

Memorandum

To: LPA

From: Walter Fluegel, Community Development Director

A handwritten signature in black ink, appearing to read 'W. Fluegel'.

Date: April 4, 2011

Re: Extension of COP in EC Zoning District-Working Draft

As a Workshop item, I've attached our working draft of an approach to allowing and regulating extension of premises into the EC Zoning District. Based upon the previous direction received from Town Council, we are working on an approach to allowing extension of COP into EC through an Administrative Approval process for existing establishments with COP, while requiring future establishments to go through the Special Exception process.

The working draft is considering the approach of allowing expansion of COP into EC through an administrative approval process, subject to numerous conditions and requirements, including hours of service on the beach, signage requirements to restrict the movement of alcohol from one property to another, provisions for revocation, conditions to reduce litter and require bio-degradable cups. We are requesting your review and comments on this approach. Also, we are looking for your input on specific conditions or requirements that we should consider and other potential factors to consider.

We appreciate your taking the time and effort to provide us feedback on this work in progress.

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

Exhibit A

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 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

- 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 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

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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:

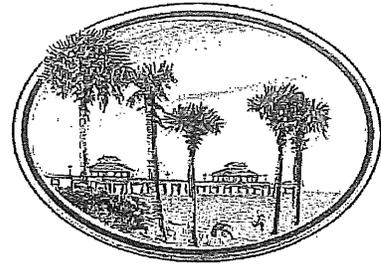
- (1) Boating, with no motors permitted except electric trolling motors.
- (2) Fishing
- (3) Removal of intrusive exotic species or diseased or dead trees, and pest control.
- (4) Hiking or nature study, including pedestrian boardwalks and dune crossovers.
- (5) Outdoor education, in keeping with the 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 (c) 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



Memorandum

To: LPA

From: Walter Fluegel, Community Development Director 

Date: May 4, 2011

Re: Consumption On-Premises (COP) in Recreation Future Land Use/EC Zoning District

The purpose of this memo is to facilitate a broader understanding of the issues surrounding the extension of premises to allow COP in the EC Zoning District and a conversation on potential regulatory approaches, while providing an overview of the evolution of the overall issue of COP in the Recreation Future Land Use category.

We'll start with a summary overview of the COP in the Recreation Future Land Use category issue, in as much as, only four of the current LPA members were members at the time this issue came before the LPA. On November 10, 2009, a report, titled "Policy Considerations and Options: Consumption of Alcoholic Beverages" (EXHIBIT 1) was presented to the LPA for their consideration. The report was commissioned by a former Town Manager and prepared by the former Community Development Director. In regards to the issue of COP on the Gulf Beaches, the report concluded, "The Plan does not clearly provide for the expansion of permitted COP onto the Gulf beaches, neither does it clearly prohibit it." At that LPA Meeting, as memorialized in LPA Resolution 2009-24 (EXHIBIT 2), the LPA Voted 5 to 1 to recommend that the Comprehensive Plan: "does restrict further expansion of on-premises consumption of alcoholic beverages on the Gulf beaches within the Town of Fort Myers Beach." The net affect of this opinion on the part of LPA was to recommend to Town Council that in the form of a Legislative Interpretation, as provided for in Chapter 15 of the Plan, was to determine that it was the intent of the Plan to further restrict the expansion of COP in the Recreation Future Land Use category.

At the November 15, 2010 Town Council Workshop, Staff presented a Memo, dated, November 8, 2010 (EXHIBIT 3) that reviewed the issue and provided potential options for Council's consideration. At Council's direction, Staff crafted several regulatory options for Council's consideration. At the December 6, 2010 Town Council Meeting, Council voted 4 to 1 to reject the LPA's Resolution and by rejecting the LPA's motion, Council's vote, in essence, deemed COP to be a permissible use on the beaches. Being that this was a Legislative Interpretation, as provided for in Chapter 15 of the Comprehensive Plan, it would now require a text amendment to reverse this determination. Further, in a subsequent motion and discussion, Council determined that the Land Development Code was the appropriate place to regulate permissible uses and directed Staff to prepare an ordinance dealing with COP in EC

as a permitted ancillary use. The motion and vote were based upon the Blue Sheet and Memo prepared for Council's consideration (EXHIBIT 4).

As Staff contemplated in the November 30, 2010 Memo, there were five potential ways to regulate COP in EC, should Council reject LPA's Resolution:

- A. Direct Staff to prepare a Land Development Code Amendment specifically identifying COP as a **Permitted Use** in the Environmentally Critical Zoning District. Or;
- B. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use. Or;
- C. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use. Or;
- D. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use, **in specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) **or to a specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc). Or;
- E. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use, **in specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) **or to a specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc).

In order to provide LPA with some context for this conversation, it is important to give consideration to some of Staff's original and subsequent concerns regarding COP in EC:

1. One of Staff's primary concerns has been a glaring loophole in the Code of Ordinances (this issue is not addressed in the Land Development Code), as it relates to "open container." Currently, the Code of Ordinances offers the following restrictions on open container:

Sec. 4-66. - Consumption or possession of alcoholic beverages on a semipublic parking lot, public way parking lot or beach.

It shall be unlawful and punishable as provided herein to:

- (1) Drink or consume any alcoholic beverage on a semipublic parking lot, or a public street, sidewalk, parkway, beach, or parking lot located in the town.***
- (2) Transport, carry, or possess any alcoholic beverage, except in the original***

- package and with the seal unbroken, on a semipublic parking lot, or a public street, sidewalk, parkway, beach, or parking lot located in the town.*
- (3) Possess an open container of an alcoholic beverage while operating a vehicle or while a passenger in or on a vehicle being operated.*

Public beach means any beach which:

- (1) Is below the mean high-water lines;*
(2) Is owned by the town or the county;
(3) Has arisen upon it a right of customary use by the public;
(4) Has arisen upon it a public easement, prescriptive or otherwise; or
(5) 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.

Staff's concern regarding this language is the fact that it is the only place in Town regulations, where COP in EC is directly dealt with and the language is vague and susceptible to challenge. For example, the prohibition to consumption on the "public" beach, technically, could be deemed to only be that area below the mean high-water line and/or beach property owned by the town or the county. In essence, for the Town to deem areas of the beach as "public beach" by a right of customary use by the public and then argue that the prohibition would extend to those areas could constitute a substantial imposition on the private property rights of beachfront property owners. For instance, if the Town were to make a determination that the beach in front (i.e. that area between the homeowner's platted lot and the mean-high water line) of a homeowner's lot, were in fact public, it could preclude the Sheriff's Office from trespassing individuals utilizing those areas and thus deprive the homeowner of peaceable enjoyment of their own property. Oddly enough, to make the determination that the beach in front of a property owners home is "public beach" would deprive the property owner of the right to enjoy a beer on their own beach property, while allowing the public to enjoy use of their property.

2. Another area of ongoing concern to Staff has been the fact that ancillary retail service uses have already been established as permitted uses in the EC Zoning District, such as Parasailing, Beach Chair Rentals and Jet-Ski Rentals. Given that the veil of commercial utilization of the beaches has already been pierced, the potential for challenge is a possibility. Also, it should be noted that COP has already been established in EC in the form of Special Event permits. Accordingly, Staff believes it is imperative to establish a regulatory framework to regulate the potential for unwanted expansion of COP on the beaches. Further, consideration should be given to the fact that uses such as parasailing and jet-ski rentals have been established in EC regardless of, and independent of, upland Planned Development Zoned areas.
3. Staff is concerned about the potential ramifications of expansion of COP in EC beyond the currently three "grandfathered" establishments of Top O'Mast, Lani Kai and Beach Pub. Accordingly, Staff conducted an assessment of existing COP in

upland zoning districts along the beach that could avail themselves of any change in regulations. Staff has determined that there are 15 establishments that could avail themselves of any change in regulations, as depicted in EXHIBIT 5. Of the 15, 8 are resorts, 2 are bars, 3 are bar/restaurants and 2 are restaurants. Further, of the 15, 6 are located in the Downtown Zoning District. Of the 9 not located in the Downtown, 6 are resorts, 2 are bars and 1 is a bar/restaurant.

In our estimation, it is reasonable to believe that of the locations outside of the Downtown, the resorts tend to be self-regulating by virtue of the risk of alienation of the clientele they serve. Accordingly, Council's directive to prepare an "administrative approval" approach appears to be reasonable, if a regulatory framework can be developed to deal with all of these establishments (existing and potential extensions of premises) in a consistent and fair manner that ensures the safety and welfare of the public, while protecting community character.

4. Staff is working on a revised draft of the COP in EC ordinance, which attempts to provide reasonable regulations for ensuring the safety and welfare of the public, while protecting community character. These working draft contemplates:
 - An Administrative Approval process for the aforementioned existing establishments;
 - Provisions for the revocation of the extension of premises for non-compliance with the requirements set forth in the ordinance;
 - Extension of premises only for property under the same ownership as the upland permitted establishment and within the same property lines;
 - Prohibition of patrons bringing their own coolers onto the establishment's beach;
 - Requirement for biodegradable containers;
 - Requirement to maintain the beach free of litter and debris;
 - Requirement for signage prohibiting patrons from moving between properties with alcohol;
 - Hours of service limitations for extension of premises onto the beach, limited to the hours of 11:00AM to sunset;
 - Restriction prohibiting service within 50' of Mean-High Water line;
 - Requirement for a Special Exception to allow entertainment in EC;
 - Requirement for tables to be buffered seaward on the beach by dune vegetation;
 - Requirement for a Certificate of Insurance covering the expanded area;
 - Requirement for Annual Certificate of Use Approval for the extension of premises;

-Establishment of fees for the Administrative Approval and for the Annual Certificate of Use and for future Special Exceptions adjacent to EC.

-Requirement that any new establishments requesting COP will be required to obtain extension of premises into EC through a Special Exception, as a component of the Special Exception for the upland establishment;

5. Should the LPA deem it more appropriate to develop an alternative regulatory scheme, such as Special Exceptions, Principal Use Restrictions (i.e. restricting extension of premises to resorts only) and/or Geographic Restrictions (i.e. restricting extension of premises to a specific area, such as the Downtown Zoning District), Staff can prepare parallel ordinances for Town Council's consideration.

We welcome your input on alternative regulatory approaches and questions/input on the proposed regulatory approach.

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 island's 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>no</u>

DULY PASSED AND ADOPTED THIS 10th day of November, 2009.

LPA of the Town of Fort Myers Beach

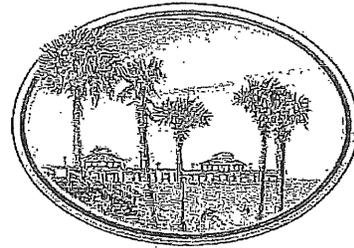
By: Joanne Shamp
Joanne Shamp, LPA Chair

Approved as to legal sufficiency:

By: Anne Dalton
Anne Dalton, Esquire
LPA Attorney

ATTEST:

By: Michelle Mayher
Michelle Mayher, Town Clerk



Memorandum

To: Mayor and Town Council
 Through: Terry Stewart, Town Manager
 From: Walter Fluegel, Community Development Director *WAF*
 Date: November 8, 2010
 Re: Consumption On-Premises (COP) in Recreation Future Land Use

Executive Summary:

DCD Staff has analyzed this issue in depth and would offer the following potential options for Council's consideration:

1. Accept LPA's interpretation that COP is not a permitted use in the Recreation Future Land Use category. Or;
2. Reject LPA's interpretation and interpret that COP is a permitted use in the Recreation Future Land Use category. Or;
3. Determine that the Land Development Code is the more appropriate place to identify more specific permissible uses (or in this instance more specific accessory/ancillary uses and/or Special Exception uses) and that COP in Recreation should be treated as a Special Exception under specific conditions in the LDC. Then direct Staff to work with the LPA to craft a regulatory framework for permitting COP. Further, this condition could include a provision directing Staff to develop a more comprehensive COP regulatory framework, establishing more consistent provisions, such as hours of operation, noise (music/entertainment), location of service, etc.

Analysis:

DCD Staff has reviewed the LPA Resolution (attached) and the Consultant's study on COP (dated: November 2008, attached) and would offer the following general observations:

1. Prohibiting COP in the Recreation Future Land Use category could have some potentially unintended consequences, such as prohibiting COP for special events at City or County Parks, including Bowditch Park, Newton Park, Mound House, Lynn

Hall Park and Bay Oaks Park. Also, in the instance of the Mound House, there was a CPD (05-13) allowing COP, with conditions, as a permitted use in the Recreation Future Land Use category.

2. An interpretation that specific uses are precluded in any particular land use category could present challenges for similar ancillary related uses in a broader overall use category. For example, in Recreation we presently allow a broad spectrum of quasi-retail/recreational ancillary uses, such as parasailing and jet skis. It is possible that these legitimate uses could be challenged if Council's interpretation is that COP, which is also a quasi-retail/recreational ancillary use, is precluded in the Recreation Future Land Use category.
3. While the Consultant's study on COP (dated: November 2008) provided the policy analysis for concluding that COP is not a permitted use in the Recreation Future Land Use category, our analysis of broader policies concluded that there is sufficient policy latitude to declare it as either a permitted use or not a permitted use or a permitted use (accessory/ancillary or Special Exception use) that should be limited to specific areas, such as Times Square and/or other areas.
4. The Recreation Future Land Use category only really speaks with definitive limitation to one use and that is "new" residential development, which the policy (4-B-8) specifically states, "No new residential development is permitted." In this regard, we would urge caution about reading more into the policy language than is really there and that the Land Development Code may be the more appropriate place for regulating or making such determinations on specific uses. Land use categories, in general terms, are intended for establishing broader ranges of uses and when they seek to prohibit a specific use (such as "new" residential), it is typically found in specific language in the policy, as is the case for the residential prohibition in this very policy. Also, while COP as a use, may, in some instances be considered a primary use, often it is more typically classified as an accessory/ancillary or Special Exception use. In general terms, Comprehensive Plan policy language is not intended to drill down to this level of specificity, but deals with uses in broader contextual terms, as was the instance in the prohibition of "new residential" in the Recreation Future Land Use category.

Comprehensive Plan/Policy Analysis:

In order to provide you with some basis for making your decision, we have analyzed some specific policies (in addition to those policies analyzed in the Consultant's Study on COP) and broader language from the Comprehensive Plan, for your consideration:

1. Here is some select narrative language from the Future Land Use Element which may provide some insight into intent, as it speaks of Times Square in terms of being an "Urban Beach environment." Also, it speaks of it in terms of "intense commercial activities." "Lynn Hall Park has more recreational facilities and remains the most lively and popular beach in Lee County."

Analysis: The narrative contemplates a more vibrant downtown, which could be construed to suggest a more intensive mix of uses and a more permissive view of the overall range of uses.

2. Goal 4: 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.

Analysis: The goal suggests that while maintaining the small town character, there is an acknowledgement of the tourist destination nature and hence the range of amenities that make the beach a desirable destination for tourists.

3. Policy 4-A-8: The town shall establish clear and consistent rules and processes that govern private and public development. They shall be incorporated into a graphic Land Development Code that: i. illustrates permitted uses and dimensions needed to implement this comprehensive plan; iii. Resolves inconsistencies between current zoning and land development regulations and this comprehensive plan...

Analysis: In Staff's view, this policy suggests that the LDC is the more appropriate venue to determine the appropriateness of specific uses. In the case of COP, Council may deem it more appropriate to consider it an accessory/ancillary or Special Exception use to another primary use.

4. Policy 4-B-8: "RECREATION": applied to public parks, schools, undevelopable portions of Bay Beach, and those parts of Gulf Beaches that lie seaward of the 1978 coastal construction line. Additional accretions of beach, whether by natural causes or through beach renourishment, will automatically be assigned to this category. No new residential development is permitted (although several existing buildings were legally constructed seaward of the 1978 control line). The maximum density of residential development here is one unit per 20 acres, with all units constructed outside this category. Allowable uses are parks, schools, libraries, bathing beaches, beach access points, and related public facilities.

Analysis: The policy contemplates a specific prohibition of "new residential" as a broad range of potential primary uses and remains silent with respect to allowable accessory/ancillary uses. However, the policy does establish bathing beaches as a primary use, which then provides Council the latitude to interpret the accessory/ancillary uses, be it through the Comprehensive Plan or the Land Development Code.

5. Objective 3-D: TIMES SQUARE — Stimulate the revitalization of the downtown core area (near Times Square) as the nucleus of commercial and tourist activities.

Policy 3-D-1: The town shall create a Downtown Redevelopment Agency to assist the Main Street program in revitalizing downtown as a lively, inviting, comfortable, and safe public environment.

Analysis: The objective and policy contemplate Times Square as a nucleus of commercial and tourist activities, supporting the concept of a broader range of more intensive urban uses and uses supportive of tourism.

6. Policy 4-B-6: "PEDESTRIAN COMMERCIAL": a primarily commercial district applied to the intense activity centers of Times Square (including Old San Carlos and nearby portions of Estero Boulevard) and the area around the Villa Santini Plaza. For new development, the maximum density is 6 dwelling units per acre (except where the Future Land Use Map's "platted overlay" indicates a maximum density of 10 units per acre for affordable units consistent with the adopted redevelopment plan). Commercial activities must contribute to the pedestrian-oriented public realm as described in this comprehensive plan and must meet the design concepts of this plan and the Land Development Code. Where commercial uses are permitted, residential uses are encouraged in upper floors. All "Marina" uses in Policy 4-B-7 are also allowed on parcels that were zoned for marinas prior to adoption of this plan. Non-residential uses (including motels and churches) now comprise 58.9% of the land in this category, and this percentage shall not exceed 90%.

Analysis: The policy contemplates more vibrant activity centers, suggesting these nodes and the ranges of uses may be broader and more intensive than in other areas.

7. Policy 5-D-1: The town's policies on shoreline protection measures shall be as follows (see also Objective 5 and related policies in the Conservation Element of this plan):
 - i. Beach renourishment will be necessary along much of the Gulf beach. The long-term recreational and economic benefits will offset the cost. The town shall work closely with Lee County, which has agreed to take the lead role in carrying out this important activity. All practical measures shall be taken to ensure that beach renourishment improves sea turtle nesting habitat rather than interfering with it. Public access to existing and renourished beaches is an important priority of the town of Fort Myers Beach.
 - ii. Sand dunes should be protected and re-created wherever they have been removed. Native dune plants should be protected and non-native exotics removed. Dune walkovers should be constructed where they do not exist and existing structures should be maintained.
 - iii. The use of vehicles on any part of the beach should be severely limited in accordance with Conservation Policy 6-E-4(iv).
 - iv. **Buildings and other structures should be located as far away from the shoreline and dune system as possible since the beach is a constantly changing environment.** Beachfront development shall be protected from coastal erosion, wave action, and storms by vegetation, setbacks, and/or beach renourishment rather than by seawalls or other hardened structures, which tend to hasten beach erosion, interfere with public access, and block sea turtle nesting.
 - v. Development (other than minor structures) shall not be allowed seaward of

the 1978 Coastal Construction Control Line. Development seaward of the 1991 Coastal Construction Control Line may be permitted provided it complies with this comprehensive plan and all state and local permitting requirements.

vi. Where buildings are threatened by erosion that cannot be reversed by major beach renourishment, the town's priorities are (1) to allow the structure to be moved away from the beach; (2) to allow emergency renourishment (including the use of trucked-in sand); and (3) to allow rip-rap only when the previous priorities are not possible. Existing seawalls on the beach may be maintained or removed but not rebuilt.

vii. The absolute last resort for shoreline protection is the use of hardened structures (except that terminal groins may be permitted at inlets if acceptable to state and federal permitting agencies). New beachfront buildings requiring seawalls for protection from coastal erosion shall not be permitted.

Analysis: The policy establishes the importance of protecting beaches as a natural resource and contemplates the impact of development (i.e. buildings), but is silent on the impact of uses.

8. LEGISLATIVE INTERPRETATIONS

In order to apply the plan consistently and fairly, it will be necessary from time to time to interpret provisions in the plan in a manner which insures that the legislative intent of the Town Council which adopted the plan be understood and applied by subsequent councils, town employees, private property owners, and all other persons whose rights or work are affected by the plan. When the plan is interpreted, it should be done in accordance with generally accepted rules of statutory construction, based upon sound legal advice, and compiled in writing in a document, which can be a companion to the plan itself.

A. Requests. Requests for interpretations may be made by any Town Council member, the Town Manager, the Local Planning Agency, or any applicant for a type of development regulated by this plan.

B. Local Planning Agency. Upon receiving a request and written recommendations from the Town Manager, the Local Planning Agency shall review the same and forward them to the Town Council with its comments and recommendations.

C. Town Council. Upon receiving the recommendations of the Local Planning Agency, the Town Council shall render a final decision as to the correct interpretation to be applied. This interpretation shall be that which is adopted by absolute majority of the Town Council, and, upon being reduced to a board resolution drafted in response to the board majority, it shall be signed by the Mayor and recorded in the town's official records. The Town Clerk shall be responsible for maintaining copies of all such resolutions in a single document, which shall be appropriately indexed and provided to all persons upon request.

The document shall be updated regularly and the latest version thereof furnished to all persons requesting copies of the plan itself.

D. Legal Effect of Legislative Interpretations. Any provision of the plan specifically construed in accordance with the foregoing procedures may not be reinterpreted or modified except by a formal amendment of the plan itself. Once formally adopted in accordance with these procedures, the annotation shall have the force of local law and all persons shall be placed on constructive notice of it. Any development orders issued in reliance on legislative interpretations of this plan are subject to challenge under the provisions of Section 163.3215, Florida Statutes.

Analysis: The interpretation provisions contemplate the full legal effect, which includes a requirement that any subsequent interpretation of a previous interpretation can only be accomplished through a Comprehensive Plan Amendment.

Conclusion/Recommendation:

While Staff is inclined to support the more defensible policy interpretation of Option 3 identified in the Executive Summary, wherein the Land Development Code is the more appropriate place to interpret this specific use, we acknowledge that this important interpretation is ultimately a potentially important basic community character standard and the policy language provides a fair degree of latitude to accommodate the range of potential interpretations outlined in the Executive Summary.

Further, should Council decide on Option 3, Staff is confident that code language can be promulgated to provide a more definitive framework for dealing with future uses. For example, future COP in Recreation could be limited to specifically established and/or geographically defined areas, such as Times Square and/or established larger resort destinations, with appropriate conditioned restrictions. Also, Council would retain the option to further restrict the future expansion of COP uses on the beach or not allow it at all. Also, the policy framework could acknowledge previously conveyed and/or established rights, while setting more consistent standards on future uses. Last, dealing with COP in the Land Development Code would allow Staff to develop a more comprehensive regulatory framework encompassing a broader range of COP issues in a more consistent manner.

Town of Fort Myers Beach
Agenda Item Summary

Blue Sheet Number: 2010-152

1. Requested Motion:

Motion to determine that the Land Development Code is the more appropriate place to identify more specific permissible uses.

Then direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary** use to an adjacent approved COP use.

Why the action is necessary:

In order to complete the LPA review process.

Meeting Date:

December 6, 2010

What the action accomplishes:

2. Agenda:

Information:

- Consent
- Administrative

3. Requirement/Purpose:

- Resolution
- Ordinance
- Other

4. Submitter of

- Council
- Town Staff
- Town Attorney

5. Background:

Per Council's direction at the November 15, 2010 Town Council Workshop, Staff would offer the following motions on whether or not COP is a permissible use in the Recreation Future Land Use category:

1. Accept LPA's interpretation that COP is not a permissible use in the Recreation Future Land Use category. Or;
2. Reject LPA's interpretation and interpret that COP is a permissible use in the Recreation Future Land Use category. Or;
3. Determine that the Land Development Code is the more appropriate place to identify more specific permissible uses.

Based upon the first motion, Staff would offer the following potential motions to provide Staff with policy direction to enable the first motion.

- A. Direct Staff to prepare a Land Development Code Amendment specifically identifying COP as a **Prohibited Use** in the Environmentally Critical Zoning District. Or;
- B. Direct Staff to prepare a Land Development Code Amendment specifically identifying COP as a **Permitted Use** in the Environmentally Critical Zoning District. Or;
- C. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use. Or;
- D. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary** use to an adjacent approved COP use. Or;
- E. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use, in **specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) or to a **specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc). Or;
- F. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary** use to an adjacent approved COP use, in **specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) or to a **specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc).

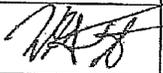
6. Alternative Action:

None proposed.

7. Management Recommendations:

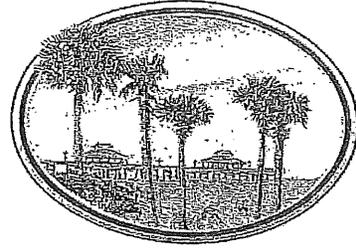
Staff recommends Council determine that the Land Development Code is the more appropriate place to identify more specific permissible uses. Then direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use.

8. Recommended Approval:

Town Manager	Town Attorney	Finance Director	Public Works Director	Community Development Director	Cultural Resources Director	Town Clerk
						

9. Council Action:

Approved Denied Deferred Other



Memorandum

To: Mayor and Town Council

Through: Terry Stewart, Town Manager

From: Walter Fluegel, Community Development Director

Date: November 30, 2010

Re: Consumption On-Premises (COP) in Recreation Future Land Use

Executive Summary:

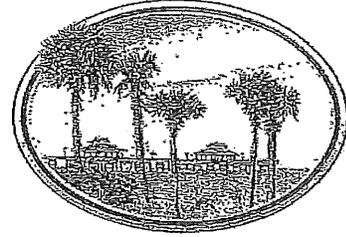
Per Council's directive at the November 15, 2010 Town Council Workshop, DCD Staff has Prepared the following potential motions for Council to act upon the COP issue. The prospective motions contemplate Council first acting upon the issue of interpreting whether or not the Comprehensive Plan allows COP in the Recreation Future Land Use category and then acting upon a motion to direct Staff to take a defined policy direction to enable the first motion on COP. Accordingly, Staff would offer the following motions on whether or not COP is a permissible use in the Recreation Future Land Use category:

1. Accept LPA's interpretation that COP is not a permissible use in the Recreation Future Land Use category. Or;
2. Reject LPA's interpretation and interpret that COP is a permissible use in the Recreation Future Land Use category. Or;
3. Determine that the Land Development Code is the more appropriate place to identify more specific permissible uses.

Based upon the first motion, Staff would offer the following potential motions to provide Staff with policy direction to enable the first motion.

- A. Direct Staff to prepare a Land Development Code Amendment specifically identifying COP as a **Prohibited Use** in the Environmentally Critical Zoning District. Or;
- B. Direct Staff to prepare a Land Development Code Amendment specifically identifying COP as a **Permitted Use** in the Environmentally Critical Zoning District. Or;

- C. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use. Or;
- D. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use. Or;
- E. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use, **in specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) or to a **specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc). Or;
- F. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use, **in specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) or to a **specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc).



Memorandum

To: Mayor and Town Council

Through: Terry Stewart, Town Manager

From: Walter Fluegel, Community Development Director *WAF*

Date: November 8, 2010

Re: Consumption On-Premises (COP) in Recreation Future Land Use

Executive Summary:

DCD Staff has analyzed this issue in depth and would offer the following potential options for Council's consideration:

1. Accept LPA's interpretation that COP is not a permitted use in the Recreation Future Land Use category. Or;
2. Reject LPA's interpretation and interpret that COP is a permitted use in the Recreation Future Land Use category. Or;
3. Determine that the Land Development Code is the more appropriate place to identify more specific permissible uses (or in this instance more specific accessory/ancillary uses and/or Special Exception uses) and that COP in Recreation should be treated as a Special Exception under specific conditions in the LDC. Then direct Staff to work with the LPA to craft a regulatory framework for permitting COP. Further, this condition could include a provision directing Staff to develop a more comprehensive COP regulatory framework, establishing more consistent provisions, such as hours of operation, noise (music/entertainment), location of service, etc.

Analysis:

DCD Staff has reviewed the LPA Resolution (attached) and the Consultant's study on COP (dated: November 2008, attached) and would offer the following general observations:

1. Prohibiting COP in the Recreation Future Land Use category could have some potentially unintended consequences, such as prohibiting COP for special events at City or County Parks, including Bowditch Park, Newton Park, Mound House, Lynn

Hall Park and Bay Oaks Park. Also, in the instance of the Mound House, there was a CPD (05-13) allowing COP, with conditions, as a permitted use in the Recreation Future Land Use category.

2. An interpretation that specific uses are precluded in any particular land use category could present challenges for similar ancillary related uses in a broader overall use category. For example, in Recreation we presently allow a broad spectrum of quasi-retail/recreational ancillary uses, such as parasailing and jet skis. It is possible that these legitimate uses could be challenged if Council's interpretation is that COP, which is also a quasi-retail/recreational ancillary use, is precluded in the Recreation Future Land Use category.
3. While the Consultant's study on COP (dated: November 2008) provided the policy analysis for concluding that COP is not a permitted use in the Recreation Future Land Use category, our analysis of broader policies concluded that there is sufficient policy latitude to declare it as either a permitted use or not a permitted use or a permitted use (accessory/ancillary or Special Exception use) that should be limited to specific areas, such as Times Square and/or other areas.
4. The Recreation Future Land Use category only really speaks with definitive limitation to one use and that is "new" residential development, which the policy (4-B-8) specifically states, "No new residential development is permitted." In this regard, we would urge caution about reading more into the policy language than is really there and that the Land Development Code may be the more appropriate place for regulating or making such determinations on specific uses. Land use categories, in general terms, are intended for establishing broader ranges of uses and when they seek to prohibit a specific use (such as "new" residential), it is typically found in specific language in the policy, as is the case for the residential prohibition in this very policy. Also, while COP as a use, may, in some instances be considered a primary use, often it is more typically classified as an accessory/ancillary or Special Exception use. In general terms, Comprehensive Plan policy language is not intended to drill down to this level of specificity, but deals with uses in broader contextual terms, as was the instance in the prohibition of "new residential" in the Recreation Future Land Use category.

Comprehensive Plan/Policy Analysis:

In order to provide you with some basis for making your decision, we have analyzed some specific policies (in addition to those policies analyzed in the Consultant's Study on COP) and broader language from the Comprehensive Plan, for your consideration:

1. Here is some select narrative language from the Future Land Use Element which may provide some insight into intent, as it speaks of Times Square in terms of being an "Urban Beach environment." Also, it speaks of it in terms of "intense commercial activities." "Lynn Hall Park has more recreational facilities and remains the most lively and popular beach in Lee County."

Analysis: The narrative contemplates a more vibrant downtown, which could be construed to suggest a more intensive mix of uses and a more permissive view of the overall range of uses.

2. Goal 4: 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.

Analysis: The goal suggests that while maintaining the small town character, there is an acknowledgement of the tourist destination nature and hence the range of amenities that make the beach a desirable destination for tourists.

3. Policy 4-A-8: The town shall establish clear and consistent rules and processes that govern private and public development. They shall be incorporated into a graphic Land Development Code that: i. illustrates permitted uses and dimensions needed to implement this comprehensive plan; iii. Resolves inconsistencies between current zoning and land development regulations and this comprehensive plan...

Analysis: In Staff's view, this policy suggests that the LDC is the more appropriate venue to determine the appropriateness of specific uses. In the case of COP, Council may deem it more appropriate to consider it an accessory/ancillary or Special Exception use to another primary use.

4. Policy 4-B-8: "RECREATION": applied to public parks, schools, undevelopable portions of Bay Beach, and those parts of Gulf Beaches that lie seaward of the 1978 coastal construction line. Additional accretions of beach, whether by natural causes or through beach renourishment, will automatically be assigned to this category. No new residential development is permitted (although several existing buildings were legally constructed seaward of the 1978 control line). The maximum density of residential development here is one unit per 20 acres, with all units constructed outside this category. Allowable uses are parks, schools, libraries, bathing beaches, beach access points, and related public facilities.

Analysis: The policy contemplates a specific prohibition of "new residential" as a broad range of potential primary uses and remains silent with respect to allowable accessory/ancillary uses. However, the policy does establish bathing beaches as a primary use, which then provides Council the latitude to interpret the accessory/ancillary uses, be it through the Comprehensive Plan or the Land Development Code.

5. Objective 3-D: **TIMES SQUARE** — Stimulate the revitalization of the downtown core area (near Times Square) as the nucleus of commercial and tourist activities.

Policy 3-D-1: The town shall create a Downtown Redevelopment Agency to assist the Main Street program in revitalizing downtown as a lively, inviting, comfortable, and safe public environment.

Analysis: The objective and policy contemplate Times Square as a nucleus of commercial and tourist activities, supporting the concept of a broader range of more intensive urban uses and uses supportive of tourism.

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Analysis: The policy contemplates more vibrant activity centers, suggesting these nodes and the ranges of uses may be broader and more intensive than in other areas.

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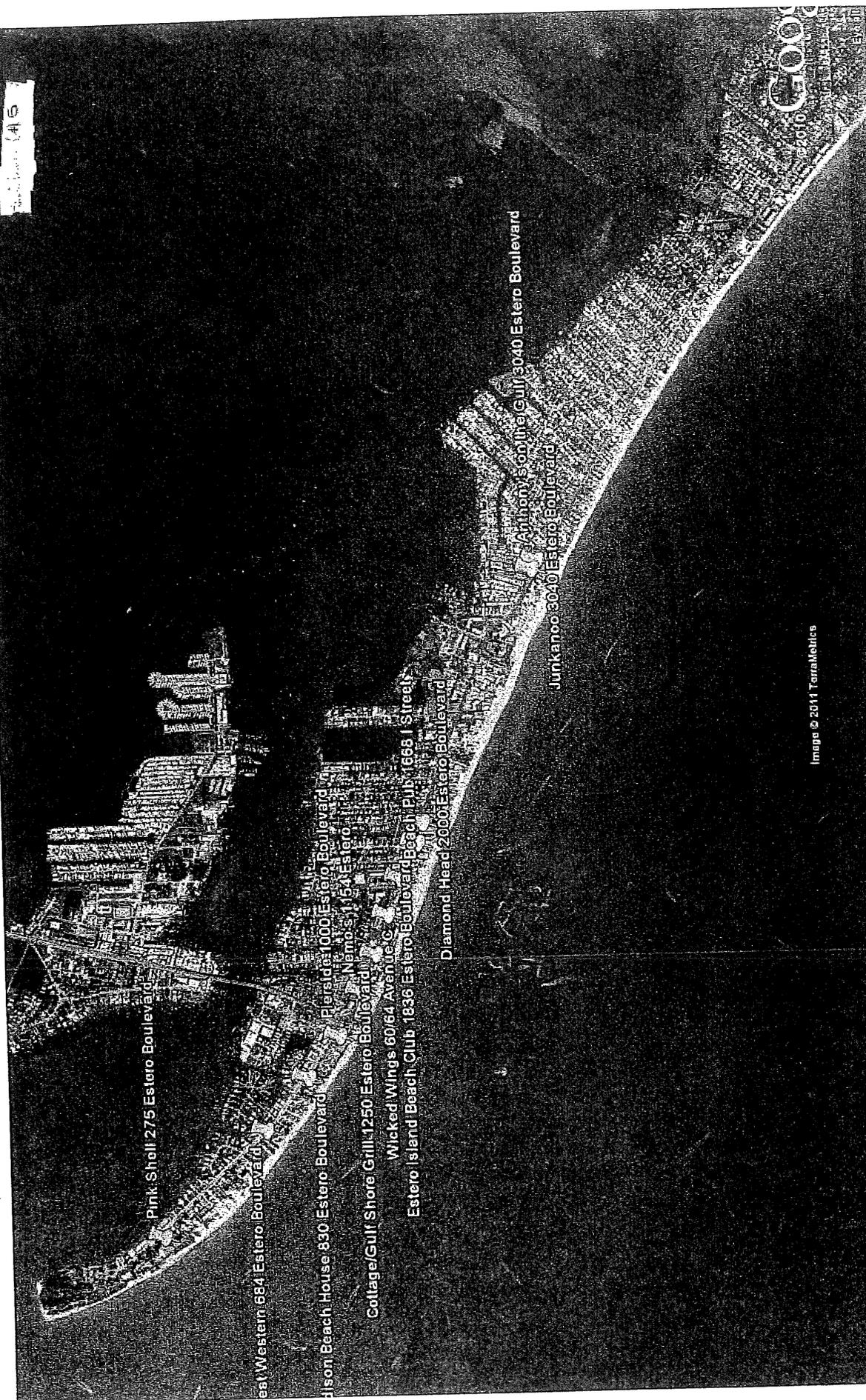
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Conclusion/Recommendation:

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Further, should Council decide on Option 3, Staff is confident that code language can be promulgated to provide a more definitive framework for dealing with future uses. For example, future COP in Recreation could be limited to specifically established and/or geographically defined areas, such as Times Square and/or established larger resort destinations, with appropriate conditioned restrictions. Also, Council would retain the option to further restrict the future expansion of COP uses on the beach or not allow it at all. Also, the policy framework could acknowledge previously conveyed and/or established rights, while setting more consistent standards on future uses. Last, dealing with COP in the Land Development Code would allow Staff to develop a more comprehensive regulatory framework encompassing a broader range of COP issues in a more consistent manner.

Estero, FL 33427



Pink Shell 275 Estero Boulevard

West Western 684 Estero Boulevard

Wilson Beach House 830 Estero Boulevard

Collage/Gulf Shore Grill 1250 Estero Boulevard

Wicked Wings 6064 Avenue C

Estero Island Beach Club 1836 Estero Boulevard

Diamond Head 2000 Estero Boulevard

Anthony's on the Gulf 3040 Estero Boulevard

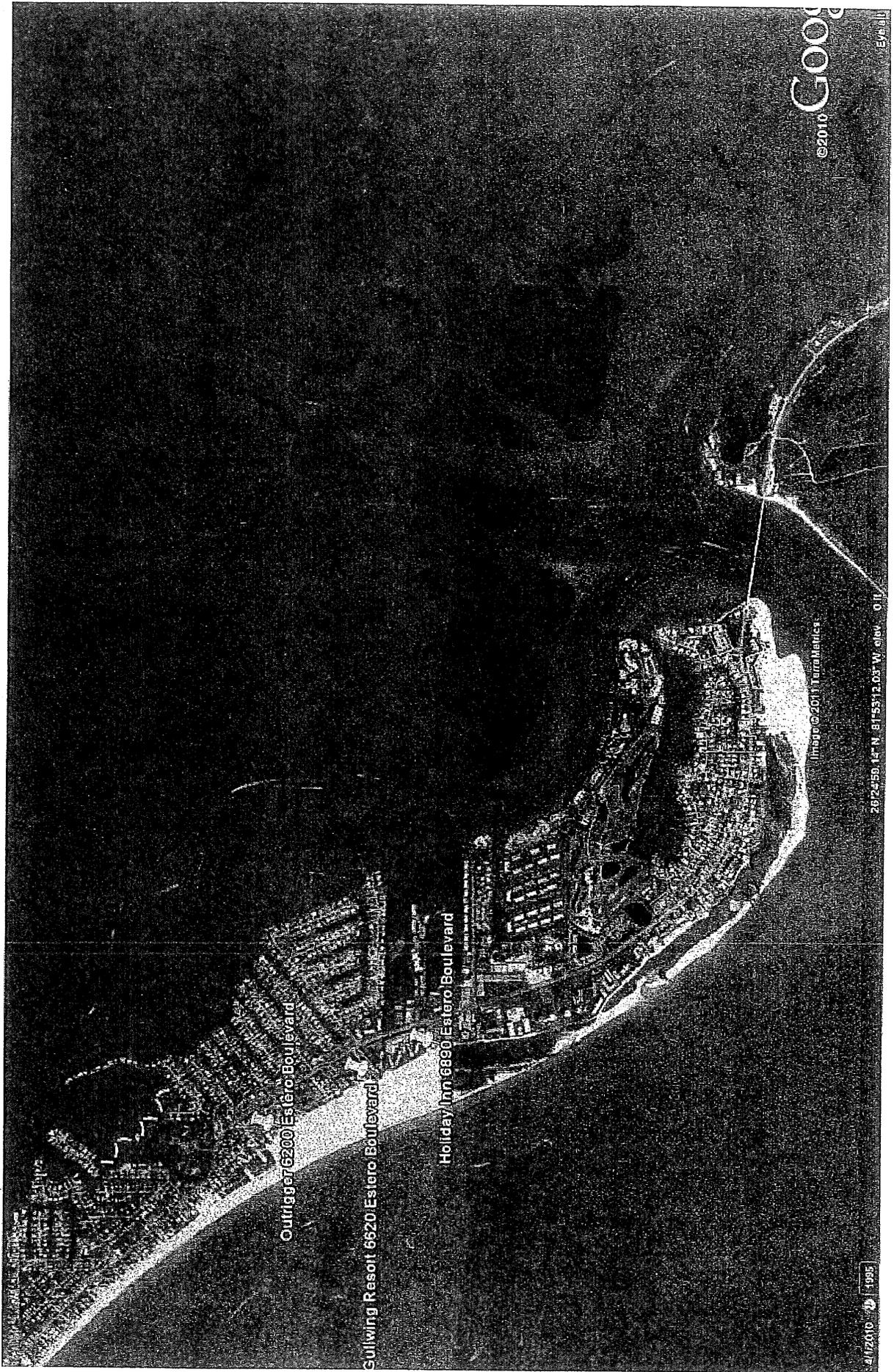
Junkanoo 3040 Estero Boulevard

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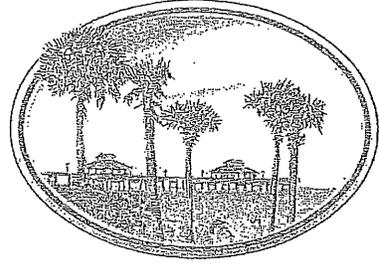


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4/1/2010 1995



Memorandum

To: LPA

From: Walter Fluegel, Community Development Director

Date: June 9, 2011

Re: Consumption On-Premises (COP) in Recreation Future Land Use/EC Zoning District
Workshop Discussion for June LPA Meeting

The purpose of this memo is to have a workshop discussion of the issues surrounding the extension of premises of COP in the EC Zoning District and a conversation on potential regulatory approaches.

In order to facilitate the conversation, I have attached the following documents for background information:

1. A copy of the LPA Chair's memo, dated May 10, 2011, regarding her review of the Land Development Code as it relates to COP in EC/REC;
2. Copy of COP alternative language proposed by LPA Member Ryffel (strike through/underline version and normal version);
3. A copy of my memo to the LPA dated May 4, 2011

In order to facilitate a constructive dialogue, I would suggest that we review the LPA Chair's memo first and discuss her comments in a line by line fashion, to explore LPA and Staff's comments on each issue. Then I would suggest we explore the two options regarding overall permissibility of COP in EC, which include:

1. Outright prohibition of all COP in EC, or
2. Regulatory options for permitting COP in EC (service and consumption or consumption only).

Regarding the second option of regulating COP in EC, I would suggest that the dialogue focus on if COP is to be allowed in EC, then what is the best way to regulate it. The considerations for regulatory mechanisms can be considered in the following task groups:

1. Procedure (i.e. Special Exception, Administrative Approval, Permitted Use, Planned Development Zoning, Conditional Use, etc.);

2. Geographic restrictions- Should COP in EC be restricted to specific geographic area(s);
3. Principal Use Restrictions- Should COP in EC be limited as an ancillary use to specific principal uses, i.e. restaurants, bars, resorts, etc.; and
4. Specific Conditions of Approval- What specific conditions should be required, for example:
 - a. Plastic cups, aluminum cans or glass bottles.
 - b. Hours of service/consumption in EC.
 - c. Location restrictions of service/consumption in EC, i.e. within property lines under same ownership and no closer than 10 feet of the Mean High Water Line (MHW).
 - d. Restrictions on tables.
 - e. Management/maintenance responsibilities of owners.
 - f. Security requirements.
 - g. Signage requirements, i.e. alcohol purchased on one property is prohibited from being taken onto another property.
 - h. Insurance requirements.
 - i. Seasonal restrictions, i.e. should hours of service/consumption be further restricted during times of the year, such a turtle nesting season.
 - j. Annual renewal requirements.
 - k. Terms of revocation and revocation process.
 - l. Fees, i.e. initial fee and annual renewal fees.
 - m. Other considerations that LPA deems appropriate.

In order to prioritize Community Development Department's work schedule and productivity, I have established the following work schedule for this endeavor:

June- Workshop

July-Workshop

August- Public Hearing

**COP EXPANSION IN THE ENVIRONMENTALLY CRITICAL ZONE/RECREATION FLUM
AN LDC REVIEW PREPARED BY JOANNE SHAMP, CHAIR, LPA
MAY 10, 2011**

The Town Council rejected LPA Resolution 2009-24, deciding that the Land Development Code is the more appropriate place to identify more specific permissible uses relating to the expansion of COP onto the beaches in the EC Zone/Recreation FLUM. The LPA provides its role as described in the LDC as follows: **Sec. 34-120(4)** "The function of the Land Planning Agency in accordance with LDC is to review proposed land development changes and amendments thereto, and make recommendation to the Town Council as to their consistency with the Comprehensive Plan"; and **Sec. 34-120(2)** "the function and duty of the LPA is to prepare policies for guiding land uses in the town in order to preserve the unique and natural characteristics of the island."

In reviewing the LDC, references are found to indicate that the proposed COP expansion is prohibited. LDC **Sec. 14-3(a)(15)** states that it is "unlawful or prohibited for any person to do, conduct or permit any commercial activities on the beach or dunes not explicitly authorized by this code or other town ordinances." There exists no explicit authorization of this COP expansion in the Comp Plan (see report "Policy Considerations and Options: Consumption of Alcoholic Beverages"), the LDC or in Town ordinances.

The Land Development Code's strongest prohibition to the proposed COP expansion is **LDC Sec. 34-1574 (b)**. "Except in instances of overriding public interest, new roads, private land development, or the expansion of existing facilities within Wetlands or on the sandy beaches that are designated in the Recreation category in the Fort Myers Beach Comprehensive Plan shall be prohibited." No evidence of overriding public interest has been presented to the LPA.

LDC regulations support the legal relationship between the Comprehensive Plan and the LDC regarding COP expansion on the beaches. LDC **Sec. 34-652(a)** designates the purpose of the EC zoning is to designate that the preservation of beaches is critical to the Town of Fort Myers Beach and restricts the uses. In **Sec. 34-652(b)** the application of the EC district is intended to prevent a public harm by precluding the use of land for purposes that adversely affect a defined public interest. **Sec. 34-609** states that where there are conflicts between the LDC and the Comp Plan regarding development in zoning districts, the Comp Plan will prevail.

The LDC limits COP expansion "by right" in the EC Zone. **Sec. 34-652(d)** states that no land use in the EC Zone shall be permitted by right except those permitted by the Fort Myers Beach Comprehensive Plan and **Sec. 34-613(c)** states that development rights may be limited by other factors such as the Fort Myers Beach Comprehensive Plan and conditions on special exceptions and special permits.

COP expansion is also not permitted as an accessory or ancillary use in the Land Development Code. LDC **Sec. 34-1262** states that premises used for the purpose of the retail sale, service or consumption of alcoholic beverages must conform with all applicable town regulations. Those beachfront COP premises that are parcels split by zoning boundaries are regulated by **Sec. 34-617(b)**: "when a parcel is split between two or more zoning districts each parcel is limited only

to the permitted uses allowed in that portion, plus allowable accessory uses”, while “accessory uses may not be placed on portions of the parcels that do not contain the principal use to which they are incidental and subordinate.”

LDC Sec. 34-677(b)(3) refers to the regulation of the sale of alcoholic beverages outdoors in Sec. 34-1264, which states that “the area designated for an alcoholic beverage permit cannot be expanded without filing a new application for an alcoholic beverage permit covering the existing and proposed expanded area” (Sec. 34-1264(g)).

With regard to a proposed administrative approval of such COP expansion, Sec. 34-1264(a)(2)a.2 states that administrative approval may not be granted for outdoor seating within 500 feet of a park or dwelling unit under separate ownership. In addition, Sec. 34-1264(a)(1) states that administrative approval of the expansion of on-premises consumption of alcoholic beverages may not be the appropriate action when there is a record of public opposition to a similar use at that location. The Comp Plan provides further safeguards, for example requiring the Town to provide procedural protection comparable to the public hearing process in the Mixed Residential FLUM category.

A restriction or prohibition to this commercial expansion is addressed by Comp Plan POLICY 4-C-2 directing that intensity in any FLUM category is limited by provisions of the Comp Plan and LDC. Comp Plan POLICY 4-C-2 requires the LDC to specify maximum commercial intensities using the floor-area-ratio (FAR). The maximum intensity may not include land in the Recreation FLUM according to LDC Sec. 34-633(2): *“a site’s lot area includes the gross square footage within the site’s private property line, minus wetlands, canals or other water bodies, and minus any land designated “Recreation” on the Comprehensive Plan’s future land use map.”* Land in the Recreation FLUM Category is not available for commercial expansion.

Expansion of area for this COP service would require additional parking, per Sec. 34-20209(b)(1) which states that “existing uses enlarged in terms of floor area shall provide additional parking spaces in accordance with Sec. 34-2020(d)(2)h.2” and Sec. 34-2020(d)(2)h.2. which states additional parking is required for outdoor seating for restaurants, bars and cocktail lounges.

COP expansion and beach definitions are limited by the new mean high water line (ECL) and state owned beachfront in the current navigation/re-nourishment project per (F.S. 161.191 (1): “the ECL recorded in accordance with a beach re-nourishment project shall be the new high water line and all land seaward of that line are the sovereign property of the State of Florida.”

Limiting the expansion of COP to specific zoning districts would fall under several regulations of the Comp Plan and LDC. The FLUM ELEMENT of the COMP PLAN states that the Town can insist on protection of its private realm and the enhancement of its public realm when evaluating for new commercial development, providing for protection of residential interests. Even in the Downtown area, the map in Sec. 34-672, Figure 34-6 of the Downtown Zoning district shows the beaches and land seaward of the Coastal Construction Line (CL) to be outside the zoning district, as if intentionally protected from land use development.

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COP OPTIONS

Option 1

1A. COP will be permitted on the beach of on any property with an existing COP license, up to 10' landward of the interface between the wet and dry sand with an existing COP license, and located in the Times Square area only subject to any reasonable conditions, including, but not limited to that alcohol must be purchased at the existing bar(s) to be consumed on the beach. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

Alternative to Option 1A

1A. COP will be permitted on the beach of any property with an existing COP license up to 10' landward of the interface between the wet and dry sand and located in the Times Square area only subject to any reasonable conditions, including but not limited to that there will be no tables or carts of any kind, however powered, on the beach. (This would allow wait staff, sales and service)

1B. Properties outside the Times Square area with existing COP licenses, (not including those whose COP was approved as part of a planned development) may seek approval via a Special Exception. Alcohol must be purchased at the existing bar(s) to be consumed on the beach up to 10' landward of the interface between the wet and dry sand. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

1C. Properties with COP approved as part of the Planned Development process must request permission for consumption on the beach via an amendment to their approved planned development. Alcohol may be consumed up to 10' landward of the interface between the wet and dry sand. Alcohol must be purchased at the existing bar(s) to be consumed on the beach. There will be no sales, wait staff, tables or carts however powered, of any kind, on the beach.

Option 2

2.A At any facility on the beachfront with an existing COP license, alcohol may be consumed on the beach owned by the business or owner of the property up to 10' landward of the interface between the wet and dry sand. All purchases must be made from the existing bar(s) on the property and may be consumed on the beach. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

For any of these there may need to be an amendment to the Open Container Ordinance to provide for these options.

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COP OPTIONS

Option 1

1A. COP will be permitted on the beach ~~of~~ on any property with an existing COP license, up to ~~within 50' mean high tide line~~ 10' landward of the interface between the wet and dry sand ~~with an existing COP license~~, and located in the Times Square area only subject to any reasonable conditions, including, but not limited to that alcohol must be purchased at the existing bar(s) to be consumed on the beach. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

Alternative to Option 1A

1A. COP will be permitted on the beach ~~of~~ on any property with an existing COP license up to 10' landward of the interface between the wet and dry sand ~~within 50' of the mean high tide line~~ with an existing COP license, and located in the Times Square area only subject to any reasonable conditions, including but not limited to that there will be no tables or carts of any kind, however powered, on the beach. (This would allow wait staff, sales and service)

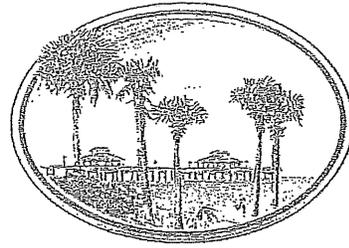
1B. Properties outside the Times Square area with existing COP licenses, (not including those whose COP was approved as part of a planned development) may seek approval via a Special Exception. Alcohol must be purchased at the existing bar(s) to be consumed on the beach to 10' landward of the interface between the wet and dry sand ~~within 50' of the mean high tide~~. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

1C. Properties with COP approved as part of the Planned Development process must request permission for consumption on the beach via an amendment to their approved planned development. Alcohol may be consumed up to 10' landward of the interface between the wet and dry sand ~~within 50' of the mean high tide~~. Alcohol must be purchased at the existing bar(s) to be consumed on the beach. There will be no sales, wait staff, tables or carts however powered, of any kind, on the beach.

Option 2

2.A At any facility on the beachfront with an existing COP license, alcohol may be consumed on the beach owned by the business or owner of the property up to 10' landward of the interface between the wet and dry sand ~~50' of the mean high tide line~~. All purchases must be made from the existing bar(s) on the property and may be consumed on the beach. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

For any of these there may need to be an amendment to the Open Container Ordinance to provide for these options.



Memorandum

To: LPA

From: Walter Fluegel, Community Development Director 

Date: May 4, 2011

Re: Consumption On-Premises (COP) in Recreation Future Land Use/EC Zoning District

The purpose of this memo is to facilitate a broader understanding of the issues surrounding the extension of premises to allow COP in the EC Zoning District and a conversation on potential regulatory approaches, while providing an overview of the evolution of the overall issue of COP in the Recreation Future Land Use category.

We'll start with a summary overview of the COP in the Recreation Future Land Use category issue, in as much as, only four of the current LPA members were members at the time this issue came before the LPA. On November 10, 2009, a report, titled "Policy Considerations and Options: Consumption of Alcoholic Beverages" (EXHIBIT 1) was presented to the LPA for their consideration. The report was commissioned by a former Town Manager and prepared by the former Community Development Director. In regards to the issue of COP on the Gulf Beaches, the report concluded, "The Plan does not clearly provide for the expansion of permitted COP onto the Gulf beaches, neither does it clearly prohibit it." At that LPA Meeting, as memorialized in LPA Resolution 2009-24 (EXHIBIT 2), the LPA Voted 5 to 1 to recommend that the Comprehensive Plan: "does restrict further expansion of on-premises consumption of alcoholic beverages on the Gulf beaches within the Town of Fort Myers Beach." The net affect of this opinion on the part of LPA was to recommend to Town Council that in the form of a Legislative Interpretation, as provided for in Chapter 15 of the Plan, was to determine that it was the intent of the Plan to further restrict the expansion of COP in the Recreation Future Land Use category.

At the November 15, 2010 Town Council Workshop, Staff presented a Memo, dated, November 8, 2010 (EXHIBIT 3) that reviewed the issue and provided potential options for Council's consideration. At Council's direction, Staff crafted several regulatory options for Council's consideration. At the December 6, 2010 Town Council Meeting, Council voted 4 to 1 to reject the LPA's Resolution and by rejecting the LPA's motion, Council's vote, in essence, deemed COP to be a permissible use on the beaches. Being that this was a Legislative Interpretation, as provided for in Chapter 15 of the Comprehensive Plan, it would now require a text amendment to reverse this determination. Further, in a subsequent motion and discussion, Council determined that the Land Development Code was the appropriate place to regulate permissible uses and directed Staff to prepare an ordinance dealing with COP in EC

as a permitted ancillary use. The motion and vote were based upon the Blue Sheet and Memo prepared for Council's consideration (EXHIBIT 4).

As Staff contemplated in the November 30, 2010 Memo, there were five potential ways to regulate COP in EC, should Council reject LPA's Resolution:

- A. Direct Staff to prepare a Land Development Code Amendment specifically identifying COP as a **Permitted Use** in the Environmentally Critical Zoning District. Or;
- B. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use. Or;
- C. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use. Or;
- D. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use, in **specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) or to a **specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc). Or;
- E. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use, in **specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) or to a **specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc).

In order to provide LPA with some context for this conversation, it is important to give consideration to some of Staff's original and subsequent concerns regarding COP in EC:

1. One of Staff's primary concerns has been a glaring loophole in the Code of Ordinances (this issue is not addressed in the Land Development Code), as it relates to "open container." Currently, the Code of Ordinances offers the following restrictions on open container:

Sec. 4-66. - Consumption or possession of alcoholic beverages on a semipublic parking lot, public way parking lot or beach.

It shall be unlawful and punishable as provided herein to:

(1) Drink or consume any alcoholic beverage on a semipublic parking lot, or a public street, sidewalk, parkway, beach, or parking lot located in the town.

(2) Transport, carry, or possess any alcoholic beverage, except in the original

package and with the seal unbroken, on a semipublic parking lot, or a public street, sidewalk, parkway, beach, or parking lot located in the town.

- (3) Possess an open container of an alcoholic beverage while operating a vehicle or while a passenger in or on a vehicle being operated.*

Public beach means any beach which:

- (1) Is below the mean high-water lines;*
(2) Is owned by the town or the county;
(3) Has arisen upon it a right of customary use by the public;
(4) Has arisen upon it a public easement, prescriptive or otherwise; or
(5) 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.

Staff's concern regarding this language is the fact that it is the only place in Town regulations, where COP in EC is directly dealt with and the language is vague and susceptible to challenge. For example, the prohibition to consumption on the "public" beach, technically, could be deemed to only be that area below the mean high-water line and/or beach property owned by the town or the county. In essence, for the Town to deem areas of the beach as "public beach" by a right of customary use by the public and then argue that the prohibition would extend to those areas could constitute a substantial imposition on the private property rights of beachfront property owners. For instance, if the Town were to make a determination that the beach in front (i.e. that area between the homeowner's platted lot and the mean-high water line) of a homeowner's lot, were in fact public, it could preclude the Sheriff's Office from trespassing individuals utilizing those areas and thus deprive the homeowner of peaceable enjoyment of their own property. Oddly enough, to make the determination that the beach in front of a property owners home is "public beach" would deprive the property owner of the right to enjoy a beer on their own beach property, while allowing the public to enjoy use of their property.

2. Another area of ongoing concern to Staff has been the fact that ancillary retail service uses have already been established as permitted uses in the EC Zoning District, such as Parasailing, Beach Chair Rentals and Jet-Ski Rentals. Given that the veil of commercial utilization of the beaches has already been pierced, the potential for challenge is a possibility. Also, it should be noted that COP has already been established in EC in the form of Special Event permits. Accordingly, Staff believes it is imperative to establish a regulatory framework to regulate the potential for unwanted expansion of COP on the beaches. Further, consideration should be given to the fact that uses such as parasailing and jet-ski rentals have been established in EC regardless of, and independent of, upland Planned Development Zoned areas.
3. Staff is concerned about the potential ramifications of expansion of COP in EC beyond the currently three "grandfathered" establishments of Top O'Mast, Lani Kai and Beach Pub. Accordingly, Staff conducted an assessment of existing COP in

upland zoning districts along the beach that could avail themselves of any change in regulations. Staff has determined that there are 15 establishments that could avail themselves of any change in regulations, as depicted in EXHIBIT 5. Of the 15, 8 are resorts, 2 are bars, 3 are bar/restaurants and 2 are restaurants. Further, of the 15, 6 are located in the Downtown Zoning District. Of the 9 not located in the Downtown, 6 are resorts, 2 are bars and 1 is a bar/restaurant.

In our estimation, it is reasonable to believe that of the locations outside of the Downtown, the resorts tend to be self-regulating by virtue of the risk of alienation of the clientele they serve. Accordingly, Council's directive to prepare an "administrative approval" approach appears to be reasonable, if a regulatory framework can be developed to deal with all of these establishments (existing and potential extensions of premises) in a consistent and fair manner that ensures the safety and welfare of the public, while protecting community character.

4. Staff is working on a revised draft of the COP in EC ordinance, which attempts to provide reasonable regulations for ensuring the safety and welfare of the public, while protecting community character. These working draft contemplates:

- An Administrative Approval process for the aforementioned existing establishments;
- Provisions for the revocation of the extension of premises for non-compliance with the requirements set forth in the ordinance;
- Extension of premises only for property under the same ownership as the upland permitted establishment and within the same property lines;
- Prohibition of patrons bringing their own coolers onto the establishment's beach;
- Requirement for biodegradable containers;
- Requirement to maintain the beach free of litter and debris;
- Requirement for signage prohibiting patrons from moving between properties with alcohol;
- Hours of service limitations for extension of premises onto the beach, limited to the hours of 11:00AM to sunset;
- Restriction prohibiting service within 50' of Mean-High Water line;
- Requirement for a Special Exception to allow entertainment in EC;
- Requirement for tables to be buffered seaward on the beach by dune vegetation;
- Requirement for a Certificate of Insurance covering the expanded area;
- Requirement for Annual Certificate of Use Approval for the extension of premises;

-Establishment of fees for the Administrative Approval and for the Annual Certificate of Use and for future Special Exceptions adjacent to EC.

-Requirement that any new establishments requesting COP will be required to obtain extension of premises into EC through a Special Exception, as a component of the Special Exception for the upland establishment;

5. Should the LPA deem it more appropriate to develop an alternative regulatory scheme, such as Special Exceptions, Principal Use Restrictions (i.e. restricting extension of premises to resorts only) and/or Geographic Restrictions (i.e. restricting extension of premises to a specific area, such as the Downtown Zoning District), Staff can prepare parallel ordinances for Town Council's consideration.

We welcome your input on alternative regulatory approaches and questions/input on the proposed regulatory approach.

In order to conserve time and paper, the remainder of the 70 pages of information to this Memo is contained in last month's LPA packet which you already have.

Thank you.

COP Timeline				
Date	Town or County Ordinance/ Resolution Chnages regarding COP	Site Specific COP Approvals	Nature of Ordinance, Resolution or Approval	Exhibit
Mar-75	County Ord. 75-5		County repeals alcohol provisions for consistency with change in State Laws.	
Jun-76	County Ord. 76-9		Special Permit required for COP within 500' of school or church.	
Jan-79	County Ord.79-1		Clarifies Ord 76-9 that measurement must be by straight line.	
Jan-80	County Ord. 80-4		Variance required for COP in Commercial Zoning Districts & finding requirements	
Sep-81	County Ord. 81-41		Special permit required for specific Zoning Districts	
Dec-95		Case 95-07-161.02S	Special Permit for COP on the beach is approved at 1154, Estero (AKA: Nemos)	
Dec-95			Town of Fort Myers Beach is incorporated	
Apr-96	County Ord. 96-08		County Laws and Town Jursidiction	
Jul-96	Town Ord. 96-05		Town Open Container Ordinance	
Sep-96	Town Ord. 96-20		Town Ordinance creating Redevelopment Overlay District and establishing AA and SP for COP	
Jan-99	Town Ord. 98-14		Adopted Comprehensive Plan for the Town & created Recreation Future Land Use Category	
Jun-01	Town Reso. 01-15		Town Council approves Special Permit for COP at 2000 Estero (AKA: Diamondhead), a portion of this approved site extends into the EC Zoning District.	
Mar-03	Town Ord.03-03		Town Ordinance creating Chapter 34 and COP provisions	
May-04	Town Reso. 04-17		Recognized Town Interim Zoning Map, without EC Zoning District	
May-04	Town Reso. 04-16		Created Official Town Zoning Map and created EC Zoning District that bifurcated zoning on properties that were previously one zoning district to Mean High Water Line	
Feb-07		Town Reso. 07-13	Town recognized previously approved Special Permit for Nemos (Case 95-07-161.02S) from December 1995	
Nov-09	LPA Reso. 2009-24		LPA Resolution recommending to Town Council that the Comprehensive Plan "does restrict further expansion of on-preises consumption of alcholic beverages on the Gulf Beaches within the Town of Fort Myers Beach."	
Dec-09		LPA Reso. 2009-29	LPA Resolution recommending approval of Special Exception for 61 Avenue C (AKA: Wicked Wings) to allow COP in the Downtown and EC Zoning Districts.	
Jan-10		Town Reso. 10-01	Town Council approves Special Exception for 61 Ave C to allow COP in Downtown and EC Zoning Districts.	
Jun-10		LPA Reso. 2010-06	LPA Resolution recommending approval of Special Exception for 1154 Estero (AKA: Nemos) to allow COP in the Downtown and EC Zoning District.	
Jul-10		Town Reso. 10-15	Town Council approves Special Exception for 1154 Estero to allow COP in Downtown and EC Zoning Districts.	