested approval, as conditioned, 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 appeal in 1007. 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 Town Council determination 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.

2. The requested special exception, as conditioned, **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 other bars, hotels, restaurants 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.

3. The requested special exception, as conditioned, **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 administrative 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.

4. The requested special exception, as conditioned, **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.

5. The requested special exception, as conditioned, **will** be compatible with existing or planned uses and **will not** cause damage, hazard, nuisance or other detriment to persons or property:

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.

6. The requested special exception, as conditioned, **will** be in compliance with the applicable general zoning provisions and supplemental regulations pertaining to the use set forth in LDC Chapter 34:

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.

THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.

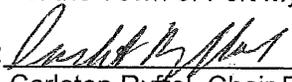
The foregoing Resolution was adopted by the LPA upon a motion by LPA Member Joe Kosinski and second by LPA Member Chuck Moorefield, and upon being put to a vote, the result was as follows:

Joanne Shamp, Chair absent  
Carleton Ryffel, Member/Chair Pro Tem aye  
Chuck Moorefield, Member aye  
John Kakatsch, Member nay

Bill Van Duzer, Vice Chair absent  
Rochelle Kay, Member nay  
Joe Kosinski aye

DULY PASSED AND ADOPTED THIS 8<sup>th</sup> day of June, 2010.

LPA of the Town of Fort Myers Beach

By:   
Carleton Ryffel, Chair Pro Tem  
For: Joanne Shamp, LPA Chair

Approved as to legal sufficiency:

By:   
Anne Dalton, Esquire  
LPA Attorney

ATTEST:

By:   
Michelle Mayher, Town Clerk

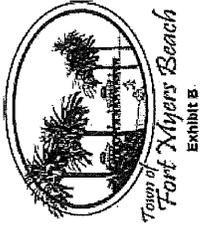
**Exhibit A**  
**SEZ2010-0007**

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:

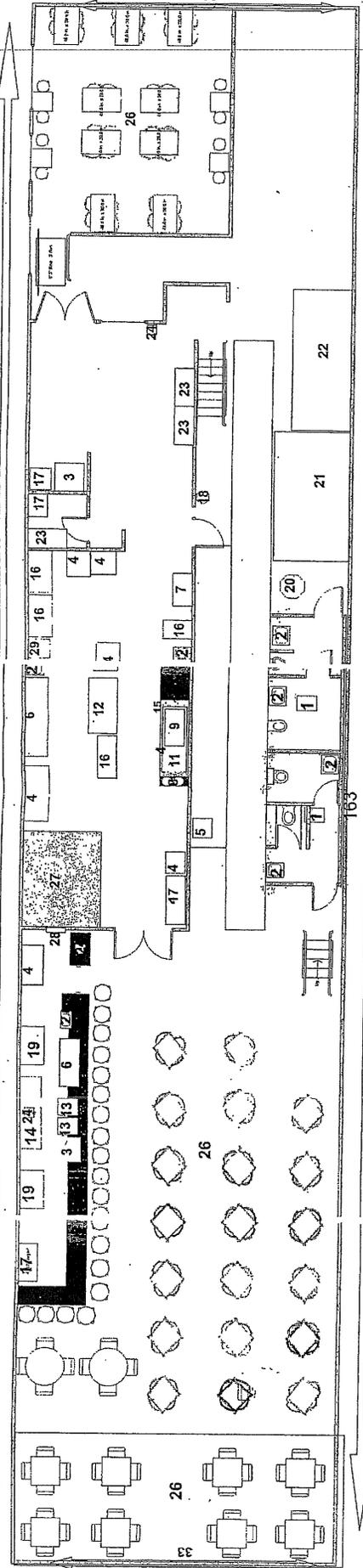
Commencing at the southwest corner of Block E, CRESCENT PARK ADDITION, as recorded in Plat Book 4, Page 46, Public Records of Lee County, Florida, on the east line of Section 24, Township 46 South, Range 23 East; thence S.00°44'25"E. on said east line for 53.28 feet to a point on the southerly right-of-way 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



163 feet



## Equipment List

1. Ventilation Fan
2. Hand Sinks
3. Ice Machine
4. Refrigerator/Freezer
5. Mop Sink
6. 3-Compartment sink w/drainboard
7. Steam Table
8. 2 Burner Stove
9. Flat - Top Griddle
10. Fryer
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

20. Grease Trap
21. Propane Tank Area
22. Dumpster Area
23. Dry Storage
24. POS System
25. Bar
26. Table & Chairs
27. Walk in Cooler
28. Draft Beer Taps
29. Steamer
30. Portable Fire Extinguish

**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:

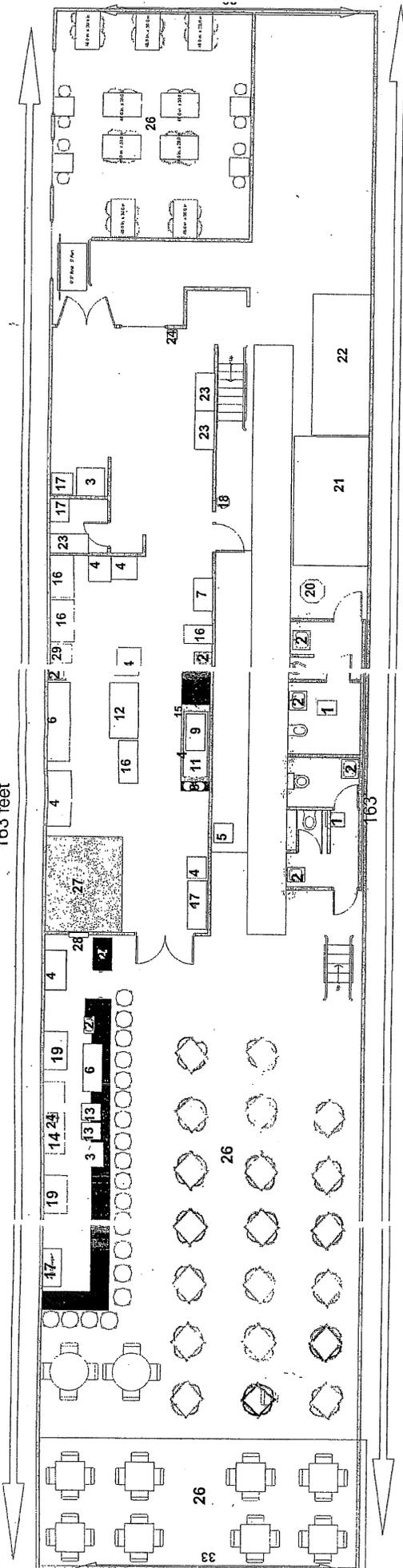
Commencing at the southwest corner of Block E, CRESCENT PARK ADDITION, as recorded in Plat Book 4, Page 46, Public Records of Lee County, Florida, on the east line of Section 24, Township 46 South, Range 23 East; thence S.00°44'25"E. on said east line for 53.28 feet to a point on the southerly right-of-way 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



163 feet



## Equipment List

- |                                    |                                 |
|------------------------------------|---------------------------------|
| 1. Ventilation Fan                 | 20. Grease Trap                 |
| 2. Hand Sinks                      | 21. Propane Tank Area           |
| 3. Ice Machine                     | 22. Dumpster Area               |
| 4. Refrigerator/Freezer            | 23. Dry Storage                 |
| 5. Mop Sink                        | 24. POS System                  |
| 6. 3-Compartment sink w/drainboard | 25. Bar                         |
| 7. Steam Table                     | 26. Table & Chairs              |
| 8. 2 Burner Stove                  | 27. Walk In Cooler              |
| 9. Flat - Top Griddle              | 28. Draft Beer Taps             |
| 10. Fryer                          | 29. Steamer                     |
| 11. Char Broiler                   | 30. Portable Fire Extinguishers |
| 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

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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 a 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, pre-dates 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 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 pub 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:

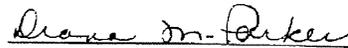
This Decision becomes final on the date rendered. A Hearing Examiner Decision may be appealed to the Circuit Court in Lee County. Appeals must be filed within thirty (30) days of the date the Hearing Examiner Decision is rendered.

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.

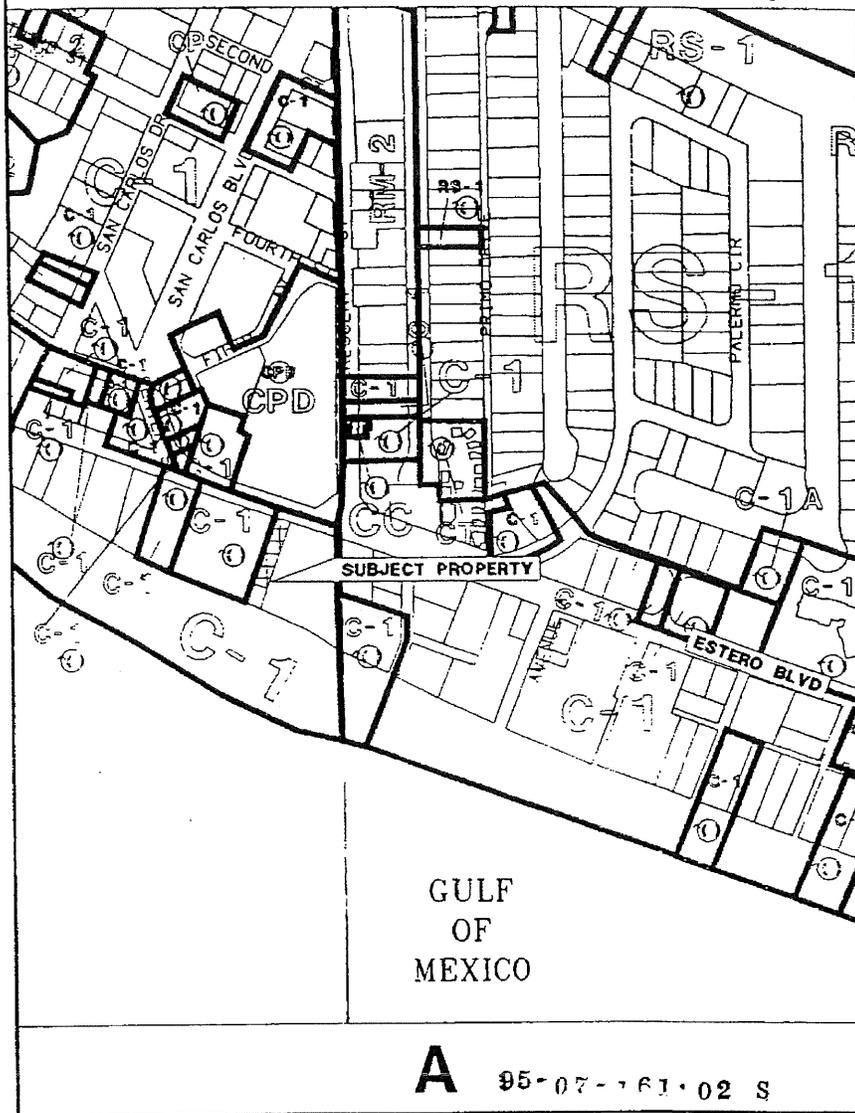
B. The original file and documents used at the hearing will remain in the care and custody of the Department of Community Development. The documents are available for examination and copying by all interested parties during normal business hours.

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:

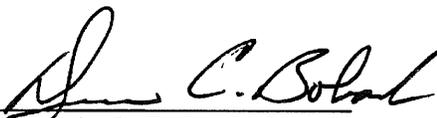
Dennis Boback, Mayor	AYE
Don Massucco, Vice Mayor	AYE
Garr Reynolds	AYE
Charles Meador, Jr.	AYE
William Shenko, Jr.	AYE

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

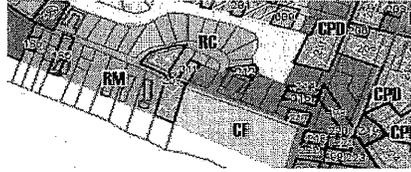
Approved as to form by:

  
Anne Dalton, Town Attorney

Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

**Town of Fort Myers Beach**  
Department of Community Development



Zoning Division

TOWN OF  
FORT MYERS BEACH

DEC - 3 2009

RECEIVED BY

**Supplement PH-A**

**Additional Required Information for a  
Special Exception Application**

This is the second part of a two-part application. This part requests specific information for a special exception. Include this form with the Request for Public Hearing form.

<b>Project Name:</b> Estero Beach Holdings, LLC dba Nemo's on the Beach
<b>Authorized Applicant:</b> Patrick Ciniello
<b>LeePA STRAP Number(s):</b> 24-46-23-W3-0011.0000

<b>Current Property Status:</b> Restaurant/Bar
<b>Current Zoning:</b> C-1
<b>Future Land Use Map (FLUM) Category:</b>
<b>Platted Overlay?</b> __yes__no <b>FLUM Density Range:</b>

**Requested Action:**

<input type="checkbox"/> Use of premises in the EC (Environmentally Critical) zoning district for:
<input checked="" type="checkbox"/> Use of premises in the <u>Downtown</u> zoning district for:
<u>CDP</u>

Case # \_\_\_\_\_  
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PART I  
Narrative Statements

**A. Request for:** (indicate the proposed use that requires a special exception)

Presently the location property is approved for a 2-COP beer and wine license used in conjunction with the restaurant.
With the resolution of the Town Council of the town of Fort Myers Beach, Florida Resolution # 07-13 the town approved the expansion of the alcoholic beverages and reduction of parking requirements. We request approval for a 4COP-SRX full service liquor license and extension of hours of operation to 11:00 a.m. to midnight Sunday through Thursday, 11:00 a.m. to 2:00 a.m. on Friday and Saturday. Live entertainment in the outside area would be limited to 10:00 p.m. nightly.

**B. Reasons for request:** (state how the property qualifies for a special exception and what impact granting the request could have on surrounding properties. Direct these statements toward the guidelines in LDC Section 34-88)

<b>The property qualifies for a Special Exception because:</b>
The property, with Resolution #07-13 dated February 20, 2007 allowed for the expansion of seating and on-premises consumption and is now licensed for 182 seats and qualifies for a 4COPSRX by State law. Currently one of the owners, Patrick Ciniello, has (6) 4COP/SBL licenses that he operates and has been in business for over 30 years in southwest Florida. Having the ability to have a full liquor license helps give the new business an equal chance to compete with the local bar and restaurants. The ability to have full service would not impact traffic since 75% of customers would be walking or coming off the beach.

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<b>Granting the requested Special Exception could impact surrounding properties as follows:</b>
The granting of the Special Exception would have a positive effect since it would add a new fresh concept alternative to visitors and locals with a long term operator who knows the market.
In this present economy Fort Myers Beach needs investors and businesses to help bring visitors and dollars to our community. The addition of this establishment will add 30+ jobs to the Fort Myers Beach area.

**PART 2**  
**Submittal Requirements**

All applications for a special exception must submit fourteen (14) copies of this application form and all applicable exhibits.

**Required Items**

- Public Hearing Request Form
- Supplemental form PH-A
- Site Plan (to scale) including the current use of all existing structures on the site, and those on adjacent properties within 100 feet of the perimeter; all proposed structures and uses for the site; and any proposed fencing and screening.

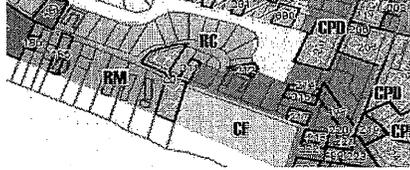
**For New Communication Towers:**

- a. Lee County Application for Communication Tower
- b. Shared-Use Plan Agreement

Case # \_\_\_\_\_  
 Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
 Date of Sufficiency/Completeness \_\_\_\_\_

**Town of Fort Myers Beach**  
 Department of Community Development



Zoning Division

**Application for Public Hearing**

This is the first part of a two-part application. This part requests general information required by the Town of Fort Myers Beach for any request for a public hearing. The second part will address additional information for the specific type of action requested.

<b>Project Name:</b> Nemo's on the Beach
<b>Authorized Applicant:</b> Patrick Ciniello
<b>LeePA STRAP Number(s):</b> 24-46-23-W3-0011.0000

<b>Current Property Status:</b>
<b>Current Zoning:</b>
<b>Future Land Use Map (FLUM) Category:</b>
<b>Platted Overlay? <u>  </u>yes<u>  </u>no    FLUM Density Range:</b>

Action Requested	Additional Form Required
<input checked="" type="checkbox"/> Special Exception	Form PH-A
<input type="checkbox"/> Variance	Form PH-B
<input type="checkbox"/> Conventional Rezoning	Form PH-C
<input type="checkbox"/> Planned Development	Form PH-D
<input type="checkbox"/> Master Concept Plan Extension	Form PH-E
<input type="checkbox"/> Appeal of Administrative Action	Form PH-F
<input type="checkbox"/> Development of Regional Impact	Schedule Appointment
<input type="checkbox"/> Other (cite LDC section number: _____)	Attach Explanation

**Town of Fort Myers Beach**  
**Department of Community Development**  
 2523 Estero Boulevard  
 Fort Myers Beach, FL 33931  
 (239) 765-0202

Case # \_\_\_\_\_  
Planner \_\_\_\_\_

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### PART I – General Information

#### A. Applicant:

Name(s):	Nemo's on the Beach/Estero Beach Holdings LLC		
Address: Street:	1154 Estero Boulevard		
City:	Ft Myers Beach	State:	FL Zip Code: 33931
Phone:	239-494-4747		
Fax:	239-947-4941		
E-mail address:	pciniello@qubicaamf.com or mosouth@aol.com		

#### B. Relationship of applicant to property (check appropriate response)

<input checked="" type="checkbox"/> Owner (indicate form of ownership below)
<input type="checkbox"/> Individual (or husband/wife) <input type="checkbox"/> Partnership
<input type="checkbox"/> Land Trust <input type="checkbox"/> Association
<input checked="" type="checkbox"/> Corporation <input type="checkbox"/> Condominium
<input type="checkbox"/> Subdivision <input type="checkbox"/> Timeshare Condo
<input type="checkbox"/> Authorized representative (attach authorization(s) as Exhibit AA-1)
<input type="checkbox"/> Contract Purchaser/vendee (attach authorization(s) as Exhibit AA-2)
<input type="checkbox"/> Town of Fort Myers Beach (Date of Authorization: _____)

#### C. Agent authorized to receive all correspondence:

Name:	Patrick Ciniello		
Mailing address: Street:	28351 S. Tamiami Trail		
City:	Bonita Springs	State:	FL Zip Code: 34134
Contact Person:	Patrick Ciniello		
Phone:	239-707-5939	Fax:	239-947-4941
E-mail address:	mosouth@aol.com or pciniello@qubicaamf.com		

#### D. Other agents:

Name(s):		
Mailing address: Street:		
City:	State:	Zip Code:
Phone:	Fax:	
E-mail address:		

Use additional sheets if necessary, and attach to this page.

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### PART II – Nature of Request

**Requested Action (check applicable actions):**

<input checked="" type="checkbox"/> Special Exception for: Liquor license & hours of operation
<input type="checkbox"/> Variance for:
<input type="checkbox"/> Conventional Rezoning from _____ to: _____
<input type="checkbox"/> Planned Development
<input type="checkbox"/> Rezoning (or amendment) from _____ to: _____
<input type="checkbox"/> Extension/reinstatement of Master Concept Plan
<input type="checkbox"/> Public Hearing of DRI
<input type="checkbox"/> No rezoning required
<input type="checkbox"/> Rezoning from _____ to: _____
<input type="checkbox"/> Appeal of Administrative Action
<input type="checkbox"/> Other (explain):

### PART III – Waivers

**Waivers from application submittal requirements:** Indicate any specific submittal items that have been waived by the Director for the request. Attach copies of the Director’s approval(s) as Exhibit 3-1.

Code Section Number	Describe Item

### PART IV – Property Ownership

<input type="checkbox"/> <b>Single owner</b> (individual or husband and wife)			
Name:			
Address:		Street:	
City:		State:	Zip Code:
Phone:		Fax:	
E-mail Address:			

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<input type="checkbox"/> <b>Multiple owners (including corporation, partnership, trust, association, condominium, timeshare condominium, or subdivision)</b>
Attach Disclosure Form as Exhibit 4-1
Attach list of property owners as Exhibit 4-2
Attach map showing property owners' interests as Exhibit 4-3 if multiple parcels are involved
For condominiums, timeshare condominiums, and subdivisions, see instructions.

### PART V – Property Information

#### A. Legal Description of Subject Property

Is the property entirely made up of one or more undivided platted lots officially recorded in the Plat Books of the Public Records of Lee County?
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
If yes:
Subdivision name: Crescent Park
Plat Book Number: 4348    Page: 3495    Unit:    Block: E    Lot:
If no:
Attach a legible copy of the metes and bounds legal description, with accurate bearings and distances for every line, as Exhibit 5-1. The initial point in the description must be related to at least one established identifiable real property corner. Bearings must be referenced to a well-established and monumented line.

#### B. Boundary Survey

Attach a Boundary Survey of the property meeting the minimum standards of Chapter 61G17-6 of the Florida Administrative Code, as Exhibit 5-2. A Boundary Survey must bear the raised seal and original signature of a Professional Surveyor and Mapper licensed to practice Surveying and Mapping by the State of Florida.
--

#### C. STRAP Number(s):

24-46-23-W3-0011.0000
-----------------------

#### D Property Dimensions:

Area:	square feet	acres
Width along roadway:	feet	Depth: feet

#### E. Property Street Address:

1154 Estero Boulevard, Fort Myers Beach, FL 33931
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Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

**F. General Location of Property (from Sky Bridge or Big Carlos Pass Bridge):**

North side of Sky Bridge - .8 miles. See attached map.
Attach Area Location Map as Exhibit 5-3

**G. Property Restrictions (check applicable):**

<input type="checkbox"/> There are no deed restrictions or covenants on this property that affect this request.
<input type="checkbox"/> Restrictions and/or covenants are attached as Exhibit 5-4
<input type="checkbox"/> A narrative statement explaining how the deed restrictions and/or covenants may affect the request is attached as Exhibit 5-5.

**H. Surrounding property owners:**

<input checked="" type="checkbox"/> Attach list of surrounding property owners (within 500 feet) as Exhibit 5-6
<input checked="" type="checkbox"/> Attach two sets of mailing labels as Exhibit 5-7
<input checked="" type="checkbox"/> Attach a map showing the surrounding property owners as Exhibit 5-8

**I. Future Land Use Category: (see Comprehensive Plan Future Land Use Map)**

<input type="checkbox"/> Low Density	<input type="checkbox"/> Marina
<input type="checkbox"/> Mixed Residential	<input type="checkbox"/> Recreation
<input type="checkbox"/> Boulevard	<input type="checkbox"/> Wetlands
<input checked="" type="checkbox"/> Pedestrian Commercial	<input type="checkbox"/> Tidal Water
<b>Is the property located within the "Platted Overlay" area on the Future Land Use Map? <input type="checkbox"/> Yes <input type="checkbox"/> No</b>	

**J. Zoning: (see official zoning map, as updated by subsequent actions)**

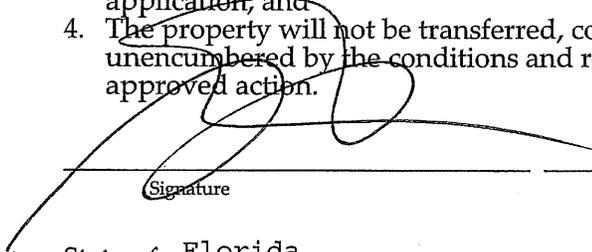
<input type="checkbox"/> RS (Residential Single-family)	<input type="checkbox"/> CM (Commercial Marina)
<input type="checkbox"/> RC (Residential Conservation)	<input type="checkbox"/> CO (Commercial Office)
<input type="checkbox"/> RM (Residential Multifamily)	<input type="checkbox"/> CB (Commercial Boulevard)
<input type="checkbox"/> VILLAGE	<input type="checkbox"/> SANTINI
<input type="checkbox"/> SANTOS	<input checked="" type="checkbox"/> DOWNTOWN
<input type="checkbox"/> IN (Institutional)	<input type="checkbox"/> RPD (Residential Planned Dev.)
<input type="checkbox"/> CF (Community Facilities)	<input type="checkbox"/> CPD (Commercial Planned Dev.)
<input type="checkbox"/> CR (Commercial Resort)	<input type="checkbox"/> EC (Environmentally Critical)
<input type="checkbox"/> BB (Bay Beach)	

**PART VI – Affidavit**

**Application Signed by Individual Owner or Authorized Applicant**

I, Patrick Ciniello, swear or affirm under oath, that I am the owner or the authorized representative of the owner(s) of the property and that:

1. I have full authority to secure the approval(s) requested and to impose covenants and restrictions on the referenced property as a result of any action approved by the Town in accordance with this application and the Land Development Code;
2. All answers to the questions in this application and any sketches, data, or other supplemental matter attached hereto and made a part of this application are honest and true;
3. I hereby authorize Town staff or their designee(s) to enter upon the property during normal working hours (including Saturdays and Sundays) for purposes reasonably related to the subject matter of this application; and
4. The property will not be transferred, conveyed, sold, or subdivided unencumbered by the conditions and restrictions imposed by the approved action.

  
 \_\_\_\_\_ Patrick Ciniello  
 Signature Typed or Printed Name

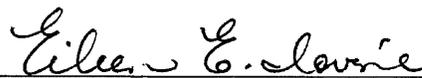
State of Florida  
 County of Lee

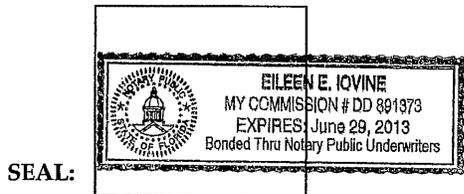
The foregoing instrument was sworn to (or affirmed) and subscribed

before me this 12/1/09 by Patrick Ciniello  
(date) (name of person under oath or affirmation)

who is personally known to me or produced \_\_\_\_\_  
(type of identification)

as identification.

  
 \_\_\_\_\_ Eileen E. Iovine  
 Signature of person administering oath Typed or Printed Name



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Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
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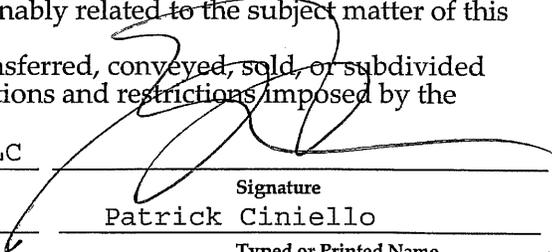
**PART VI – Affidavit**

**Application Signed by a Corporation, Limited Liability Company (LLC),  
Limited Company (LC), Partnership, Limited Partnership, or Trustee**

See attached explanatory notes for instructions

I, Patrick Ciniello, as President  
of Estero Beach Holdings, LLC, swear or affirm under oath, that I am  
the owner or the authorized representative of the owner(s) of the property and  
that:

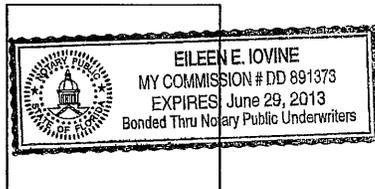
1. I have full authority to secure the approval(s) requested and to impose covenants and restrictions on the referenced property as a result of any action approved by the Town in accordance with this application and the Land Development Code;
2. All answers to the questions in this application and any sketches, data, or other supplemental matter attached hereto and made a part of this application are honest and true;
3. I hereby authorize Town staff or their designee(s) to enter upon the property during normal working hours (including Saturdays and Sundays) for purposes reasonably related to the subject matter of this application; and
4. The property will not be transferred, conveyed, sold, or subdivided unencumbered by the conditions and restrictions imposed by the approved action

<u>Estero Beach Holdings, LLC</u>	
Name of Entity (corporation, LLC, partnership, etc)	Signature
<u>President</u>	<u>Patrick Ciniello</u>
Title of Signatory	Typed or Printed Name

State of Florida  
County of Lee

The foregoing instrument was sworn to (or affirmed) and subscribed  
before me this 1st of December, 2009 by Patrick Ciniello  
Date Name of person under oath or affirmation  
who is personally known to me or who has produced \_\_\_\_\_  
Type of identification

as identification.  
Eileen E. Iovine Eileen E. Iovine  
Signature of person administering oath Typed or Printed Name



SEAL:

Case # \_\_\_\_\_  
Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

**EXHIBIT 4-1**  
**DISCLOSURE OF INTEREST FORM**

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

Attach additional sheets in the same format for each separate STRAP number in the application if multiple parcels with differing ownership are included.

1. If the property is owned in fee simple by an INDIVIDUAL, tenancy by the entirety, tenancy in common, or joint tenancy, list all parties with an ownership interest as well as the percentage of such interest.

Name and Address	Percentage

2. If the property is owned by a CORPORATION, list the officers and stockholders and the percentage of stock owned by each.

Name, Address, and office	Percentage
Patrick Ciniello, President	65%
28351 S. Tamiami Trail, Bonita Springs, FL 34134	
James H. Forrester, Treasurer	35%
1429 Colonial Blvd., Fort Myers, FL 33907	

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3. If the property is in the name of a TRUSTEE, list the beneficiaries of the trust and the percentage of interest.

Name and Address	Percentage

4. If the property is in the name of a GENERAL PARTNERSHIP or LIMITED PARTNERSHIP, list the names of the general and limited partners with the percentage of ownership.

Name and Address	Percentage

5. If there is a CONTRACT FOR PURCHASE, whether contingent on this application or not, regardless of whether a Corporation, Trustee, or Partnership is involved, list the names of the contract purchasers below, including the officers, stockholders, beneficiaries, or partners, and their percentage of stock.

Name, Address, and Office (if applicable)	Percentage

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Planner \_\_\_\_\_

Date Received \_\_\_\_\_  
Date of Sufficiency/Completeness \_\_\_\_\_

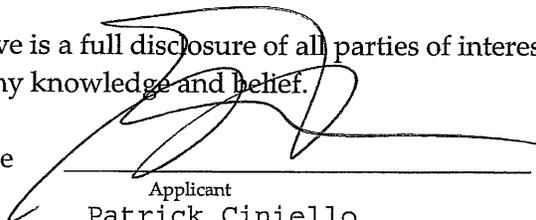
6. If any contingency clause or contract terms involve additional parties, list all individuals, or officers if a corporation, partnership, or trust.

Name and Address


For any changes of ownership or changes in contracts for purchase subsequent to the date of the application but prior to the date of final public hearing, a supplemental disclosure of interest must be filed.

The above is a full disclosure of all parties of interest in this application, to the best of my knowledge and belief.

Signature

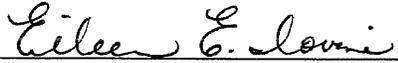


Applicant  
Patrick Ciniello

Printed or typed name of applicant

STATE OF Florida  
COUNTY OF Lee

The foregoing instrument was acknowledged before me this 1st day of December, 2009, by Patrick Ciniello who is personally known to me or who has produced \_\_\_\_\_ as identification and who did (or did not) take an oath.

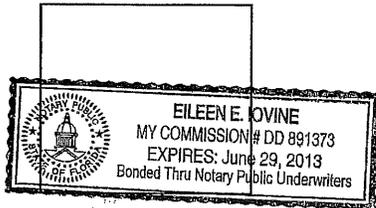


Signature of Notary

Eileen E. Iovine

Typed or Printed Name of Notary

SEAL:





# Lee County Property Appraiser

**Kenneth M. Wilkinson, C.F.A.**

GIS Department / Map Room

Phone: (239) 533-6159 • Fax: (239) 533-6139 • eMail: MapRoom@LeePA.org

## VARIANCE REPORT

**Date of Report:** December 01, 2009  
**Buffer Distance:** 500 ft  
**Parcels Affected:** 58  
**Subject Parcel:** 24-46-23-W3-00011.0000

<b>OWNER NAME AND ADDRESS</b>	<b>STRAP AND LOCATION</b>	<b>LEGAL DESCRIPTION</b>	<b>Map Index</b>
HUNTINGBURG PARTNERS LTD TODD MCGEE STE 1203 5294 SUMMERLIN COMMONS WAY FORT MYERS FL 33907	<b>24-46-23-W3-00006.0000</b> 1133-1155 ESTERO BLVD/FIFTH ST FORT MYERS BEACH FL 33931	BUSINESS CTR PHILLIPS PB 9 PG 9 LOTS 10 THRU 15 + OR 587/198 LESS R/W 2353/3036	1
CONSOLIDATED CONSTRUCTION CORP 6170 1ST FINANCIAL DR STE 30 BURLINGTON KY 41005	<b>24-46-23-W3-00009.0000</b> 1160 ESTERO BLVD FORT MYERS BEACH FL 33931	PARL IN SE 1/4 OF SE 1/4 SEC 24 TWP 46 RGE 23 DESC IN OR 1305 PG 0806	2
CONSOLIDATED REALTY HOLDINGS 1130 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>24-46-23-W3-00013.0000</b> 1130 ESTERO BLVD FORT MYERS BEACH FL 33931	PARL IN SE 1/4 S OF ESTERO BLVD DESC IN OR 1754 PG 3049	3
UNITED REALTY HOLDINGS INC EXCEL HOSPITALITY INC 6200 GULF BLVD ST PETE BEACH FL 33706	<b>24-46-23-W3-00014.0000</b> 1100 ESTERO BLVD FORT MYERS BEACH FL 33931	PARL LOCATED IN G L 1 SEC 24 TWP 46 RGE 23 PER OR 1720 PG 288	4
SANDS SUITES LLC 1080 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>24-46-23-W3-00015.0000</b> 1080 ESTERO BLVD FORT MYERS BEACH FL 33931	FRM SW COR BLK E CRESCENT PK ADD ON E LI SEC 24 RUN S ALG SD LI 53.24 FT TO S	5
STEER-MILL INC PO BOX 4026 FORT MYERS BEACH FL 33932	<b>24-46-23-W3-00016.0000</b> 1046 ESTERO BLVD FORT MYERS BEACH FL 33931	FROM SW COR BLK E CRESCENT PK ADD ON E LI SEC 24 RUN S ALG SD LI TO S LI CO RD	6
STEER-MILL INC PO BOX 4026 FORT MYERS BEACH FL 33932	<b>24-46-23-W3-00017.0000</b> 1028 ESTERO BLVD FORT MYERS BEACH FL 33931	FROM SW COR BLK E CRES PK ADD ON E LI SEC 24 RUN S ALG SD LI TO S LI CO RD TH	7
LIGHTHOUSE ISLAND RESORT INC 1051 FIFTH ST FORT MYERS BEACH FL 33931	<b>24-46-23-W3-00205.0060</b> 1051 FIFTH ST FORT MYERS BEACH FL 33931	BUSINESS CTR BLK 5 PB 9 PG 9 LT 6 + 10 THRU 18 E 865R/W LESR/W OR2353/3036	8
HUNTINGBURG PARTNERS LTD D TODD MCGEE STE 1203 5294 SUMMERLIN COMMONS WAY FORT MYERS FL 33907	<b>24-46-23-W3-00205.0070</b> PARKING LOTS FORT MYERS BEACH FL 33931	BUSINESS CENTER BLK 5 PB 935 PG 9 PT LOT 7 + LOTS 8 + 9	9
SEAFARERS 1997 INC 6170 FIRST FINANCIAL DR #301 BURLINGTON KY 41005	<b>24-46-23-W3-00206.0010</b> 1113 ESTERO BLVD FORT MYERS BEACH FL 33931	BUSINESS CENTER BLK 6 PB 9 PG 9 LOTS 1-4 LESS R/W + DESC OR 1904/4451	10
RICHARD JOHN W 237 OLD SAN CARLOS BLVD FORT MYERS BEACH FL 33931	<b>24-46-23-W3-00206.0050</b> 1054 FIFTH ST FORT MYERS BEACH FL 33931	BUSINESS CENTER BLK 6 PB 9 PG 9 LOT 5 R/W OR 1154 PG 1510	11
HUNTINGBURG PARTNERS LTD D TODD MCGEE STE 1203 5294 SUMMERLIN COMMONS WAY FORT MYERS FL 33907	<b>24-46-23-W3-00206.0060</b> 1150-1180 FIFTH ST FORT MYERS BEACH FL 33931	BUSINESS CENTER BLK 6 PB 9 PG 9 LOTS 6 THRU 9	12
PRIMEAU BEVERLY A TR 950 SAN CARLOS DR FORT MYERS BEACH FL 33931	<b>24-46-23-W3-00208.0060</b> 1035 ESTERO BLVD FORT MYERS BEACH FL 33931	BUSINESS CENTER BLK.8 PB 9 PG 9 LT 7 + LOT 6 LESS WLY 6 FT LESS ROW OR3539 PG3351	13

<b>OWNER NAME AND ADDRESS</b>	<b>STRAP AND LOCATION</b>	<b>LEGAL DESCRIPTION</b>	<b>Map Index</b>
KROHN INVESTMENTS LLC PO BOX 2518 FORT MYERS BEACH FL 33932	<b>24-46-23-W3-00208.0080</b> 1028 FIFTH ST FORT MYERS BEACH FL 33931	BUSINESS CENTER BLK 8 PB 9 PG 9 LOTS 8 + 9	14
FORD JAYNE 1/2 + 37 CEDAR ST NORWOOD MA 02062	<b>19-46-24-W4-0060H.0240</b> 136 PRIMO DR FORT MYERS BEACH FL 33931	VENETIAN GARDENS BLK H PB 6 PG 70 LOT 24	15
HODGES JAMES K + MARY G 124 PRIMO DR FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0060H.0250</b> 124 PRIMO DR FORT MYERS BEACH FL 33931	VENETIAN GARDENS BLK H PB 6 PG 70 LOT 25	16
MILLER JOHN T + MARTA R 314 W 4TH ST #400 BLOOMINGTON IN 47404	<b>19-46-24-W4-0060H.0260</b> 122 PRIMO DR FORT MYERS BEACH FL 33931	VENETIAN GARDENS BLK H PB 6 PG 70 PT LOT 26	17
EVERETT PAUL D 12081 COYLE RD FORT MYERS FL 33905	<b>19-46-24-W4-0060H.026A</b> 120 PRIMO DR FORT MYERS BEACH FL 33931	VENETIAN GARDENS BLK.H PB 6 PG 70 PT LTS 26 31 32	18
MERTENS RAYMOND J SR + SUSAN 56 OAK CREEK DR YORKVILLE IL 60560	<b>19-46-24-W4-0060H.0300</b> 1249 ESTERO BLVD FORT MYERS BEACH FL 33931	VENETIAN GARDENS BLK H PB 6 PG 70 LOTS 30 31+32 + PT LT 29 OR2414/2433	19
GANIM PROPERTIES LLC 4666 MAIN ST BRIDGEPORT CT 06606	<b>19-46-24-W4-0140A.0010</b> 1240 ESTERO BLVD FORT MYERS BEACH FL 33931	CRESCENT PARK BLK.A PB 4 PG 39 LOTS 1 2 8 9 AND BLK C LOT 3 LESS E 2.5 FT	20
VANSELOW SCOTT + 1204 ESTERO BLVD #06 FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0140A.0030</b> 1204 ESTERO BLVD #06 FORT MYERS BEACH FL 33931	CRESCENT PARK BLK A PB 4 PG 39 LOTS 3 THRU 7	21
LIBERTY BANK 4949 N TAMIAMI TRL NAPLES FL 34103	<b>19-46-24-W4-0140B.0010</b> 1188/1190 ESTERO BLVD FORT MYERS BEACH FL 33931	CRESCENT PARK BLK B PB 4 PG 39 LOT 1	22
LIBERTY BANK 4949 N TAMIAMI TRL NAPLES FL 34103	<b>19-46-24-W4-0140B.0020</b> 1172/74 ESTERO BLVD FORT MYERS BEACH FL 33931	CRESCENT PARK BLK B PB 4 PG 39 LOTS 2 + 3 + 6	23
LIBERTY BANK 4949 N TAMIAMI TRL NAPLES FL 34103	<b>19-46-24-W4-0140B.0040</b> 231 CANAL ST FORT MYERS BEACH FL 33931	CRESCENT PARK BLK B PB 4 PG 39 LOT 4	24
LIBERTY BANK 4949 N TAMIAMI TRL NAPLES FL 34103	<b>19-46-24-W4-0140B.0050</b> 221 CANAL ST FORT MYERS BEACH FL 33931	CRESCENT PARK BLK B PB 4 PG 39 LOT 5	25
CONSOLIDATED CONSTRUCTION CORP 1160 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0140B.0070</b> 1160 ESTERO BLVD FORT MYERS BEACH FL 33931	CRESCENT PARK BLK B PG 4 PG 39 LTS 7 THRU 9 + LAND DESC IN OR 1305 PG 0796	26
BISCHOFF JAMES A + JEAN B TR 21570 MADERA RD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0150D.0060</b> 141 PRIMO DR FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK D PB 4 PG 46 LT 6 + VAC RW + LAND ADJ CANAL	27
GREENE JEFFREY W + 6040 BAYVIEW RD SAINT LEONARD MD 20685	<b>19-46-24-W4-0150D.0070</b> 143 PRIMO DR FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK D PB 4 PG 46 LT 7 + VAC RW + LAND ADJ CANAL	28
PATTON T D + CHRISTINE M 153 PRIMO DR FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0150D.0080</b> 153 PRIMO DR FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK D PB 4 PG 46 LT 8 + VAC RW + LAND ADJ CANAL	29
BOGGS RICHARD A + MARGARET A 163 PRIMO DR FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0150D.0090</b> 163 PRIMO DR FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK D PB 4 PG 46 LT 9 + VAC RW + LAND ADJ CANAL	30
MALLOUS JAMES ETAL 14061 BRANT POINT CIR #743 FORT MYERS FL 33919	<b>19-46-24-W4-0150E.0010</b> 1161/1165 ESTERO BLVD FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK E PB 4 PG 46 PT LTS 1 + 2 OR0545/43LESR/W 2353/3036	31
CERMAKS SURF CLUB LLC 1167 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0150E.001A</b> 1167 ESTERO BLVD FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK E PB 4 PG 46 BEG ON NLY SI CO RD 80 FT	32

<b>OWNER NAME AND ADDRESS</b>	<b>STRAP AND LOCATION</b>	<b>LEGAL DESCRIPTION</b>	<b>Map Index</b>
BRIDGE GEORGE E + KIM ANN 116 CRESCENT ST FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0150E.0030</b> 108/116 CRESCENT ST FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK E PB 4 PG 46 LT 3	33
REICH JOHN R + 120 CRESCENT ST FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0150E.0040</b> 118/22 CRESCENT ST FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK E PB 4 PG 46 LT 4 + S10 FT LOT 5 LES R/W2353/3036	34
URSOLEO JAY F + KARIN M 1/2 + 9017 LIGON CT FORT MYERS FL 33908	<b>19-46-24-W4-0150E.0060</b> 150 CRESCENT ST FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK E PB 4 PG 46 LTS 6 + 7 + 32.67 FT ADJ + N 40 FT OF LOT 5 + VAC + ADJ CANAL LESS R/W OR2353/3036	35
RICHARD JOHN W TR 237 OLD SAN CARLOS BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0150E.0080</b> 170 CRESCENT ST FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK E PB 4 PG 46 LT 8 + VAC R/W+ LAND ADJ LESR/WOR2353/3036	36
RICHARD JOHN W L/E 237 OLD SAN CARLOS BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-0150E.0090</b> 202 CRESCENT ST FORT MYERS BEACH FL 33931	CRESCENT PARK ADD BLK E PB 4 PG 46 LOTS 9 10 + VAC + LAND ADJ LESR/W2353/3036	37
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0010</b> 1207 ESTERO BLVD #1 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 1 AKA ABALONE	*38
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.001A</b> 1207 ESTERO BLVD #1A FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 1A AKA ANGEL WING	*38
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0020</b> 1207 ESTERO BLVD #2 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 2 AKA BUBBLE	39
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0030</b> 1207 ESTERO BLVD #3 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 3 AKA COQUINA	40
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0040</b> 1207 ESTERO BLVD #4 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 4 AKA DOSINA	41
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0050</b> 1207 ESTERO BLVD #5 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 5 AKA ENGINA	42
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0060</b> 1207 ESTERO BLVD #6 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 6 AKA-FORREIA	43
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0070</b> 1207 ESTERO BLVD #7 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 2733 UNIT 7 AKA GAZA	44
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0080</b> 1207 ESTERO BLVD #8 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 8 AKA HAYALIAA	45
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0090</b> 1207 ESTERO BLVD #9 FORT MYERS BEACH FL 33931	SILVER SAND RESORT CONDO OR 1662 PG 1362 UNIT 9 AKA IMPERIAL HARP	46
SILVER SANDS RESORT CONDO ASOC 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.00CE</b> HDR: SILVER SANDS FORT MYERS BEACH FL 33931	A CONDOMINIUM LOCATED IN SEC 19 TWP 46 RGE 24 AS DESC IN OR 1662 PG 1362 COMMON ELEMENTS	47
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0100</b> 1207 ESTERO BLVD #10 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 10 AKA KINGS HELMENT	*48
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.010A</b> 1207 ESTERO BLVD #10A FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 10A AKA JEWEL BOX	*48

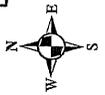
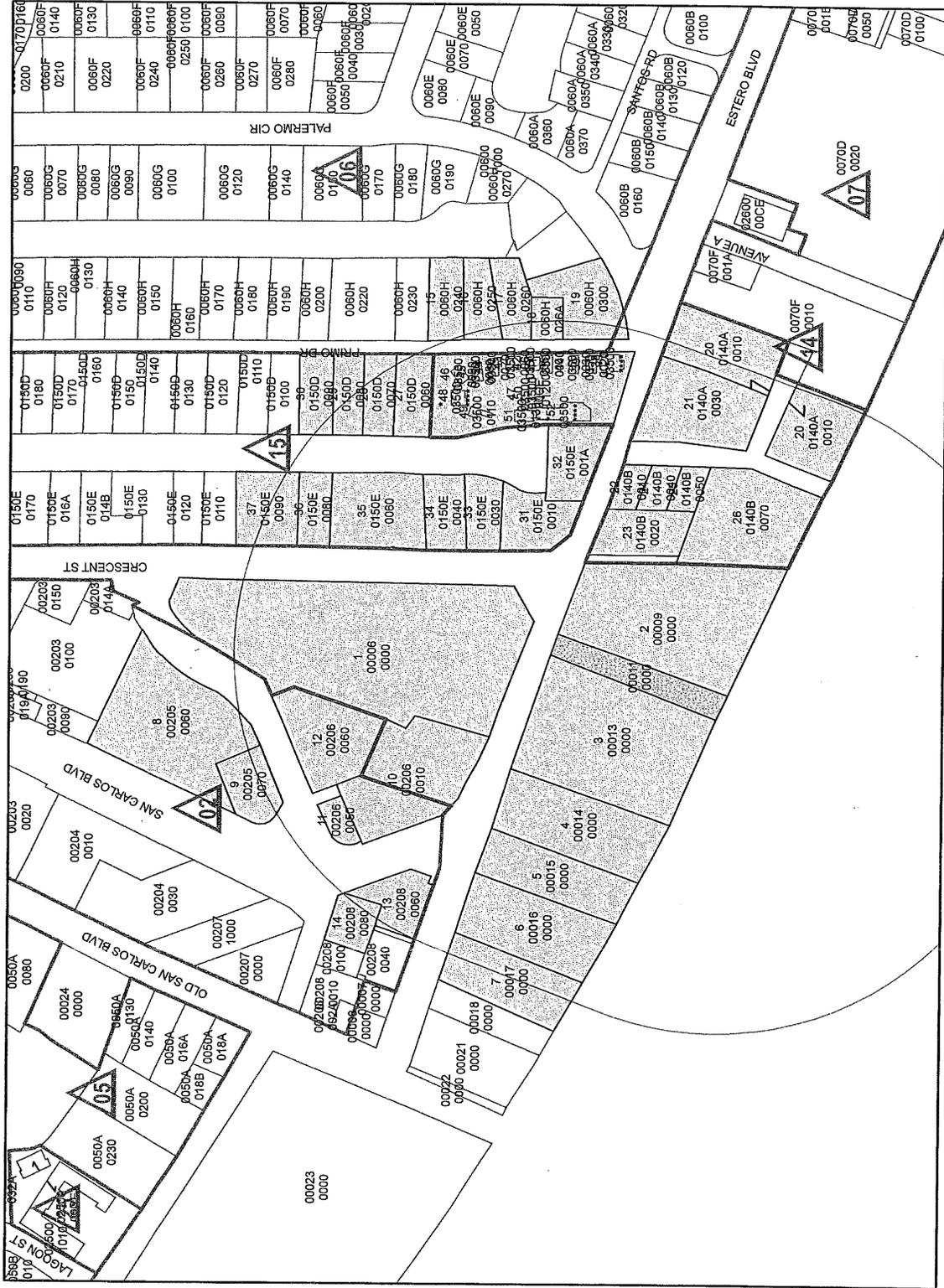
<b>OWNER NAME AND ADDRESS</b>	<b>STRAP AND LOCATION</b>	<b>LEGAL DESCRIPTION</b>	<b>Map Index</b>
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0110</b> 1207 ESTERO BLVD #11 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 11 AKA LUCINE	49
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0120</b> 1207 ESTERO BLVD #12 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 12 AKA OLIVE	50
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0130</b> 1207 ESTERO BLVD #13 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 13 AKA #16-MACOMA	51
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.0140</b> 1207 ESTERO BLVD #14 FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 14 AKA PERIWINKLE	*52
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.014A</b> 1207 ESTERO BLVD #14A FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 14A AKA RISSONIA	*52
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.014B</b> 1207 ESTERO BLVD #14B FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 14B AKA SUNDIAL	*52
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.014C</b> 1207 ESTERO BLVD #14C FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 14C AKA NUTMEG	*52
GROVES THOMAS + 1207 ESTERO BLVD FORT MYERS BEACH FL 33931	<b>19-46-24-W4-03500.014D</b> 1205 ESTERO BLVD FORT MYERS BEACH FL 33931	SILVER SANDS RESORT CONDO OR 1662 PG 1362 UNIT 14D AKA OLIVE	*52

**58 RECORDS PRINTED**

# VARIANCE REPORT

12/1/2009

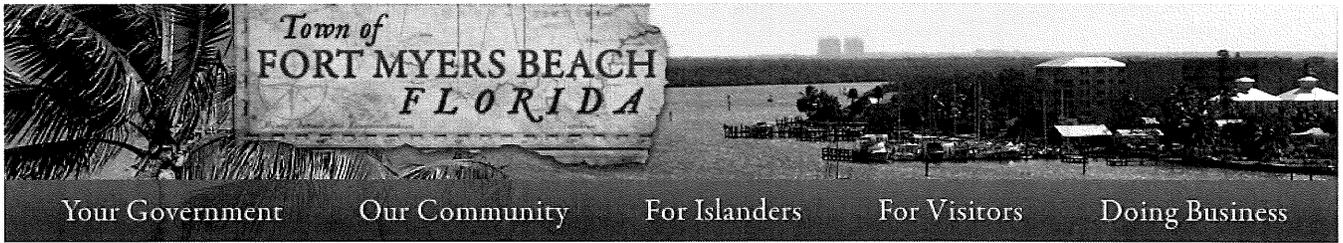
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24-46-23-W3-00011.0000

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### August 10, 2010

**FORT MYERS BEACH  
LOCAL PLANNING AGENCY (LPA)**  
Town Hall – Council Chambers  
2523 Estero Boulevard  
Fort Myers Beach, Florida  
August 10, 2010

#### AGENDA [all time frames are informational and approximate]

- 9:00 AM
- I. Call to Order
  - II. Pledge of Allegiance
  - III. Invocation
  - IV. Minutes 5 minutes
    - A. [Minutes of July 13, 2010](#)
  - V. Administrative Agenda
    - A. Review of [FY 2011 Capital Improvement Plan](#) 15 minutes
  - VI. Adjourn as LPA and reconvene as Historic Preservation Board
  - VII. Administrative Agenda
    - A. Discussion of [HPB Report to Town Council](#) on COP for Aug 16, 2010 15 minutes
  - VIII. HPB Member Items or Reports 10 minutes
  - IX. Adjourn as Historic Preservation Board and reconvene as LPA
  - X. LPA Member Items and Reports 10 minutes
  - XI. LPA Attorney Items 5 minutes
  - XII. Community Development Director Items 5 minutes
  - XIII. [LPA Action Item List](#) Review 10 minutes
  - XIV. Public Comment
  - XV. Adjournment

Next Meeting: September 14, 2010, 9:00 AM

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**MINUTES  
FORT MYERS BEACH  
Local Planning Agency**

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

**Tuesday, August 10, 2010**

**I. CALL TO ORDER**

Meeting was called to order at 9:00 AM by Joanne Shamp. Other members present:

Joe Kosinski  
Rochelle Kay  
John Kakatsch  
Carleton Ryffel  
Bill Van Duzer  
Chuck Moorefield-excused absence

LPA Attorney James Humphrey

Staff present: Terry Stewart, Town Manager  
Evelyn Wicks, Finance Director

**II. PLEDGE OF ALLEGIANCE and INVOCATION**

Rochelle Kay

**III. MINUTES**

A. Minutes of July 13, 2010

**Motion: Mr. Ryffel moved to accept the minutes, as recorded, with noted clarification.**

**Seconded by Mr. Van Duzer;**

**Vote: Motion passed 6-0;**

**IV. ADMINISTRATIVE ADGENDA**

A. Review of FY 2011 Capital Improvement Plan

Ms. Shamp gave a brief overview and explanation for the benefit of new members before yielding to Mr. Stewart.

Mr. Stewart referred to the proposed CIP before the members and opened up for questions and comments. Ms. Shamp stressed the importance of this report to the new members and asked that they read and understand it, adding that they should not hesitate to ask questions if they have any. She also asked Ms. Wicks to explain certain portions of her report as they are discussed to be sure there is a full understanding of the terms and elements.

Ms. Wicks explained that all of the projects in this CIP are continuation projects and said that next year the remaining balance will appear in the report because these are funded with existing cash or grants that are already in hand. She said that there has been nothing new added to this report and continued to explain how this works,

including an explanation of a “capital improvement.” Ms. Shamp added that this is the only part of the budget that the LPA is involved in. She asked Ms. Wicks to explain the water utility, which she said is a separate corporation. Ms. Wicks stated that it is a “blended component” of the city’s financial structure, with a separate audit. For the general fund departments, with the exception of the water utility, a separate capital projects fund is set up and when money is spent for that project, the money is moved over to meet the expense. Mr. Stewart added that many government entities pay water and sewer utilities systems with an enterprise fund, which is a totally separate fund that is accounted and managed separate from any other monies. He said that an enterprise fund operates somewhat like a business and he is confused as to the reasoning for having this set up in this manner. Mr. Humphrey added that his firm is looking into the operation of the entity that operates the FL water system and whether it should be changed.

Ms. Wicks then guided the members through their budget packets, explaining each portion. Mr. Kakatsch asked if the North Estero Project is moving along. Mr. Stewart answered that it is but there have been some delays, created by TECO, dealing with underground lines, etc.

Ms. Wicks continued that there are no new additions, other than the “side street” resurfacing, which she hopes to add that every year. Mr. Stewart gave an explanation of funding specifications and formulas as well as how population affects this system. He said that there needs to be a more equitable dissemination of state funds and they will be working on changing this process in the future months.

Lastly, Ms. Wicks pointed out the last page of the report, specifically the grants and other funding sources that the Town has been diligent in searching for. Ms. Kay asked where the funding comes from for beach nourishment and Ms. Wicks responded that initially that fund was established with a transfer from the general fund, the rest being interest earnings on that investment, so if the Town should decide to use that money for something else in the future, there is no restriction to stop them. Certain impact fees are restricted by law, but the beach nourishment is not.

Mr. Ryffel asked about undergrounding utilities for the N. Estero project. Mr. Stewart said that there is not a “yes or no” answer at this point. He added that they are still working with the utility companies, etc. on these issues. Some discussion ensued about this and the associated costs.

Ms. Shamp asked if there are any laws regulating the addition of any other capital improvements. Ms. Wicks said that she didn’t think so but that, if needed, the Town would probably only adjust the budget without having to change the CIP.

Mr. Ryffel also inquired about impact fees and how they are charged, as well as park impact fees. Ms. Wicks was not sure if the park impact fees are charged to both residential and commercial. Mr. Stewart also did not know but said he will get back to him with the answer.

Ms. Shamp asked for public comment on the CIP; no public comment. She asked the LPA members to carefully review this and said that the attorney will have a draft

resolution for the next meeting. Ms. Shamp also gave a brief review of the process from last year, adding that one of the biggest problems then was the addition of restrooms at beach accesses and if that was in the Comp Plan. Mr. Kakatsch asked if there is a plan for restrooms and Mr. Stewart responded that it is actually happening at this moment. He said he will present a proposal for spacing them to the Council on Monday, along with the cost. Brief discussion ensued about the restrooms.

B. Discussion of HPB Report to Council on COP for August 16, 2010

This presentation to Council was to address the lack of response on the resolution the LPA passed regarding the COP expansion, as well as the routine annual report of LPA activity. Some members had reviewed this in advance and Ms. Shamp opened it up for discussion.

Ms. Kay referred to a \$2000.00 line item for the HPB in the budget and asked if this is accurate. Mr. Stewart said he does not have an answer at this time. Mr. Van Duzer commented that he did not receive his packet in advance and was unable to read it. He did comment that the storm water issue is ongoing and well overdue, especially since the long-awaited survey is now complete. Ms. Shamp also added comments about the frustration on the part of the LPA with the lack of communication and/or feedback from Council concerning these outstanding items. She again urged the members to attend the Council meeting to help express their concerns to the Council.

Ms. Kay said that she also understood that there would be a joint workshop for these items with Council but the workshop took place without their input. Mr. Stewart corrected that the workshop has been scheduled on the right-of-way issue for Oct. 4<sup>th</sup>. There was discussion about the overall storm water management system problems.

Ms. Shamp asked if there was a consensus that some members attend the Council meeting. Members agreed that Mr. Van Duzer will attend.

Ms. Shamp pointed out that there have been many hearings on the COP issue with still no response as to direction from Council. She added that the sign ordinance is another issue they have been working on diligently and that there is still no direction from Council on this either. Mr. Humphrey commented that his firm may be partially to blame for the delay since they've been looking at this ordinance and agree that it still needs work. He said his firm will be sending a recommendation to Council on this and suggested that the LPA advise them that they still want to be involved. Ms. Shamp pointed out that, not only do they want to be involved but that they have a responsibility to be. Mr. Stewart pointed out that some municipalities were involved in legal battles due to changes to their ordinances, some which were found to be unconstitutional. Therefore, the whole ordinance needed to be carefully reviewed again to be sure that the general philosophies of the Town are not significantly altered.

Ms. Kay brought up the sign ordinance and said that the LPA had several hearings on specific signs and had come up with certain specifications. She pointed out that once a question of constitutionality came up, the Council decided to take over making the decisions on signs.

Mr. Ryffel asked if this depends on the attorneys making decisions according to case law once they review the ordinance and the code provisions. Mr. Humphrey agreed that this is basically the way it will work.

Ms. Shamp reiterated that the LPA takes their tasks very seriously and they hold the Comp Plan and the LDC as their “bible” so they do not seek to change things that do not need changing.

Mr. Humphrey brought up the parking code changes that the LPA recommended. He said this was presented at the last meeting and referred to certain “options” in the proposal and asked for the options chosen. He will request a copy of the minutes from the meeting to address this.

Mr. Stewart reported that the candidate they had chosen for the zoning position turned the job down so that position may go to the second choice. The position of Community Development Director is still not filled but there were about 28 applications reviewed and interviews will be set up next week.

**Motion: Mr. Van Duzer moved to adjourn as the LPA and reconvene as the HPB.  
Seconded by Ms. Kay;  
Vote: Motion passed 6-0.**

**V. ADJOURN AS LPA-RECONVENE AS THE HPB**

Ms. Kay called the meeting to order at 10:43 AM. She reported that she spoke with the Sandpiper about the error in the article they ran; it will be corrected.

Ms. Kay reported said that the HPB would like to move ahead on the Historic Recognition issue and plans to use the \$2000.00 remaining in the budget for that; however, she said this needs to be put on hold until there is a new Community Development Director.

Ms. Shamp pointed out the items she included in the aforementioned report to Town Council dealing with the HPB and the progress in placing the Historic Recognition plaques on their respective structures.

**Motion: Mr. Kakatsch moved to adjourn as the HPB and reconvene as the LPA.  
Seconded by Mr. Kosinski;  
Vote: Motion passed 6-0.**

**VI. ADJOURN AS HPB AND RECONVENE AS LPA**

Reconvene at 10:50 AM with all above members still present.

**VII. LPA MEMBER ITEMS AND REPORTS**

Ms. Shamp reported that the expiring LPA terms for October are Mr. Ryffel, Ms. Shamp and Mr. Van Duzer and these members should resubmit their applications for re-appointment. At the meeting following those term renewals, nominees for the Chair and Vice Chair positions will be discussed.

**VIII. LPA ATTORNEY ITEMS**

Mr. Humphrey had nothing to report.

**IX. COMMUNITY DEVELOPMENT DIRECTOR ITEMS**

Nothing further to report.

**X. LPA ACTION LIST REVIEW**

- Resolution 2009-24 COP expansion on the beach; August 16-Shamp
- Amendments to Parking Regulations-August 16-Ms. Kay

**Future Work Activities**

- Shipwreck-10/12
- ROW Residential Connection; August 16-Van Duzer
- LDC 613-14 10-25 Storm Water; TBD
- Sign ordinance-Ms. Miller; TBD
- CIP Resolution-Ms. Miller; Sept. 14
- HPB Vistas/Historical Designation Line item-Ms. Kay-TBD
- Post-disaster reconstruction/recovery-TBD; Ms. Miller

**XI. PUBLIC COMMENT**

Mr. Lee Melsek welcomed Mr. Van Duzer back. Mr. Melsek expressed his pleasure that the sign ordinance will be addressed by the LPA and added that the sign laws are being enforced and sees this firsthand. Mr. Melsek also encouraged the LPA to preserve the historic structures and the standards for them that are in effect now, begging them to research locations to relocate any historic buildings that may be in jeopardy of being lost.

**XII. ADJOURNMENT**

**Motion: Mr. Van Duzer moved to adjourn.**

**Seconded by Mr. Kakatsch;**

**Vote: Motion passes 6-0.**

Meeting adjourned at 11:12 AM.

Adopted \_\_\_\_\_ with/without changes. Motion by \_\_\_\_\_  
(DATE)

Vote: \_\_\_\_\_ Signature: \_\_\_\_\_

- End of document

**LPA/HPB Report to Town Council**  
**August 16, 2010**

The LPA and HPB have passed a total of 31 resolutions in 2009 and 8 resolutions to date in 2010. In addition, considerable time has been spent on issues relating to Right of Way, Storm Water Management, Noise Control, Hours of Operation for COP and Historic Recognition of Structures by the HPB in conjunction with its sub-committee, the HAC.

**HISTORIC PRESERVATION**

A total of 11 HPB and or LPA resolutions were passed in 2009 relating to historic structures and properties including the Newton Cottage, Seven Seas and the Mound House. (Resolutions 2009-01HPB, 2009-02HPB, 2009-03HPB, 2009-04HPB, 2009-06HPB, 2009-07HPB, 2009-08HPB, 2009-09HPB, 2009-10HPB, 2009-14HPB, 2009-15). The HPB/HAC is successfully underway in the process of placing the Historic Designation plaques on structures with several ceremonies completed to date. They have begun the process for the Historic Significance plaque program and seek a line budget item in the Town budget for this important plaque/brochure program benefitting historic preservation in the town.

**LPA POLICIES AND PROCEDURES**

The LPA PnP manual was updated with 5 resolutions relating to procedures, membership and CIP function. (2009-01, 2009-17, 2009-21, 2009-26)

**RECOGNITIONS**

With several changes in membership and staff, there have been 6 resolutions of recognition for service to the LPA/HPB. (Barnes 2009-11, Yerkes 2009-12, Weimer 2009-25, Green 2009-30, Dalton 2010-05, Shockey 2010-08)

**LAND USE**

Two hearings with resolutions have related to land use for specific parcels (2009-13, 2010-03), one of which resulted in a small scale amendment to our Comprehensive Plan.

**REFUSE CONTAINERS**

Two resolutions were passed to update regulations for refuse management, refuse containers, lids and the shielding of containers. (2009-28, 2010-01)

**SEASONAL PARKING**

The LPA studied the seasonal parking issue and passed Resolution 2010-04 with changes to improve the appearance and function of seasonal parking lots within the town.

### **RIGHT OF WAY (ROW) AND STORM WATER MANAGEMENT**

This is an ongoing issue that the LPA has spent many hours studying. Much of the work is stalled and awaiting the ROW survey report and a storm water management work session that was to be planned to properly inform the LPA regarding these issues and the LDC and COMP PLAN. Work is also underway on driveways and apron connections in the ROW. One resolution has been passed to date (2009-19) for the San Carlos Boulevard ROW agreement. He LPA seeks to be invited to a work session on these topics as soon as the information is available.

### **ALCOHOL EXPANSION, CONSUMPTION ON PREMISES (COP), NOISE, HOURS OF OPERATION**

The LPA has spent considerable time studying these issues, and seeks guidance from Town Council. Specifically, there is a desire to create consistency in the policy and regulation of these issues within the town. The LPA passed Resolution 2009-24 which clearly stated the LPA's opposition to expansion of the service of alcohol onto the beaches of our Town. The LPA has waited for over eight months for a response from Town Council on this vital issue. During this waiting period, the LPA has continued to be faced with three hearings for COP expansion (2009-29, 2010-02, 2010-06) without guidance from Council on this matter.

### **SIGN ORDINANCE**

The sign ordinance was brought before the LPA recently, and with the resignations of the Community Development Director and the LPA Attorney, the issue appears to have been removed from the LPA action list without consideration by the LPA. The LPA seeks direction from Town Council as to whether the sign ordinance will be reviewed by the LPA.

### **CIP**

The LPA has designated member Rochelle Kay as the LPA representative for the CIP. She will coordinate with the Town Manager in assuring that the CIP reaches the LPA for review in a timely manner. The review began at the August LPA meeting.

### **ISSUES OF PRIORITY**

As discussed at the joint Town Council/LPA work session of May 5, 2010, the LPA is awaiting guidance from Council on the following issues, some already determined high priority at that meeting, and some as were further described above:

- Post Disaster Reconstruction Ordinance
- Revisit LDC Chapter 10
- COP Expansion/Noise/Entertainment Zoning

- Beach Technology
- Storm Water Management / ROW
- Sign Ordinance
- Beach Raking
- Approval of Budget Item for Historic Significance Plaque Program

Respectfully submitted by Joanne K. Shamp, Chair, Land Planning Agency